

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of

CLAIMANT,

v.

WESTSIDE REGIONAL CENTER, Service Agency.

OAH No. 2021020714

DECISION

Robert Walker, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on October 1, 2021. The proceeding was conducted by video conference.

Candace J. Hein, Fair Hearing Specialist, represented Westside Regional Center (WRC).

Claimant's mother represented claimant.

The record was closed and the matter was submitted for decision on October 1, 2021.

ISSUE

Is claimant eligible for services under the Lanterman Developmental Disabilities Services Act (Welf. & Inst. Code, § 4500 et seq.) (Lanterman Act)?¹

EVIDENCE RELIED ON

Documents: Service Agency's exhibits 1 through 13.

Testimony: Kaely Shilakes, Psy.D., a licensed clinical psychologist with WRC; claimant's mother.

FACTUAL FINDINGS

WRC's Denial of Claimant's Application

1. Claimant is a 44-year-old woman. Sometime before December 14, 2020, claimant applied to WRC for Lanterman Act services. WRC determined that she is not eligible.

¹ All statutory references are to the Welfare and Institutions Code unless otherwise designated.

2. The eligibility-determination team based its decision on claimant's records, a WRC psychosocial assessment, and a psychological evaluation conducted by an outside consultant.

3. WRC sent claimant a denial letter dated December 9, 2020, advising her that WRC found her to be not eligible for Lanterman Act services. The letter said:

[Claimant] does not currently have a "substantial disability" as a result of Intellectual Disability, Autism, Cerebral Palsy, [or] Epilepsy. And [claimant] also does not appear to have a disabling condition related to intellectual disability or to need treatment similar to what individuals with an intellectual disability need. Therefore, WRC concluded that [claimant] is not currently eligible for WRC services for people with developmental disabilities, as that term is defined in California Welfare and Institutions Code (WIC) Section 4512.

4. WRC also sent claimant a notice of proposed action dated December 14, 2020, advising her that WRC had determined she was not eligible for Lanterman Act services.

5. Claimant's mother, on behalf of claimant, appealed. She filed a fair hearing request dated February 19, 2021, and the hearing in this matter followed. In the fair hearing request, under "Reasons for requesting a fair hearing," claimant's mother wrote:

Due to the length of time that has transpired, Dr. Nishii had no access to school records (IPes), prior ors diagnosis², & only partial records of residential treatment. [Claimant's] autism & intellectual disability qualified her for admission to Devereux Foundation residential treatment for several years.

6. Under "Describe what is needed to resolve your complaint," she wrote:

[Claimant's] disability stems beyond the scope of a mental disorder. She receives federal assistance (SSI) based on the diagnosis of competent drs. The California State Dept. of Rehab. attempts at finding her employment for over 5 years have failed. [Claimant] is in desperate need of RC assistance.

7. WRC treated the fair hearing request as raising issues as to whether claimant was eligible for services under the following categories: autism; intellectual disability; or the fifth category, i.e., a disabling condition closely related to an intellectual disability or that requires treatment similar to that required by an individual with an intellectual disability.

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² No evidence was presented as to what claimant's mother meant by "ors diagnosis." Olfactory reference syndrome, or olfactory reference disorder, is a medical condition, but there was no evidence that claimant suffers from it.

Diagnostic Criteria for Autism

8. The DSM-5 specifies criteria for the diagnosis of autism spectrum disorder. The diagnostic criteria include 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 based on autism.

Diagnostic Criteria for Intellectual Disability

9. The DSM-5 specifies criteria for the diagnosis of 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. Intellectual functioning is typically measured using intelligence tests. Individuals with intellectual disability typically have intelligent quotient (IQ) scores in the 65-75 range.

Testimony of Kaely Shilakes, Psy.D.

10. Kaely Shilakes, Psy.D., is a licensed clinical psychologist with WRC. As part of her duties she serves as intake manager. She often sits on intake evaluation teams. Each team includes two psychologists, one of whom specializes in mental health; a neurologist; and a behavioral/autism specialist. Dr. Shilakes reviews every psychological report that is submitted, and she reviews other reports when she sits on an intake evaluation team. Dr. Shilakes was a member of the team that evaluated claimant's application.

11. Dr. Shilakes testified about each exhibit received in evidence in the present case, and her testimony is included with the discussion of each exhibit.

12. Dr. Shilakes testified that one can have a developmental disability that entitles one to regional center services and also have a mental disorder. But the fact that one has a mental disorder, by itself, does not entitle one to regional center services.

13. Dr. Shilakes testified that the intake evaluation team considered whether claimant qualified for regional center services under the so called fifth category, i.e., whether she has a condition that is similar to intellectual disability or that requires treatment similar to that required for intellectual disability. The team concluded claimant does not qualify under the fifth category.

Records Regional Center Obtained Concerning Claimant's History

14. An Individualized Education Plan (IEP) dated September 18, 1989, shows that claimant was attending Kit Carson Elementary School. She was 12 years old. Claimant was in a special day class. She had no mainstream activities. She received psychological counselling. Handicapping conditions were listed as "behaviors and learning disabilities." However, no special education eligibility category is stated. A note says, "Referred for mental health assessment. . . . [Claimant] has been receiving . . . counseling services and needs to receive more intense interventions." Dr. Shilakes testified that the fact that a child is eligible for special education services does not necessarily indicate that he or she is eligible for regional center services. Conditions that affect a child's ability to access curriculum are very broad and can qualify a child for special education services. However, eligibility for regional center services requires a diagnosis of intellectual disability, autism, cerebral palsy, or epilepsy. One also can be

eligible under the so called fifth category if one has a condition that is similar to intellectual disability or that requires treatment similar to that required for intellectual disability. It is not uncommon for a child to qualify for special education services but not be eligible for regional center services.

15. On January 25, 1993, claimant's mother placed claimant in a Devereux Foundation residential facility. Claimant was 15 years old. C.H. Nicholson, M.D., performed a Psychiatric Evaluation and wrote a report dated February 2, 1993. Dr. Nicholson reported admission diagnosis as follows: Axis 1, pervasive developmental disorder, not otherwise specified, and major depression, recurrent with psychotic features. Axis 2, Developmental arithmetic disorder and developmental reading disorder. Dr. Nicholson noted that claimant's records indicated that she had "low average" intelligence, "indicating that she did poorly on tests of intellect but average on tests of ability; there was also the notation of a wide variation of performance on the same tests given at different times." Dr. Shilakes testified that nothing about the records regarding intelligence testing or Dr. Nicholson's comments on those records suggests a diagnosis of intellectual disability. Dr. Nicholson reported that, in his interview, claimant was polite, verbal, and cooperative. After reviewing claimant's records and conducting a clinical interview, Dr. Nicholson diagnosed as Axis 1, psychotic disorder, not otherwise specified; Tourettes disorder (provisional); simple phobia (butterflies); and dysfunctional family circumstances. He diagnosed as Axis 2, pervasive developmental disorder, not otherwise specified, with learning impairments. He diagnosed as Axis 4, psychosocial stressors, severe. Dr. Nicholson recommended psychometric testing. He wrote:

If possible, academic and psychometric testing should be repeated to confirm or disprove the presence of intellectual

impairment or specific developmental disorders. There is inadequate documentation of these disorders present in the admission records. Additional records sought from previous schools might be helpful in this regard.

16. Dr. Shilakes testified that nothing in Dr. Nicholson's report suggests a diagnosis of autism spectrum disorder.

17. On July 18, 2018, claimant was admitted to Del Amo Hospital on a Welfare and Institutions Code section 5150 hold because she posed a danger to others. She was 40 years old. Manolito Fidel, M.D., wrote an Initial Psychiatric Evaluation. The admitting diagnosis were: regarding psychiatric: schizoaffective disorder, depressive type; regarding medical: alcohol and marijuana use; and regarding psychosocial and contextual: "mild." Dr. Fidel did not report having administered any standardized testing. Dr. Fidel reported that he was familiar with the patient; "the patient has had prior psychiatric hospitalizations and also was attending the partial hospitalization program at Del Amo Hospital." The patient reported that she missed her medication. Dr. Fidel observed that claimant's mood disorder and thought disorder were evidence of her failure or inability to benefit from a less intensive program. Dr. Shilakes testified that nothing in Dr. Fidel's evaluation suggests a diagnosis of autism or intellectual disability.

WRC Psychosocial Assessment

18. Maritza Cortes, Intake Counselor, WRC, conducted an intake interview by telephone with claimant and her mother. Ms. Cortes wrote a Psychosocial Assessment dated October 2, 2020; she reported as follows: Claimant has been diagnosed with schizoaffective disorder, bipolar disorder, and a history of pervasive developmental

disorder. Claimant requests WRC to evaluate her and re-determine eligibility for regional center services. With regard to self-care, claimant's mother reported that claimant is able to perform daily living activities such as taking care of her personal hygiene, dressing, eating, and toileting. However, "she wouldn't shower daily and barely brushes her hair," She is able to prepare simple meals and wash her clothes. She can use a mobile phone. She can drive an automobile but would not drive on a freeway. Claimant goes shopping, makes purchases, and pays with an ATM card; she has a difficult time dealing with cash. Claimant spoke in a clear manner using sentences and provided pertinent information about background and current functioning. Claimant is able to express her opinions and feelings. Claimant is able to follow commands and instructions, yet sometimes she forgets. She is able to carry on a basic conversation and answer questions.

19. Dr. Shilakes testified about the psychosocial assessment. She said nothing reported concerning claimant's medical history, medication, or self-care suggests autistic spectrum disorder. There is an indication of deficits in intellectual ability, and that raises a question as to whether those deficits are caused by a developmental disability or mental health problems.

20. Regarding social and emotional behavioral problems, Ms. Cortes reported that claimant likes to be around people, is outgoing, and likes to go shopping. She is anxious most of the time and ruminates. Claimant said, "It takes time to get out of those thoughts." To cope with anxiety, claimant calls her friends. Dr. Shilakes testified about the psychological assessment regarding social and emotional behavioral problems. Dr. Shilakes testified that nothing in the psychological assessment suggests a communication problem, and nothing suggests a diagnosis of autistic spectrum disorder.

21. Dr. Shilakes noted that Ms. Cortes concluded that claimant presents with deficits in adaptive and cognitive skills, and Ms. Cortes recommended a psychological assessment to evaluate the possibility of intellectual disability and autism.

Psychological Evaluation by Dr. Jeffrey Nishii, Psy.D.

22. Jeffrey Nishii, Psy.D., conducted a psychological evaluation and wrote a report dated November 26, 2020. Dr. Nishii is not a regional center employee. He has a contract with WRC pursuant to which he conducts psychological evaluations. He wrote that the regional center referred this matter to him to rule out or substantiate a diagnosis of autism spectrum disorder and clarify claimant's current level of functioning.

23. Dr. Nishii reviewed claimant's records, conducted a clinical interview, and administered psychometric tests.

24. Dr. Nishii reported on his clinical observations of claimant. He wrote that she was a poor historian for both recent and remote memories, and she had difficulty performing basic arithmetic in her head. Dr. Shilakes testified that Dr. Nishii did not report having difficulty communicating with claimant. And he did not report any other visible or audible characteristics of autism spectrum disorder or intellectual disability.

25. Dr. Nishii used an abbreviated administration of the Wechsler Adult Intelligence Scale, Fourth Edition (WAIS- IV) to assess claimant's verbal comprehension. He administered the test through a remote audio-visual presentation. The results are expressed in five components – a verbal comprehension index, on which claimant scored 76; a perceptual reasoning index; a working memory index, on which claimant scored extremely low; a processing speed index, on which claimant scored extremely low; and the full-scale intelligence quotient (IQ). Claimant's score of

76 on the verbal comprehension index is in the borderline range. i.e., on the border between average and intellectual disability. Dr. Nishii did not report claimant's score on the perceptual reasoning index or the full-scale IQ.

26. Dr. Nishii administered the Raven's 2 Progressive Matrices (Raven's 2), which measures non-verbal reasoning concerning matters such as patterns. Claimant scored in the extremely low range.

27. Dr. Nishii used the Vineland Adaptive Behavior Scales, Third Edition (VABS-III), to evaluate adaptive functioning. Dr. Nishii interviewed claimant's mother to obtain information for the VABS-III. An evaluator can have a reporter fill out a form, or an evaluator can interview a reporter. Dr. Nishii chose the latter. Complainant's composite score was in the low range.

28. Dr. Nishii administered the Autism Diagnostic Observation Schedule, Second Edition (ADOS-2). The ADOS-2 provides the evaluator an opportunity to observe behaviors and characteristics associated with autism spectrum disorder. Dr. Nishii reported:

[Claimant] did not display abnormalities of communication. She did not display stereotyped/idiosyncratic use of words or phrases. She did not display deficits in use of gestures. She engaged in a contextually appropriate amount of reciprocal conversation. Though eye contact was difficult to assess given the video conference format, [claimant] displayed good visual attention to her video screen. She displayed an appropriate range of facial expressions. She made appropriate inferences and comments about social-

emotional situations. Quality and amount of social overtures fell within normal limits. Rapport was easily established. [Claimant] did not display or endorse any unusual sensory related interests or behaviors. She did not display any hand, finger, or other complex mannerisms. She did not display or endorse any excessive interest in specific topics or objects. She did not endorse having compulsions or rituals.

29. In determining whether to diagnose autism spectrum disorder, Dr. Nishii used the *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition, (DSM-5) criteria, and found that claimant did not meet those criteria. In his evaluation, Dr. Nishii wrote that “[claimant] displayed little to no evidence of autism spectrum-related symptoms.” Dr. Nishii reported a total score of two on the ADOS. Dr. Shilakes testified that two indicates non-autistic; the cutoff for an indication of autism is seven.

30. In determining whether to diagnose intellectual disability, Dr. Nishii found that claimant did not meet the DSM-5 criteria. He wrote that claimant’s records and history reflect levels of intellectual functioning that do not support a finding of intellectual disability. And claimant’s current scores in the borderline and extremely low ranges do not meet the DSM-5 requirement of “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.” Further, claimant’s records do not support a finding of an onset of intellectual and adaptive deficits during the developmental period.

31. Dr. Nishii reported diagnostic impressions as follows: schizoaffective disorder, depressive type, per history and borderline intellectual functioning.

Claimant's Mother's Testimony

32. The following is a summary of claimant's mother's testimony.

33. When claimant was a child, she qualified for regional center services at the Santa Barbara Regional Center.

34. Claimant was autistic and had an intellectual disability at birth.

35. Claimant was at the Devereux Foundation facility for seven years. They provide services to individuals with special needs – people with behavioral, psychological, intellectual, or neurological impairments. The fact that she was there for seven years shows that she has special needs. She lived at Zink House, which is for children with developmental disabilities or moderate to severe emotional disturbances.

36. Claimant's functioning has improved because of the instruction and behavior modification services she has received.

37. The Department of Rehabilitation worked with claimant for seven years but was able to obtain employment for her for only two months – at a Ross Department Store.

38. Claimant currently goes to the Del Amo hospital out-patient therapy program three days per week, and they recommended that she apply for regional center services.

39. Claimant is at an extremely low intellectual level.

Dr. Shilakes's Testimony Concerning Tri City Regional Center's Response to WRC's Request for Records

40. As noted above, claimant's mother testified that, when claimant was a child, she qualified for regional center services at the Santa Barbara Regional Center.

41. Dr. Shilakes testified as follows: There is no Santa Barbara Regional Center; however, there is an office in Santa Barbara for the Tri Counties Regional Center. WRC sought records for claimant from Tri Counties Regional Center and was told there are none. Tri Counties replied that they have no records and that claimant was not assessed.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he or she is asserting." (Evid. Code, § 500.) Claimant has the burden of proving that she is eligible for Lanterman Act services.

2. The standard of proof is proof by a preponderance of the evidence. (Evid. Code, § 115.)

The Law Regarding Eligibility

3. Welfare and Institutions Code section 4512, subdivision (a), defines developmental disability.

“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.

4. Welfare and Institutions Code section 4512, subdivision (1)(1), defines substantial disability as that term is used in Welfare and Institutions Code section 4512, subdivision (a).

“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:

(A) Self-care.

(B) Receptive and expressive language.

(C) Learning.

(D) Mobility.

(E) Self-direction.

(F) Capacity for independent living.

(G) Economic self-sufficiency.

5. Welfare and Institutions Code section 4642, subdivision (a)(1), provides for eligibility for initial intake and assessment services.

Any person believed to have a developmental disability, and any person believed to have a high risk of parenting a developmentally disabled infant shall be eligible for initial intake and assessment services in the regional centers. In addition, any infant having a high risk of becoming developmentally disabled may be eligible for initial intake and assessment services in the regional centers. For purposes of this section, "high-risk infant" means a child less than 36 months of age whose genetic, medical, or environmental history is predictive of a substantially greater risk for developmental disability than that for the general population.

6. Welfare and Institutions Code section 4643, subdivision (a), provides that assessment may include collection and review of historical diagnostic data.

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).

7. Welfare and Institutions Code section 4643, subdivision (a), provides that a regional center may consider evaluations and tests from other sources.

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.

8. Without administering any tests, a regional center may be able to determine whether an applicant is eligible for services. A regional center may be able to do that based on historical data and based on evaluations and tests that have been performed by, and are available from, other sources. Thus, a regional center may be able to act on an application for services without providing intake and assessment services.

Analysis

9. There is no evidence that a psychologist or medical professional has found claimant to have a developmental disability as defined in Welfare and Institutions Code section 4512, subdivision (a).

10. The fact that claimant received special education services as a child does not mean she qualifies for Lanterman Act services. The conditions and behaviors that can qualify a child for special education services are much broader than the definition of developmental disability in Welfare and Institutions Code section 4512, subdivision (a). Moreover, the IEP dated September 18, 1989, shows that claimant received psychological counselling. Her handicapping conditions were listed as "behaviors and learning disabilities." No special education eligibility category is stated, and a note says, "Referred for mental health assessment. . . . [Claimant] has been receiving . . . counseling services and needs to receive more intense interventions." The IEP does not indicate that claimant had a developmental disability.

11. In Dr. Nicholson's psychiatric evaluation report, he recommended that academic and psychometric testing should be repeated. He said there was inadequate documentation concerning intellectual impairment or developmental disorders. Dr. Shilakes testified that nothing in Dr. Nicholson's report suggests a diagnosis of autism spectrum disorder.

12. On July 18, 2018, claimant was admitted to Del Amo Hospital, and Dr. Fidel conducted an initial psychiatric evaluation. In his report, he wrote that the admitting diagnoses were schizoaffective disorder and alcohol and marijuana use. He wrote that, regarding psychosocial and contextual, the diagnosis was "mild." Dr. Fidel does not report having done any standardized testing. Dr. Shilakes testified that nothing in Dr. Fidel's evaluation suggests a diagnosis of autism or intellectual disability.

13. In Ms. Cortes's Psychosocial Assessment, she recommended a psychological assessment to evaluate the possibility of intellectual disability and autism.

14. Dr. Nishii's does not report diagnosing a developmental disability. Dr. Nishii wrote that "[claimant] displayed little to no evidence of autism spectrum-related symptoms." Dr. Nishii reported a total score of two on the ADOS. Dr. Shilakes testified that two indicates non-autistic; the cutoff for an indication of autism is seven. Dr. Nishii found that claimant did not meet the DSM-5 criteria for a diagnosis of intellectual disability. Further, claimant's records do not support a finding of an onset of intellectual and adaptive deficits during the developmental period. Dr. Nishii reported diagnostic impressions as follows: schizoaffective disorder, depressive type, per history, and borderline intellectual functioning.

15. The record contains no evidence to support a finding of developmental disability.

ORDER

Claimant's appeal from WRC's determination that claimant is not eligible for regional services is denied. The regional center's determination is affirmed.

DATE:

ROBERT WALKER
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 90 days.