

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

v.

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2017020849

DECISION

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter in San Bernardino, California, on April 6 and May 15, 2017.

Stephanie Zermeño, Consumer Services Representative, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

Claimant's mother appeared on behalf of complainant on April 6, 2017. There was no appearance on behalf of claimant on May 15, 2017.

The matter was submitted on May 15, 2017.

ISSUE

Is claimant eligible for regional center services under the Lanterman Act under the category of Autism Spectrum Disorder or Intellectual Disability?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. On January 19, 2017, IRC notified claimant, who is 17 years old, that he was not eligible for regional center services because the records he provided to IRC did not establish that he had a substantial disability as a result of an intellectual disability, autism, cerebral palsy, epilepsy, or a disabling condition closely related to an intellectual disability that required similar treatment as an individual with an intellectual disability.

2. On February 15, 2017, claimant's mother filed a fair hearing request appealing IRC's determination. On February 22, 2017, OAH mailed a notice of hearing to all parties, which included a notification of rights regarding fair hearings contained in the Lanterman Act.

3. On April 6, 2017, a hearing was held at IRC, and claimant's mother appeared on behalf of claimant. During testimony of IRC's witness, Dr. Miller, claimant's mother requested a continuance because she felt she needed to hire an attorney and did not feel comfortable continuing on her own. Upon further discussion, claimant's mother claimed she did not receive notice of the hearing from OAH, but was alerted to the hearing several days prior when she received IRC's evidence. She said her witness was unable to attend the hearing due to the short notice. Based on claimant's mother's assertion that she did not receive the notice of hearing, the case was continued and claimant's mother signed a time waiver.

4. On April 12, 2017, OAH sent both parties a notice of hearing scheduled for May 15, 2017.

5. On May 15, 2017, neither claimant's mother nor claimant appeared at the hearing. It was determined that notice of the hearing was properly served, and the hearing continued despite claimant's absence.

DIAGNOSTIC CRITERIA FOR AUTISM SPECTRUM DISORDER (AUTISM)

6. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-5) identifies criteria for the diagnosis of autism. The diagnostic criteria includes persistent deficits in social communication and social interaction across multiple contexts; restricted repetitive and stereotyped patterns of behavior, interests, or activities; symptoms that are present in the early developmental period; symptoms that cause clinically significant impairment in social, occupational, or other important areas of function; and disturbances that are not better explained by intellectual disability or global developmental delay. An individual must have a DSM-5 diagnosis of autism spectrum disorder to qualify for regional center services under autism.

DIAGNOSTIC CRITERIA FOR INTELLECTUAL DISABILITY

7. The DSM-5 contains the diagnostic criteria used to diagnose intellectual disability. Intellectual disability is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. Three diagnostic criteria must be met in order to receive a diagnosis of intellectual disability: Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience; deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility; and, the onset of these deficits must have occurred during the developmental period. Intellectual functioning is typically measured using intelligence tests. Individuals with an intellectual disability typically have intelligent quotient (IQ) scores at or below the 65-75 range.

The essential features of intellectual disability are deficits in general mental abilities and impairment in everyday adaptive functioning, as compared to an individual's age, gender, and socio-culturally matched peers.

EVIDENCE PRESENTED AT HEARING

8. Holly Miller, Psy.D, is a California licensed clinical psychologist. She received her doctorate in psychology in 2009. After working several years as a clinical psychologist, she joined IRC as a staff psychologist approximately a year ago. At IRC, she conducts psychological evaluations of children and adults to determine eligibility for regional center services. Dr. Miller reviewed and considered claimant's Individualized Education Programs (IEPs) and school psycho-educational evaluations, as well as a psychological assessment conducted for IRC by Michael McCormick, Psy.D. Dr. Miller testified regarding the significance of findings in each document. She concluded that none of the documents established eligibility for regional center services.

9. An August 26, 2008, assessment, conducted when claimant was nine years old, determined that claimant qualified for special education services under the category of Emotional Disturbance. Claimant had been administered the Cognitive Assessment System (CAS) in 2005, which revealed a low average cognitive processing score. According to Dr. Miller, the report identified many behavioral concerns that could have affected claimant's cognition.

10. A triennial psycho-educational evaluation was conducted by the district in June 2012. Claimant's cognitive abilities assessed by the CAS indicated scattered individual scores, which ranged from well below average to average depending on the tasks given. Dr. Miller testified that a person who is intellectually disabled would typically not have such a scattering of scores, which indicates other reasons for poor performance. The evaluator concluded that there may not be enough evidence to establish special education eligibility under the category of Emotional Disturbance, but

there was significant evidence to establish eligibility under Specific Learning Disability and Other Health Impairment.

11. Claimant's school district conducted a psychoeducational assessment on May 6, 2015, which established eligibility for special education under the categories of Emotional Disturbance and Other Health Impairment—Attention-Deficit Hyperactivity Disorder (ADHD). Dr. Miller noted that in an Individualized Education Plan from May 2015, claimant met both goals related to his emotional and behavioral needs. Additionally, claimant's teachers described him as bright and funny; someone who works best in a group setting; and someone who enjoys writing down his feelings in a journal. Dr. Miller testified that this indicated a level of empathy and self-awareness that are not typically found in children with autism.

12. Dr. McCormick conducted a psychological assessment of claimant on December 9, 2016. His assessment included interviewing claimant and claimant's mother, reviewing claimant's prior school records, and administering the following tests: Test of Memory Malingering (TOMM), Wechsler Adult Intelligence Scale Fourth Edition (WAIS-IV), and Adaptive Behavior Assessment System Third Edition (ABAS-3).

13. Dr. McCormick administered the TOMM to determine the presence of memory impairment and to evaluate claimant's motivation and performance effort. Based on the scores, Dr. McCormick determined that claimant did not appear to be giving his best effort, which negatively impacted his scores.

14. The WAIS-IV was administered to measure claimant's overall cognitive ability. Claimant received a full score of 71, which lies in the borderline range. However, Dr. McCormick noted that claimant did not appear to give his best effort during the test and requested to discontinue the assessment. Claimant's mother had to encourage him to complete the test. Dr. McCormick believed claimant's true ability was likely higher than what was portrayed.

15. Claimant's mother completed the ABAS-3, which is used to measure claimant's adaptive functioning skills. Claimant's scores were all in the below average range but did not indicate he had any significant deficits in adaptive functioning.

16. Dr. McCormick concluded that claimant did not satisfy the criteria for intellectual disability or autism and was thus not eligible for IRC services.

17. Dr. Miller concurred with the evaluation, and based on her review of all the records, concluded claimant does not qualify for regional center services under the Lanterman Act.

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. Welfare and Institutions Code section 4501 provides:

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.

3. Welfare and Institutions Code section 4512, subdivision (a), defines developmental disability as a disability that “originates before an individual attains 18 years of age; continues, or can be expected to continue, indefinitely; and constitutes a substantial disability for that individual.” A developmental disability includes “disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability.” (*Ibid.*) Handicapping conditions that are “solely physical in nature” do not qualify as developmental disabilities under the Lanterman Act. (*Ibid.*)

4. California Code of Regulations, title 17, section 54000, provides:

(a) “Developmental Disability” means a disability that is attributable to mental retardation¹, cerebral palsy, epilepsy, autism, or disabling conditions found to

¹ Although the Lanterman Act has been amended to eliminate the term “mental retardation” and replace it with “intellectual disability,” the California Code of Regulations has not been amended to reflect the currently used terms.

be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(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 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."

5. 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.

CONCLUSION

6. The burden was on claimant to establish his eligibility for regional center services. Claimant did not present any evidence and none of the documents introduced in this hearing established that claimant had autism or an intellectual disability. Rather, the documents showed claimant suffers from Emotional Disturbance and ADHD, which do not qualify a person for regional center services under the Lanterman Act. Dr. Miller's expert testimony that claimant did not qualify for regional center services was credible and un rebutted.

//

//

ORDER

Claimant's appeal from the Inland Regional Center's determination that he is not eligible for regional center services and supports is denied.

DATED: May 26, 2016

ADAM L. BERG

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.