

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. 2017120101

DECISION

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on January 9, 2018.

Claimant's mother represented claimant.

Senait Teweldebrhan, Consumer Services Representative, represented Inland Regional Center (IRC).

The matter was submitted on January 9, 2018.

ISSUES

1. Is claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) as a result of a disabling condition found to be an intellectual disability or a disability closely related to an intellectual disability or that requires treatment similar to that required for individuals with an intellectual disability (the "5th Category") that constitutes a substantial disability?

2. Is IRC required under the facts of this matter to have another psychologist perform an assessment of claimant to determine claimant's eligibility for regional center services?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. On November 13, 2017, IRC notified claimant that she was not eligible for regional center services.

2. On November 21, 2017, claimant's mother filed a fair hearing request, appealing IRC's decision. In the request, claimant's mother stated the following reasons claimant sought a fair hearing:

My daughter was determined to be ineligible for the regional center services. I do not believe this is true. She has a twin sister with the same developmental disability and she was approved.

Claimant's mother also stated in the request what claimant needed to resolve her complaint:

My daughter [] needs to be retested by a different doctor with me in the room with her not her father.

BACKGROUND

3. Claimant is a nine-year-old girl. Claimant was an Early Start client of IRC under an "at risk" category until she aged out of services for this program when she turned three years old. At that time, in 2010, she was assessed for eligibility for regional center services and was found ineligible. At her school, claimant receives special

education services and qualifies for these services due to intellectual disability and speech or language impairment. Claimant's school district referred claimant to IRC for services.

EVIDENCE PRESENTED BY IRC

4. Sandra Brooks, Ph.D., IRC staff psychologist, testified at the hearing. Dr. Brooks has been a staff psychologist at IRC for ten and a half years. Her duties include assessing potential clients for eligibility under the Lanterman Act, including whether these persons are eligible for services based on Intellectual Disability and/or the 5th Category.

Dr. Brooks assessed claimant for eligibility for regional center services on October 24, 2017. In this regard, she reviewed a number of documents and performed a psychological evaluation of claimant where she administered psychological assessments on claimant, interviewed claimant and her father, and reviewed relevant documents. She detailed her findings in a report dated October 24, 2017.

For her evaluation Dr. Brooks reviewed the following documents: the psychological assessment of Sara Hibbs, Psy.D., dated October 21, 2010; the social assessment dated November 3, 2008, completed by Toni Cervantes, IRC Infant Services Coordinator; and claimant's Individualized Education Plan (IEP) dated October 21, 2017. Dr. Brooks also administered the following psychological assessments of claimant: Wechler Intelligence Scale for Children 5th Edition (WISC) and Vineland Adaptive Behavior Scales - Third Edition, Comprehensive Parent/Caregiver Form. In addition, Dr. Brooks interviewed claimant and reviewed IRC's file.

5. Based on her testing and her review of the documents, Dr. Brooks concluded that claimant did not qualify for regional center services under the Intellectual Disability category or 5th category, although she found that claimant showed significant deficits with learning in several areas. Dr. Brooks based her opinion

on her review of the documents that were received in evidence in this matter in addition to her evaluation of claimant based on the psychological assessments she administered on October 24, 2017.

Dr. Brooks reached her conclusion for the following reasons: In her psychological testing claimant had a splintered pattern of development, which was inconsistent with an intellectual disability diagnosis. She had high scores in some areas and low scores in other areas. On the WAIS claimant obtained a Verbal Comprehension Index of 92, which is in the average range, a Visual Spatial Index of 69, which is in the mildly deficient range, a Working Memory Index of 69, which is in the mildly deficient range, and a Processing Speed Index of 80, which is in the low average range. Claimant obtained a Full Scale IQ of 72, which is in the borderline range. But, due to the variability among claimant's composite scores, Dr. Brooks stated that the Full Scale IQ is not considered to be the best indicator of claimant's overall abilities. In this respect, Dr. Brooks testified that claimant's standardized intellectual test scores showed that she does not have substandard intellectual functioning.

In addition to the test results of her intellectual functioning, claimant had reported deficits in adaptive and intellectual functioning. Per claimant's father's report in the Vineland Adaptive Behavior Scales, claimant demonstrated significant deficits in adaptive functioning from the low or mildly deficient range to the moderately low or borderline range. Dr. Brooks also noted, based on claimant's mother's September 13, 2017, report to IRC that claimant had significant learning difficulties. Her mother noted that claimant was unable to read. During her October 24, 2017, assessment of claimant, Dr. Brooks confirmed, to some degree, claimant's learning difficulties. She observed that claimant was able to write down some words but required assistance to spell some simple words such as "daddy" and "Abby." She was not able to write down phrases or

sentences. Claimant was able to identify most colors and she could count to 30 with some assistance. She was able to complete simple math problems with some help.

In support of her opinion, Dr. Brooks referenced Dr. Hibbs's October 21, 2010, report where she assessed claimant for regional center services eligibility. According to one intellectual assessment Dr. Hibbs performed on claimant, the Bayley Scales of Infant and Toddler Development 3rd Edition, claimant obtained a cognitive score of 90, which was in the average range, and obtained moderately low scores in the areas of communication, daily living skills, motor skills and adaptive behavior composite. Claimant's socialization skills were found to be in the adequate range. Dr. Hibbs performed this assessment to determine if claimant should receive regional center services after she turned three years old.

6. Dr. Brooks also addressed whether claimant was eligible for regional center services under the 5th category. Based on claimant's scores, Dr. Brooks did not consider claimant to be like someone with an intellectual disability and as a result she was not able to diagnose her with a condition under the 5th category "at this time." She explained that to be considered eligible under the 5th category, an individual needs to demonstrate a well-established pattern of borderline intellectual functioning, which claimant did not show. But, as Dr. Brooks explained, with a demonstrated pattern of borderline intellectual functioning claimant may become eligible under the 5th category "over time."

7. Dr. Brooks was asked whether she felt a second psychological assessment was needed to assess claimant for regional center services. She said that a second assessment was not necessary because there was no issue regarding the accuracy of claimant's intellectual test scores and she relied on these scores to form her opinion. Regarding claimant's mother's question how claimant can be determined ineligible for

regional center services when her twin sister was found eligible, Dr. Brooks stated that she can only assess the person "in front of her."

Dr. Brooks's testimony was credible and consistent with the evidence in the record as a whole.

8. In the context of her possible eligibility for regional center services, claimant's qualification under an Intellectual Disability for school services was raised at the hearing. However, her qualification for school services under this category does not establish that she is eligible for regional center services. California Code of Regulations, title 5, section 3030, provides the eligibility criteria for special education services required under the California Education Code. The criteria for special education eligibility are not the same as the eligibility criteria for regional center services found in the Lanterman Act. A school providing services to a student under an intellectual disability is insufficient to establish eligibility for regional center services. Regional centers are governed by California Code of Regulations, Title 17. Title 17 eligibility requirements for services are more stringent than those of Title 5.

CLAIMANT'S MOTHER'S TESTIMONY AND ARGUMENT

9. Claimant's mother does not agree with Dr. Brooks's assessment. She noted that claimant's twin sister has qualified for regional center services and claimant's disability is worse than her sister's. She stated that claimant hates school, hates learning and has behavioral problems. Claimant's mother does not know how to deal with claimant's behaviors and cannot control her anymore.

Claimant's mother asked for "a second opinion" from a different psychologist at IRC. She said that a different psychologist assessed claimant's sister for regional center eligibility. Her mother was also concerned that claimant's father may not have given Dr. Brooks an accurate picture of claimant's condition.

LEGAL CONCLUSIONS

BURDEN OF PROOF

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

2. "Preponderance of the evidence means evidence that has more convincing force than that opposed to it." [Citations.] (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) "The sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is on the *quality* of the evidence. The *quantity* of the evidence presented by each side is irrelevant." (*Ibid.*) "If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it [citation]." (*People v. Mabini* (2001) 92 Cal.App.4th 654, 663.)

STATUTORY AUTHORITY

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

4. 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. . . .

5. Welfare and Institutions Code section 4512, subdivision (a), defines “developmental disability” as follows:

“Developmental disability” means 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. 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.

6. California Code of Regulations, title 17, section 54000,¹ 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.

(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

¹ The regulation still uses the former term "mental retardation" instead of "intellectual disability."

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.

7. 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.

8. Welfare and Institutions Code section 4642, subdivision (a), requires a regional center to perform initial intake and assessment services for "any person believed to have a developmental disability." Welfare and Institutions Code section 4643, subdivisions (a) and (b), provide regarding assessment services:

(a) If assessment is needed, the assessment shall be performed within 120 days following initial intake.

Assessment shall be performed as soon as possible and in no event more than 60 days following initial intake where any delay would expose the client to unnecessary risk to his or her health and safety or to significant further delay in mental or physical development, or the client would be at imminent risk of placement in a more restrictive environment.

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 and is conditional upon receipt of the release of information specified in subdivision (b).

(b) In determining if an individual meets the definition of developmental disability contained in subdivision (a) of Section 4512, the regional center may consider evaluations and tests, including, but not limited to, intelligence tests, adaptive functioning tests, neurological and neuropsychological tests, diagnostic tests performed by a physician, psychiatric tests, and other tests or evaluations that have been performed by, and are available from, other sources.

CASE LAW REGARDING THE 5TH CATEGORY

9. In *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1127, the court discussed the language in the Lanterman Act regarding the 5th category and determined the language was not impermissibly vague. The court explained that finding as follows:

In the instant case, the terms "closely related to" and "similar treatment" are general, somewhat imprecise terms. However, section 4512(a) does not exist, and we do not apply it, in isolation. "[W]here the language of a statute fails to provide an objective standard by which conduct can be judged, the required specificity may nonetheless be provided by the common knowledge and understanding of members of the particular vocation or profession to which the statute applies." [Footnote omitted.] Here, the Lanterman Act and implementing regulations clearly defer to the expertise of the DDS and RC professionals and their determination as to

whether an individual is developmentally disabled. General, as well as specific guidelines are provided in the Lanterman Act and regulations to assist such RC professionals in making this difficult, complex determination. Some degree of generality and, hence, vagueness is thus tolerable.

The language defining the fifth category does not allow such subjectivity and unbridled discretion as to render section 4512 impermissibly vague. 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.

While there is some subjectivity involved in determining whether the condition is substantially similar to mental retardation and requires similar treatment, it is not enough to render the statute unconstitutionally vague, particularly when developmentally [*sic*] disabilities are widely differing and difficult to define with precision. Section 4512 and the implementing regulations prescribe an adequate standard or policy directive for the guidance of the RCs in their determinations of eligibility for services.

(Ibid. at pp. 1128-1130.)

EVALUATION

10. Claimant did not prove by a preponderance of the evidence that she qualifies for regional center services under an Intellectual Disability category or a disability closely related to an intellectual disability or that requires treatment similar to that required for individuals with an intellectual disability (5th category). Claimant did not offer evidence to contradict Dr. Brooks's findings that claimant was not eligible under either category and Dr. Brooks's findings were credible and well-supported in the record. The determination that claimant does not presently qualify for regional center services is made without prejudice to her ability to reapply for regional center services in the future with additional evidence, including evidence that shows that she has displayed a pattern of borderline intellectual functioning.

Regarding claimant's request for a second psychological assessment, this request is denied. There is no basis in the record to require such an assessment.

ORDER

Claimant's appeal from Inland Regional Center's determination that she is not eligible for regional center services and supports is denied. Claimant's request for a second psychological assessment is denied.

DATED: January 22, 2018

ABRAHAM M. LEVY

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.