BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CLAIMANT, vs. NORTH LOS ANGELES COUNTY REGIONAL CENTER, Service Agency.	OAH No. 2018060348

DECISION

The hearing in the above-captioned matter was held on July 24, 2018, in Chatsworth, California, by Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings. Claimant was represented by her father, J.W. (Dad).[1]

The Service Agency, North Los Angeles County Regional Center (NLACRC or Service Agency) was represented by Stella Dorian, Contract Officer.

Evidence was received, the case was argued, on the hearing date, but the record was held open so that the Service Agency could make a written response to evidence submitted by Claimant just prior to the hearing, and so that Claimant could reply to that submission.

On August 3, 2018, the Service Agency submitted its written Response to Claimant's Exhibits 27 & 28. That document is identified as Service Agency exhibit 25.[2] Thereafter,

[1] Initials and titles are used in the place of the names in the interests of privacy.

[2] Both parties used numerals to designate exhibits. Citations herein will carry the

Claimant timely submitted her reply, which is identified as exhibit C 29.

The record was closed and the matter was submitted for decision on August 17, 2018.

The Administrative Law Judge hereby makes his factual findings, legal conclusions, and orders.

ISSUE PRESENTED

Is Claimant eligible for services from the Service Agency on the grounds that she suffers from Intellectual Disability or that she is eligible under "the fifth category," meaning that she suffers from a condition similar to intellectual disability, or that can be treated in a manner similar to that used for Intellectual Disability?

FACTUAL FINDINGS

THE PARTIES AND JURISDICTION

1. Claimant is a 17-year-old female who seeks services from the Service Agency under the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500 et seq.[3] based on a claim that she suffers from Intellectual Disability or that she is eligible under the "fifth category."

2. On December 27, 2017, NLACRC issued a Notice of Proposed Action and accompanying letter (NOPA), which informed Claimant that she was not eligible for services under the Lanterman Act. (Ex. SA 1, pp. 7-9.) The Service Agency asserted that

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designation SA for the Service Agency and C for Claimant. There was some duplication in the parties' exhibits.

[3] All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

Claimant did not have an eligible disability that was substantially disabling within the meaning of the Lanterman Act.

3. Thereafter, further assessments were conducted by the Service Agency, and the parties had an informal conference. On May 25, 2018, the Service Agency sent a second NOPA to Claimant (Ex. SA 15.) Claimant filed a Fair Hearing Request (FHR) on June 1, 2018. (Ex. SA 1, p. 6.) Further interactions between the Service Agency and Dad occurred, and on July 2, 2018, NLACRC sent a written Final Informal Decision Letter, denying eligibility. (Ex. SA 19.)

4. This proceeding ensued, all jurisdictional requirements having been met.

CLAIMANT'S FAMILY HISTORY AND GENERAL BACKGROUND

5. Claimant lives with Dad and her mother within the Service Agency's catchment area. Dad works outside of the home while her mother is a stay-at-home mom. (Ex. SA 11.)

6. Claimant was born full term. She weighed six pounds, fourteen ounces. Her mother had suffered from hyperthyroidism during pregnancy, and took medication for it. Claimant met developmental milestones, except that she did not start talking until 36 months of age. (Ex. SA 11, p. 3.)

7. Claimant was, through early high school, a very good student. Dad reported that at age 14 she became withdrawn, although Dad also reported that she had always been shy. He reported a history of anxiety. At age 14 Claimant began to demonstrate low motivation. She began having problems sleeping, and suffered from anxiety. At the beginning of the 2017-2018 school year, when she was 16, Claimant was overwhelmed with anxiety which revealed itself at school. She would not get out of the car on some occasions, or if she did, she would not go to class. (Ex. SA 11; ex. SA 4, p. 1.) Other maladaptive behaviors emerged as well.

8. Claimant's parents took her to several therapists in September 2017, with no

positive changes. Dad reported that by September 23, 2017, she had decompensated, acting bizarrely, agitated at times and at other times laughing to herself. Claimant spoke about harming herself or her mother. A psychiatrist prescribed medications to manage her anxiety, with little success, and he recommended hospitalization.

CLAIMANT'S HOSPITALIZATION, DIAGNOSIS, AND SUBSEQUENT TREATMENT

9. Records from Claimant's hospitalization and treatment at UCLA are found in exhibit SA 5. They show that on September 22, 2017, Claimant was seen by Margaret L. Stuber, M.D. Dad reported to her that in the week leading up to the visit, Claimant had exhibited "acute change in behavior and decompensation." (Ex. SA 5, p. 1.) During this period (September 14-22, 2017) a psychiatrist was prescribing Zoloft, but he replaced that with Seorquel 50 mg. Claimant remained agitated. However, during that time she did go to school on one day (she had continued to resist attendance) and she received an A on a math exam. (Id., p. 2.)

10. Claimant reported to Dr. Stuber that she was depressed, anxious, having trouble with focus, and she stated she was paranoid a lot, thinking people were watching her with video cameras. After seeing Dr. Stuber, Claimant was hospitalized at UCLA.

11. Over the next several weeks she underwent treatment, and her doctors began trying other medications to manage apparent mental illness. For example, by September 25, 2017, they began to consider using risperdal, lithium and thorazine. (Ex. SA 5, p. 14.) While her initial intake diagnosis had focused on mood disorder and anxiety disorder, by September 26, Mark DeAntonio, M.D. was making a diagnosis of psychosis. (Id., p. 15.) By October 3, Claimant was showing signs of improvement. At that point she was taking lithium, lorazepam, risperidone, and simvastatin. (Id., pp. 45-46.)

12. Claimant was discharged on October 6, 2017. At that time her condition had improved. Her chart states that at the time of discharge, "patient was fully independent in all ADL's and iADL's." (Ex. SA 5, p. 64.) Notes of her mental status examination at the time

of discharge showed improvement, with no hallucinations, good insight, and ability to communicate. Regarding cognition, the report states: "Intellectual Functioning/Fund of Knowledge: Above Average- As Evidenced by: use of vocabulary, grammar, and educational history." (Id., p. 64, capitalization and spelling as in original.) Her medications upon discharge remained lithium, lorazepam, risperidone, and simvastatin.

13. Claimant's discharge diagnosis was Bipolar I Disorder, Social Anxiety Disorder, rule out Generalized Anxiety Disorder. (Ex. SA 5, p. 59.)

14. Within approximately three months, Claimant was diagnosed with Schizophrenia. Her medications had changed by the end of January 2018 to Olanzapine, Clozapine, Lorazepam, and Gabapentin. (Ex. SA 5, p. 71.)[4] Claimant was partially hospitalized at UCLA by that time "for stabilization of psychosis." (Ibid., p. 74.) She was partially hospitalized through April 17, 2018.

15. In January 2018, Claimant began treating with Dr. Elizabeth Casalegno, M.D., a psychiatrist. In an early note, under the heading "physical exam," Dr. Casalegno noted: "Cognition: oriented to situation time, place, and person and alert. Intelligence: above average. Memory: remoted intact and recent intact." (Ex. SA 10, p. 4.)[5] Similar entries are found in Dr. Casalegno's records. (E.g., ex. SA 10, pp. 12, 20, 27.) To be sure, the reference to above average intelligence may be to pre-break capacity, but the general statements about cognition and memory are fairly read to reference Claimant's condition at the time of the examinations.

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[4] However, the chart shows that she was continuing with Clozaril, Zyprexa, Ativan, Simvastatin. (Ex. SA 5, p. 74.)

[5] This page number is found at the top of the page, perhaps a page number used in a fax or other electronic transmission.

PSYCHO-EDUCATIONAL ASSESSMENT

16. Claimant, until her psychotic break, had been virtually a straight-A student, taking academically rigorous classes. In the year before her break she attended a community college and took two semesters of French. She earned an A in the first semester, and a B in the second. (Ex. C 10, p. 3.) Notably, the second semester ended in June 2017, a few weeks before Claimant's psychotic break. After her psychosis developed, her parents took steps to obtain special education services for her.

17. (A) Claimant's school district, the Los Angeles Unified School District (District) conducted a psycho-educational assessment in approximately November 2017; a report was issued dated November 15, 2017 of that year, and is found at exhibit SA 6. However, it refers to assessment events from December 2017. (Id., p. 5.) The report offered by the Service Agency that was received in evidence is denominated as a draft throughout.

(B) Claimant offered what appears to be the final version of the assessment report, as it is dated December 14, 2017. It is found in Claimant's exhibit 10.

18. (A) Much of the assessment could not be completed because of Claimant's symptoms and behaviors. She demonstrated hallucinatory and paranoid behavior. (Ex. C 10, p. 6.) The Cognitive Assessment System 2 was utilized to assess cognitive function.[6] However, the assessment was not scored. At times Claimant would not answer the questions posed because "'the voice is telling me not to answer.'" (Id., p. 7.)[7] Other times she said she couldn't do it, or that it was too difficult. Likewise, she was too agitated to complete the BASC-3, used to assess social emotional adjustment. (Id., p. 10, 11.) Scores

[6] The District does not assess students with standard IQ tests.

[7] At another point, she copied a square, but indicated that "the voice" told her not to copy it. (Ex. C 10, p. 8.)

on the Vineland Adaptive Behavior Scales 3 (Vineland) showed Claimant was below average in Communication, Daily Living Skills, and Socialization, with a score of 78 on each. It was noted, however, that parent reported difficulty in completing the rating scale due to Claimant's then-recent and rapid decline in function, and her apparent inconsistent abilities, which depended on Claimant's mood or sense of reality at the moment. (Id., p. 13.)

(B) The assessor concluded that Claimant was eligible for special education services under the category of emotional disturbance. (Ex. C 10, p. 14-15.) An Individual Education Plan (IEP) meeting was held on December 14, 2017. (Ex. C 11.) The record indicates that Claimant became eligible for special education services based on the category of emotional disturbance.

PSYCHOLOGICAL EVALUATION BY NLACRC

19. Sandi J. Fischer, Ph.D., a licensed clinical psychologist on the NLACRC staff, performed a psychological assessment of Claimant on March 29, 2018. Her report was received as exhibit SA 12.

20. Dr. Fischer reviewed various records, including the LAUSD psycho-educational assessment and the IEP developed for Claimant by the District, and she administered tests. To test Claimant's IQ, she used the Wechsler Adult Intelligence Scale-Fourth Edition (Wechsler). Claimant had difficulty with the test, and her scores fell into the deficit to borderline range. Her overall full scale IQ was a 51. Her processing speed was 55, working memory was 58, perceptual reasoning 51, and verbal comprehension 68. Her overall score put her in the 0.1 percentile. (Pp. 4-5, 7.)

21. Dr. Fischer utilized the Adaptive Behavior Assessment System-Fourth Addition (ABAS) to examine Claimant's adaptive functioning. Dad was the reporter. Scores for most areas of the test indicate Claimant is in the borderline range of functioning. Her general adaptive composite score was a 68, placing her in the second

percentile. The other domains—conceptual, social, practical—had similar scores (70, 68, and 71, respectively). (Pp. 5, 7.) This represents a drop from the scores yielded by the Vineland administered by the District's assessor. (Factual Finding 18(B).)

22. Dr. Fischer found the diagnosis of Schizophrenia to be appropriate given the records and Claimant's presentation to Dr. Fischer. Dr. Fischer noted that the results of the assessment suggested that Claimant's cognitive and adaptive skills had regressed significantly since the psychotic break had occurred; pre-break abilities were inferred from her status as an A student who had a challenging class load. Stating that it was unclear if Claimant's regression was a permanent or transitory state, Dr. Fischer gave a diagnosis of Unspecified Neurocognitive Disorder. (P. 5.)

23. According to the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, known as the DSM-5,[8] a diagnosis of a neurocognitive disorder is appropriate where the cognitive disorder, and poor cognitive function, can be characterized by a loss of cognitive functioning. (Ex. SA 22, p. 11 [DSM-5, p. 40]; DSM-5, p. 591 [the primary clinical deficit is in cognitive function, which deficit is acquired, rather than developmental].)

OTHER MATTERS

24. Testimony by Dr. Fischer and Dr. Sarla Karan, M.D., indicated that while impaired cognitive function can be expected in someone suffering from Schizophrenia, the

[8] The DSM-5 is the latest edition of the DSM. The DSM has long been recognized by psychiatrists, psychologists, and other health professionals as a standard reference source, and relied upon by such professionals. It was utilized by Dr. Fischer, and the ALJ indicated he would take notice of it. Copies of some chapters were offered in evidence by the Service Agency; citations to those portions will carry the exhibit page number and the book's page number.

drop in IQ shown by Claimant's scores on the Wechsler is unusually large. Both acknowledged that there are no pre-break IQ scores for Claimant, but given her years of outstanding performance in school, an above-average IQ could be inferred.[9] Even if her IQ had been completely average—100, the middle of the average range—the overall IQ score of 51 found by Dr. Fischer represented an unusual drop, three standard deviations from the mean. If Claimant's pre-break IQ was above average, i.e., 120, then the drop in function is even more precipitous, and would be more unusual in the experience of the two practitioners.

25. Dr. Karan spoke with Dr. Casalegno, Claimant's treating psychiatrist, in June 2018. According to Dr. Karan, Dr. Casalegno did not think that Claimant's cognitive functioning was the same as someone with severe Intellectual Disability. Dr. Casalegno indicated that Claimant appears to be functioning closer to a normal cognitive level when the two would interact; she told Dr. Karan it seemed closer to 80. Dr. Casalegno indicated that Claimant's cognitive function might improve as her psychosis is better controlled. (See ex SA 17.)[10]

26. Dr. Fischer spoke with a member of the treatment team at UCLA, regarding Claimant's participation in the partial hospital program. It was reported to Dr. Fischer that UCLA will not allow participation if a patient's IQ is below 75. The person indicated that

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[9] Dad produced evidence that Claimant would get the maximum scores on District standard testing.

[10] Dr. Casalegno, in a writing, disagreed with Dr. Karan's version of the conversation. Dr. Karan's is credited, as she made note of the conversation at or about the time of the conversation, and the statements attributed to Dr. Casalegno are consistent with the report to Dr. Fischer by UCLA treatment staff, and with Dr. Casalegno's chart entries cited in Factual Finding 15.

Claimant was functioning like someone with an IQ above 75.

27. Claimant's Dad testified regarding her cognitive functioning, painting a picture of a debilitated teenager. It appears that Claimant's fund of knowledge has been depleted, and she has problems solving simple problems. He spoke to her lack of working memory and her slow processing speed, and Claimant's inability to link ideas, and problems attending to things. Her medications have improved her behavior, as she is not hallucinating, and she has regained the ability to place herself in a social situation, or in public; she can go the store or the gym, which she could not do a few months before.

28. Dr. Fischer and Dr. Karan appear to lack confidence in the IQ score generated during Dr. Fischer's assessment, at least as an indicator of Claimant's overall ability. They believe that more time is needed to determine the extent of deficits, believing that there might be some improvement or stabilization in the next year.

29. Claimant's father provided scholarly publications, and the opinion of experts to the effect that the loss of cognitive function that accompanies Schizophrenia does not improve over time.

ON INTELLECTUAL DISABILITY

30. (A) The DSM-5 defines intellectual disability as "a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains." (Ex. SA 21, p. 4 [DSM-5, p. 33].) It supersedes the diagnostic category of mental retardation, which was found in the earlier, and now superseded, DSM-IV.

(B) The following three criteria must be met to establish that a person suffers from intellectual disability:

A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience,

confirmed by both clinical assessment and individualized, standardized intelligence testing.

B. Deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.

C. Onset of intellectual and adaptive deficits during the developmental period.

(C) Thus, the definitive characteristics of intellectual disability include deficits in general mental abilities (Criterion A) and impairment in everyday adaptive functioning, in comparison to an individual's age, gender, and socio-culturally matched peers (Criterion B). To meet the diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the intellectual impairments described in Criterion A. Onset is during the developmental period (Criterion C). A diagnosis of intellectual disability should not be assumed because of a particular genetic or medical condition. Any genetic or medical diagnosis is a concurrent diagnosis when Intellectual Disability is present. (Ex. SA 21, p.10-11; [DSM-5, pp. 39-40].)

(D) In the section pertaining to differential diagnosis, the DSM-5 states: "Intellectual Disability is categorized as a neurodevelopmental disorder and is distinct from the neurocognitive disorders, which are characterized by a loss of cognitive functioning." (Ex. SA 21, p. 11 [DSM-5, p. 40].)

31. The authors of the DSM-5 have indicated that "[i]ntellectual functioning is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence. Individuals with intellectual disability have scores of approximately two standard deviations

or more below the general population mean, including a margin for measurement error (generally +5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65-75 (70 + 5)." (Ex. SA 21, p. 8 [DSM-5, p. 37].) At the same time, the authors of the DSM-5 recognize that "IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks." Thus, "a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score." (Id.)

32. According to the DSM-5, "[a]daptive functioning is assessed using both clinical evaluation and individualized, culturally appropriate, psychometrically sound measures. Standardized measures are used with knowledgeable informants (e.g., parent or other family member; teacher; counselor; care provider) and the individual to the extent possible. Additional sources of information include educational, developmental, medical, and mental health evaluations." (Id.) Whether it is intellectual functioning or adaptive functioning, clinical training and judgment are required to interpret standardized measures, test results and assessments, and interview sources.

LEGAL CONCLUSIONS

JURISDICTION

1. Jurisdiction exists to conduct a fair hearing in the above-captioned matter, pursuant to section 4710 et seq., based on Factual Findings 1 through 4.

LEGAL CONCLUSIONS PERTAINING TO ELIGIBILITY GENERALLY

2. The Lanterman Act, at section 4512, subdivision (a), defines developmental disabilities as follows:

> "Developmental disability" means a disability which originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. . . . 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.
>
> This latter category is commonly known as "the fifth category."

3. (A) Regulations developed by the Department of Developmental Services, pertinent to this case, are found in title 17 of the California Code of Regulations (CCR).[11] At section 54000 a further definition of "developmental disability" is found which mirrors section 4512, subdivision (a).

(B) Under CCR section 54000, subdivision (c), some conditions are excluded. The excluded conditions 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

[11]All references to the CCR are to title 17.

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.

4. Section 4512, subdivision (l), provides that, "substantial disability" means the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

(1) Self-care.

(2) Receptive and expressive language.

(3) Learning.

(4) Mobility.

(5) Self-direction.

(6) Capacity for independent living.

(7) Economic self-sufficiency.

5. (A) To establish eligibility, Claimant must prove, by a preponderance of the evidence, that she suffers from an eligible condition, i.e., autism, intellectual disability, cerebral palsy, epilepsy, or disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual

disability. She must further establish that she is substantially disabled by her condition. This Conclusion is based on section 4512, subdivision (a) and Evidence Code section 500. It is plain that Claimant does not suffer from autism, epilepsy, or cerebral palsy.

LEGAL CONCLUSIONS SPECIFIC TO THIS CASE

6. Claimant is not eligible on the grounds that she suffers from Intellectual Disability. The weight of the evidence establishes that despite low IQ test scores, and low scores on instruments designed to assess adaptive function, Claimant does not suffer from that malady. Plainly, her IQ was in the high average range or even above average range, as demonstrated by her pre-break school performance. While "developmental period" is not clearly defined in the DSM, 16 years of age is late in the period if not outside of it. For most of her life Claimant never could have been called Intellectually Disabled. The advent of any intellectual disability came with her psychotic break. The diagnosis of Neurocognitive Disorder, made by Dr. Fischer, is supported by the weight of the evidence, and a diagnosis of Intellectual Disability is not. The former is not an eligible criteria under section 4512, subdivision (b).

7. Claimant is not eligible for services at this time on the basis of the fifth category. While her IQ score of 51, and low scores on the most recent adaptive skills testing indicate she suffers from a condition similar to Intellectual Disability, there is some question about whether the testing results paint a rounded and accurate picture. (Factual Findings 25, 26, and 28.) Claimant has shown some improvement, and she may improve more. Although the literature offered by Claimant regarding the long term nature of cognition loss in Schizophrenia does not bode well for Claimant, that doesn't mean further stability and improvement will not occur. Dr. Fischer and Dr. Karan both asserted that up to a year should pass before the Service Agency again assesses Claimant. At that time, further testing may support a finding of eligibility under the fifth category. This cautious approach is justified in this particular case, especially where the Service Agency has

indicated a willingness to not assert CCR section 54000, subdivision (c)(1) (Legal Conclusion 3(B)), as a bar to eligibility.

8. Claimant's appeal shall be denied without prejudice to re-application for services and appropriate assessment by the Service Agency following any re-application.

ORDER

Claimant's appeal is denied without prejudice to re-application for services at a future date.

Date:

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter, and both parties are bound by it. Either party may appeal this decision to a court of competent jurisdiction within ninety (90) days of this decision.