

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Eligibility of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2016061091

DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on September 19, 2016.

Claimant's mother and advocate represented claimant, who was present at the fair hearing.

Leigh-Ann Pierce, Consumer Services Representative, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

The matter was submitted on September 19, 2016.

ISSUES

1. Is claimant eligible for regional center services under the Lanterman Act as a result of epilepsy that creates a substantial disability for him?
2. Is claimant eligible for services under a diagnosis of cerebral palsy that constitutes a substantial disability?
3. Is claimant eligible for regional center services under the Lanterman Act as a result of a diagnosis of intellectual disability, or a condition closely related to

intellectual disability or requiring treatment similar to that required for an intellectually disabled individual, which constitutes a substantial handicap (fifth category)?

CASE SUMMARY

The evidence established that claimant is not eligible for regional center services under a diagnosis of epilepsy or cerebral palsy that constitutes a substantial handicap. However, the evidence established that he may be eligible under the fifth category should he undergo neuro-cognitive testing. That testing shall be ordered in this decision.

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. On June 9, 2016, IRC notified claimant that he was not eligible for regional center services.
2. On June 17, 2016, claimant's mother filed a fair hearing request appealing that decision, and this hearing ensued.

DIAGNOSTIC CRITERIA FOR INTELLECTUAL DISABILITY

3. The *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*, (DSM-5) contains the diagnostic criteria used for intellectual disability. Three diagnostic criteria must be met: deficits in intellectual functions; deficits in adaptive functioning; and the onset of these deficits during the developmental period. An individual must have a DSM-5 diagnosis of intellectual disability to qualify for regional center services. Intellectual functioning is typically measured using intelligence tests. Individuals with intellectual disability typically have IQ scores in the 65-75 range.

THE "FIFTH CATEGORY"

4. Under the "fifth category" the Lanterman Act provides assistance to individuals with "disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability" but does "not include other handicapping conditions that are solely physical in nature."¹ Along with the other four qualifying conditions (cerebral palsy, epilepsy, autism spectrum disorder, and intellectual disability), a disability involving the fifth category must originate before an individual attains 18 years of age, must continue or be expected to continue indefinitely, and must constitute a substantial disability.

The fifth category is not defined in the DSM-5. In *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1129, the California Court of Appeal held that the fifth category was not unconstitutionally vague and set down a general standard: "The fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded. Furthermore, the various additional factors required in designating an individual developmentally disabled and substantially handicapped must apply as well."

On March 16, 2002, in response to the *Mason* case, the Association of Regional Center Agencies (ARCA) approved the *Guidelines for Determining 5th Category Eligibility for the California Regional Centers* (Guidelines).² In those Guidelines, ARCA noted that eligibility for Regional Center services under the fifth category required a "determination as to whether an individual functions in a manner that is similar to that of a person with

¹ Welfare and Institutions Code section 4512, subdivision (a).

² The ARCA guidelines have not gone through the formal scrutiny required to become a regulation and were written before the DSM-5 was in effect.

mental retardation **OR** requires treatment similar to that required by individuals with mental retardation.” (Emphasis in original.) The Guidelines stated that *Mason* clarified that the Legislative intent was to defer to the professionals of the Regional Center Eligibility Team to make the decision on eligibility after considering information obtained through the assessment process. The Guidelines listed the factors to be considered when determining eligibility under the fifth category.

Another appellate decision, *Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462, has suggested that when considering whether an individual is eligible for regional center services under the fifth category, that eligibility may be based largely on the established need for treatment similar to that provided for individuals with mental retardation, notwithstanding an individual’s relatively high level of intellectual functioning. In *Samantha C.*, the individual applying for regional center services did not meet the criteria for mental retardation. Her cognitive test results scored her above average in the areas of abstract reasoning and conceptual development and she had good scores in vocabulary and comprehension. She did perform poorly on subtests involving working memory and processing speed, but her scores were still higher than persons with mental retardation. The court understood and noted that the ARCA Guidelines recommended consideration of fifth category for those individuals whose “general intellectual functioning is in the low borderline range of intelligence (I.Q. scores ranging from 70-74).” (*Id.* at p. 1477.) However, the court confirmed that individuals may qualify for regional center services under the fifth category on either of two independent bases, with one basis requiring only that an individual require treatment similar to that required for individuals with mental retardation.

BACKGROUND INFORMATION

5. Claimant is a 19-year-old male. He asserted he was eligible for services on the basis of fifth category, epilepsy or cerebral palsy. At birth, claimant was diagnosed with agenesis of the corpus collusum, a congenital brain abnormality that occurs when the corpus callosum does not develop during the early prenatal period. The corpus callosum is the largest midline structure of the brain consisting of over 200 million nerve fibers that connect the two hemispheres of the brain. Claimant received regional center Early Start services from birth to age one, at which time his case was closed. According to claimant's mother, their insurance provided services to claimant through its developmental disability program.

EVIDENCE INTRODUCED AT HEARING

6. Mary Lam, M.D., a board-certified pediatrician, IRC's medical consultant, performed a medical evaluation on August 9, 2016. She reviewed the records, consulted with claimant and his mother, and performed a physical exam. Her impression was that claimant had a learning disability and agenesis of corpus callosum. In her review of systems she found no seizures, his neurological exam was normal, although his speech was clear with occasional stutter, and cranial nerves were grossly intact. She documented no findings on physical exam and concluded that he was not eligible for regional center services under a diagnosis of cerebral palsy or epilepsy.

7. Dr. Lam testified in this proceeding consistent with her report. Her opinions were supported by the medical records.

8. Claimant's 2015 Individualized Education Program (IEP) indicated that his primary disability was Other Health Impairment and his secondary disability was Specific Learning Disability. He has been receiving services since 2005. The school assessment noted that he was far below basic in history, basic in science, English/language arts and

algebra I, and proficient in life science. The IEP noted that claimant's reading had improved since beginning high school; he exhibited average reading comprehension but at times read "choppy and slow," and "at times" had poor decoding skills. He continued to improve in his writing, but had incorrect spelling and often left out words and sentences. Poor writing organization and sentence structure was noted. Claimant struggled with math but could complete his work if given extra time.

His teachers noted that he often did not express his thoughts and needed to be prompted for clarification. Claimant also did not always have the ability to follow oral multiple step directions or repeat them back when prompted. At times he appeared not to understand social language, although this was not an area of great concern. However, most teachers reported that claimant often volunteered to answer questions orally in class and was actively listening to teacher instruction most of the time. He worked best when steps were written down so he could reference them. His writing had improved since beginning high school. He was respectful of peers and adults but exhibited poor self-esteem. He attended to his daily personal needs, kept his workspace organized, but at times did not manage time well, especially in his computer graphics class where he appeared to be losing assignments and was disorganized with the file storage on the computers. Claimant expressed the desire to work in the graphic arts/computer field and would like to continue his education. Working on communicating his desires was noted as a goal.

9. A 2008 psychological assessment report from the school psychologist, performed when claimant was 11 years old, documented that the results of the initial assessments performed when claimant began school showed nonverbal processing skills in the average range, auditory perceptual processing skills in the low average range, short-term recall in the average range, auditory reasoning skills below average and visual motor coordination skills that were average. Claimant had average scores for

reading and math and low average scores for writing. Attention was noted to be an area of weakness. Due to the lack of discrepancy between ability and achievement, the school initially concluded that claimant did not meet the criteria for special education as a student with a specific learning disability. He was found eligible for services under a speech and language impairment and was placed on a home program with consultation from the speech therapist. Later, in 2006, the school determined that claimant was eligible for special education support under the classification of Other Health Impaired due to his medical diagnosis and the way it impacted his educational progress. Claimant's mother reported developmental delays since birth.

In 2008, the school psychologist reviewed claimant's records, performed behavioral observations, and administered psychological tests. In his summary and recommendations, the school psychologist determined that claimant continued to qualify for services as a student with a health impairment and a specific learning disability due to attention and processing speed deficits and academic fluency delays.

10. On August 9, 2016, Sandra Brooks, Ph.D., an IRC staff psychologist, performed a psychological assessment. She reviewed records, administered psychological tests, observed claimant and conducted a parent interview. She authored a detailed report and testified in this proceeding. Dr. Brooks noted that when evaluating adaptive functioning, claimant's scores on the Street Survival Skills Questionnaire (SSS-Q), a test where claimant provided the responses, were higher than his mother's responses on the Vineland Adaptive Behavior Scale - Second Edition. Dr. Brooks noted that claimant's overall responses on the SSS-Q were in the low average range with his areas of weakness being health and safety, public services and measurements. Claimant's mother's scores on the Vineland were in the low/moderately deficient range.

Based upon her assessment, Dr. Brooks concluded that claimant is functioning in the average range of intellectual ability although he does have significant subtest

scatter, indicating that even within domains, he tended to score much more poorly on some subtests than on others, with most of his weaknesses being in the working memory and processing speed areas. She opined those results indicated that while claimant is a bright young man, he may take longer than others to process information and have difficulty performing mental calculations. Dr. Brooks researched corpus callosum noting that individuals with the disorder typically have delays but they may have normal intelligence. She noted that neuropsychological testing has revealed subtle differences in higher cortical functioning compared to individuals of the same age and education who do not have this disorder.

Dr. Brooks opined that claimant's assessment demonstrated that his symptomatology was consistent with his physical/neurological condition. He did not demonstrate the general sub-average intellectual functioning that is associated with intellectual disability. However, he demonstrated specific cognitive deficits that appear to be having a significant impact on specific areas of his adaptive functioning, particularly deficits in self-direction. His scores indicated that, for the most part, he has adequate knowledge in most areas of adaptive functioning but may have significant difficulty executing daily tasks. He continues to require prompts and reminders, has difficulty reading non-verbal cues and understanding personal space, and has difficulty managing money. Dr. Brooks opined that it was possible that with the correct support, claimant may increase his self-care skills, his capacity for independent living and his capacity for economic self-sufficiency. Dr. Brooks wrote that given claimant's average intellectual abilities and adequate scores on objective measures of adaptive functioning, it was difficult to justify eligibility under the fifth category "at this time." Dr. Brooks recommended consideration be given to having claimant undergo a comprehensive neuropsychological evaluation to clarify the precise nature of his deficits, their potential impact on his daily functioning and strategies for helping him reach his full potential.

She encouraged claimant to reapply for services in the future with additional information that may support eligibility after a neuropsychological evaluation is performed.

11. Dr. Brooks testified in this proceeding consistent with her report, further explaining why she concluded that claimant did not meet eligibility criteria under the fifth category. Dr. Brooks's opinions were well-reasoned and supported by the existing evidence. However, Dr. Brooks did acknowledge that her conclusion regarding eligibility was "really close." As a result, she recommended that a neuropsychological evaluation be performed.

12. Claimant's mother testified about the lifelong journey she and her husband have made to seek services for their son, to help him in school, and described his needs. Although her testimony was consistent with the records, it did not establish eligibility for regional center services under epilepsy or cerebral palsy. Nor was it sufficient to establish eligibility under the fifth category absent neuro-psychological testing.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. In a proceeding to determine eligibility, the burden of proof is on the claimant to establish he or she meets the proper criteria. The standard is a preponderance of the evidence. (Evid. Code, § 115.)

STATUTORY AUTHORITY

2. The Lanterman Act is set forth at Welfare and Institutions Code section 4500 et seq.

3. Welfare and Institutions Code section 4501 states:

The State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. Affecting hundreds of thousands of children and adults directly, and having an important impact on the lives of their families, neighbors and whole communities, developmental disabilities present social, medical, economic, and legal problems of extreme importance . . .

An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community. To the maximum extent feasible, services and supports should be available throughout the state to prevent the dislocation of persons with developmental disabilities from their home communities.

4. Welfare and Institutions Code section 4512, subdivision (a), defines "developmental disability" as follows:

'Developmental disability' means a disability which originates before an individual attains age 18, continues, or can be expected to continue indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include

intellectual disability, cerebral palsy, epilepsy, and autism.

This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability, but shall not include other handicapping conditions that are solely physical in nature.

5. California Code of Regulations, title 17, section 54000, provides:
 - (a) 'Developmental Disability' means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.³
 - (b) The Developmental Disability shall:
 - (1) Originate before age eighteen;
 - (2) Be likely to continue indefinitely;
 - (3) Constitute a substantial disability for the individual as defined in the article.
 - (c) Developmental Disability shall not include handicapping conditions that are:
 - (1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.
 - (2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual

³ The regulations were not changed to use the phrase intellectual disability.

level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

6. California Code of Regulations, title 17, section 54001, provides:

(a) 'Substantial disability' means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

(A) Receptive and expressive language;

(B) Learning;

(C) Self-care;

(D) Mobility;

(E) Self-direction;

(F) Capacity for independent living;

(G) Economic self-sufficiency.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of

- the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.
- (c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.
 - (d) Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.

7. Welfare and Institutions Code section 4642 requires a regional center to perform "initial intake and assessment services" for "any person believed to have a developmental disability."

8. Welfare and Institutions Code section 4643, subdivision (a), provides: "Assessment may include collection and review of available historical diagnostic data, provision or procurement of necessary tests and evaluations, and summarization of developmental levels and service needs"

EVALUATION

9. The Lanterman Act and the applicable regulations set forth criteria that a claimant must meet in order to qualify for regional center services. Claimant failed to prove by a preponderance of the evidence that he was eligible for services under diagnoses of cerebral palsy or epilepsy that cause a substantial handicap for him. However, although IRC concluded that he was also not eligible under the fifth category, Dr. Brooks did opine that "consideration be given to having claimant undergo a comprehensive neuropsychological evaluation to clarify the precise nature of his deficits, their potential impact on his daily functioning and strategies for helping him reach his full potential, and then he be re-assessed for eligibility." Given the provisions of Welfare

and Institutions Code sections 4642 and 4643, IRC shall make arrangements for claimant to undergo that neuropsychological testing. After that testing is complete, IRC shall reassess claimant for eligibility.

ORDERS

Claimant's appeal from Inland Regional Center's determination that he is not eligible for regional center services and supports is denied in part and granted in part. Claimant is not eligible for services under a diagnosis of epilepsy or cerebral palsy.

Claimant may be eligible under the fifth category, but neuropsychological testing is required to make that determination. IRC shall arrange and pay for that testing. After that testing is complete, IRC shall re-evaluate claimant's request for eligibility. If IRC's determination at that time is adverse to claimant, claimant may file another Request for Fair Hearing appealing that determination.

Alternatively, if claimant does not wish to undergo neuropsychological testing, IRC's present determination that he is not eligible for services will be affirmed because insufficient evidence was introduced, absent that testing, to establish eligibility.

DATED: September 26, 2016

_____/s/_____

MARY AGNES MATYSZEWSKI

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety days.