

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Miguel V.,

Claimant,

v.

Inland Regional Center,

Service Agency.

OAH No. 2012020216

DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on March 6, 2012.

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

Miguel V. (claimant) was represented by his mother, Juana V.

Oral and documentary evidence was received and the matter was submitted on March 6, 2012.

ISSUES

1. Is claimant eligible for regional center services under the Lanterman Act as a result of mental retardation, a condition closely related to mental retardation or requiring treatment similar to that required for a mentally retarded individual, which constitutes a substantial handicap, or autism?

2. Should IRC reevaluate claimant?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. On December 16, 2011, IRC notified claimant that he was not eligible for regional center services.

2. On January 30, 2012, claimant filed a Fair Hearing Request appealing IRC's determination that he was ineligible for regional center services because he was not mentally retarded and was not autistic and this hearing ensued.

DIAGNOSTIC CRITERIA FOR MENTAL RETARDATION

3. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, (DSM-IV-TR) contains the diagnostic criteria used for mental retardation and learning disorders. The DSM-IV-TR provides that, "The essential feature of mental retardation is significantly subaverage intellectual functioning (Criterion A), that is accompanied by significant limitation in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must be before the age of 18 years (Criterion C)." The DSM-IV-TR further notes that, "Significantly subaverage intellectual functioning is defined by IQ of about 70 or below..."

The DSM-IV-TR observed that with Learning Disorders "the development in a specific area (e.g. reading, expressive language) is impaired but there is no generalized impairment in intellectual development and adaptive functioning." Additionally, "Learning Disorders are characterized by academic functioning that is substantially below that expected given the person's chronological age, measured intelligence and age-appropriate education. The specific disorders identified as learning Disorders are Reading Disorder, Mathematics Disorder, Disorder of Written Expression, and Learning Disorder Not Otherwise Specified."

THE "FIFTH CATEGORY"

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

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

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

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

² The ARCA guidelines have not gone through the formal scrutiny required to become a regulation.

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

- “I. Does the individual function in a manner that is similar to that of a person with mental retardation?

Mental retardation is defined in the DSM-IV³ as “significantly subaverage general intellectual functioning . . . that is accompanied by significant limitations in adaptive functioning. . .”

General intellectual functioning is measured by assessment with one or more standardized tests. Significantly sub-average intellectual functioning is defined as an intelligence quotient (IQ) of 70 or below.

An individual can be considered to be functioning in a manner that is similar to a person with mental retardation if:

- A. The general intellectual functioning is in the low borderline range of intelligence (I.Q. scores ranging from 70-74). Factors that the eligibility team should consider include:
 1. Cognitive skills as defined in the California Code of regulations, Title 17. Section 54002: “. . . the ability of an individual to solve problems with insight, to adapt to new situations, to think abstractly and to profit from experience.”

3 The DSM-IV-TR definition is discussed in Factual Finding No. 3.

2. The higher an individual's IQ is above 70, then the less similar to a person with mental retardation is the individual likely to appear. For example, an individual with an IQ of 79 is more similar to a person with a low average intelligence and more dissimilar to a person with mild mental retardation.
3. As an individual's intelligence quotient rises above 70, it becomes increasingly essential for the eligibility team to demonstrate that:
 - a. There are substantial adaptive deficits; and
 - b. Such substantial adaptive deficits are clearly related to cognitive limitations.
4. Occasionally, an individual's Full Scale IQ is in the low borderline range (IQ 70-74) but there is a significant difference between cognitive skills. For example, the Verbal IQ may be significantly different than the Performance IQ. When the higher of these scores is in the low average range (IQ 85 or above), it is more difficult to describe the individual's general intellectual functioning as being similar to that of a person with mental retardation. In some cases, these individuals may be considered to function more like persons with learning disabilities than persons with mental retardation.
5. Borderline intellectual functioning needs to show stability over time. Young children may not yet demonstrate consistent rates and patterns of development. For this reason, eligibility for young children in the 5th category should be viewed with great caution.
- B. In addition to sub-average intellectual functioning, the person must also demonstrate significant deficits in *Adaptive* skills, including, but not limited to, communication, learning, self-care, mobility, self-direction, capacity for independent living, and economic self-sufficiency. Factors that the eligibility team should consider include:

1. Adaptive behavior deficits as established on the basis of clinical judgments supplemented by formal Adaptive Behavior Scales (e.g., Vineland ABS, AAMR-ABS) when necessary.
 2. Adaptive deficits are skill deficits related to intellectual limitations that are expressed by an inability to perform essential tasks within adaptive domains or by an inability to perform those tasks with adequate judgment.
 3. Skill deficits are not performance deficits due to factors such as physical limitations, psychiatric conditions, socio-cultural deprivation, poor motivation, substance abuse, or limited experience.
- II. Does the person require treatment similar to that required by an individual who has mental retardation?

In determining whether an individual requires "treatment similar to that required for mentally retarded individuals," the team should consider *the nature of training and intervention* that is most appropriate for the individual who has global cognitive deficits. The eligibility team should consider the following to determine whether the individual requires treatment similar to that required by an individual who has mental retardation.

- A. Individuals demonstrating *performance based deficits* often need treatment to increase motivation rather than training to develop skills.
- B. Individuals with *skill deficits* secondary to socio-cultural deprivation but not secondary to intellectual limitations need short term, remedial training, which is not similar to that required by persons with mental retardation.
- C. Persons requiring *habilitation* may be eligible, but persons requiring *rehabilitation* are not typically eligible as the term rehabilitation implies recovery of previously acquired skills; however, persons requiring rehabilitation may be eligible if the disease is acquired before age 18 and is a result of traumatic brain injury or disease.

- D. Individuals who require *long term training* with steps broken down into small discrete units taught through repetition may be eligible.
- E. The eligibility team may consider the intensity and type of *educational supports* needed to assist children with learning. Generally, children with mental retardation need more supports, with modifications across many skill areas.

III. Is the individual substantially handicapped based upon the statewide definition of Substantial Disability/Handicapped?

The W&I Code (Section 4512) defines *Developmental Disability* as a disability which originates before an individual attains the age of 18, continues, or can be expected to continue, indefinitely, and constitutes a *substantial disability* for that individual. The CCR, Title 17 (Section 54001) defines *substantial handicap* as:

- a) Substantial handicap means a condition which results in major impairment of cognitive and/or social functioning. Moreover, a substantial handicap represents a condition of sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential.
- b) Since an individual's cognitive and/or social functioning is many-faceted, the existence of a major impairment shall be determined through an assessment which shall address aspects of functioning including, but not limited to:
 - 1) Communication skills;
 - 2) Learning;
 - 3) Self-care;
 - 4) Mobility;
 - 5) Self-direction;
 - 6) Capacity for independent living;
 - 7) Economic self-sufficiency.

- c) The assessment 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 serving the potential consumer. The group shall include as a minimum, a program coordinator, a physician, and a psychologist.
- d) The Regional Center professional group shall consult the potential consumer, parents, guardians, conservators, educators, advocates, and other consumer representatives to the extent that they are willing and available to participate in its deliberation and to the extent that the appropriate consent is obtained.

Regional Centers should use criteria of three or more limitations in the seven major life activities as used in the federal definition for Developmental Disability

IV. Did the disability originate before age 18 and is it likely to continue indefinitely?

The eligibility team should provide an opinion regarding the person's degree of impairment in the adaptive functioning domains, identifying skill deficits due to cognitive limitations and considering performance deficits due to factors such as physical limitations, psychiatric conditions, socio-cultural deprivation, poor motivation, substance abuse, or limited experience. Additional information, such as that obtained by a home visit, school or day program observation, or additional testing may be required to make this determination."

DIAGNOSTIC CRITERIA FOR AUTISM

5. The DSM-IV-TR also identified criteria for the diagnosis of autism. As noted in that text, "Pervasive Developmental Disorders are characterized by severe and pervasive impairment in several areas of development reciprocal social interaction skills, communication skills, or the presence of stereotyped behavior, interests and activities." The group of disorders identified as Pervasive Developmental Disorders are Autistic Disorder,

Rett's Disorder, Childhood Disintegrative Disorder, Asperger's Disorder, and Pervasive Developmental Disorder-Not Otherwise Specified. The DSM-IV-TR notes that, "The essential features of Autistic Disorder are the presence of markedly abnormal or impaired development in social interaction and communication and a markedly restricted repertoire of activities and interests." An individual must have a DSM-IV-TR diagnosis of "Autistic Disorder" to qualify for regional center services.

The DSM-IV-TR diagnostic criteria for "Autistic Disorder" are:

"A. A total of six (or more) items from (1), (2), and (3), with at least two from (1) and one each from (2) and (3)

1. qualitative impairment in social interaction, as manifested by at least two of the following:

- a. marked impairments in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body posture, and gestures to regulate social interaction
- b. failure to develop peer relationships appropriate to developmental level
- c. a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people, (e.g., by a lack of showing, bringing, or pointing out objects of interest)
- d. lack of social or emotional reciprocity

2. qualitative impairments in communication as manifested by at least one of the following:

- a. delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime)
- b. in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others
- c. stereotyped and repetitive use of language or idiosyncratic language;

- d. lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level;
- 3. restricted repetitive and stereotyped patterns of behavior, interests and activities, as manifested by at least two of the following:
 - a. encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus
 - b. apparently inflexible adherence to specific, nonfunctional routines or rituals
 - c. stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements)
 - d. persistent preoccupation with parts of objects.
- B. Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction; (2) language as used in social communication; and (3) symbolic or imaginative play.
- C. The disturbance is not better accounted for by Rett's Disorder or Childhood Disintegrative Disorder."

EVIDENCE PRESENTED AT HEARING

6. Thomas Gross, PhD, a licensed psychologist, performed a psychological evaluation on December 6, 2011. Dr. Gross reviewed several records, noting discrepancies between information reported by claimant's mother and what the actual documents

indicated.⁴ Dr. Gross performed several psychological tests, the results of which indicated scores in the mental retardation and autism range, Dr. Gross concluded that claimant was not being forthright in his answers, was not giving his best effort and he had the impression that claimant and his mother were attempting to present claimant as more disabled than he was. Dr. Gross noted that claimant missed numerous items on testing that a six-year-old would get correct and that his test scores were completely at odds with all of the previous testing administered by the school district. The school district records showed a learning disability, not mental retardation and not autism. Dr. Gross documented, "I, frankly, find it difficult to believe that in the course of his educational career, he was never identified as having mental retardation. It is also noteworthy that he did graduate high school with a diploma (not a certificate of completion)." Dr. Gross found it highly improbable that the school district would have missed a student with the extremely low scores claimant received on Dr. Gross's testing, all the more making him believe that these test scores were invalid. Dr. Gross concluded that claimant's performance "was so discrepant from his performance on other recent psychological assessments that his current performance is useless/invalid for the purpose of determining IRC eligibility." Dr. Gross stressed the importance to claimant and his mother of candor and honesty when being assessed and recommended claimant be reevaluated by an IRC staff psychologist in order to obtain a clearer picture of his intellectual status.

7. Dr. Gross testified in this proceeding consistent with his report. He believed

⁴ Claimant's mother made similar misrepresentations in this proceeding, for example testifying that the Loma Linda evaluation determined that the school evaluation that did not evaluate adaptive functioning, however, the Loma Linda evaluation merely stated that claimant's mother made that report, Loma Linda made no determination on that allegation. In fact, a review of the school records indicated that the school district did evaluate claimant's adaptive functioning.

that claimant was being evasive with his responses and performing poorly on purpose. In fact Dr. Gross cautioned claimant several times during the testing that he needed to give honest responses. Dr. Gross testified that the only conclusion that can be drawn from his testing was that the testing was invalid and cannot be used to make an eligibility decision. Dr. Gross also testified that he found it difficult to believe the school district would have missed an individual as severely disabled as claimant was based upon Dr. Gross's test results.

8. On four different occasions in April 2011 Loma Linda University Health Care conducted a neuropsychological evaluation which claimant's mother had requested from the school district. At the time of the evaluation claimant was 18 years old. The report documented that claimant's mother was first advised of a need for a neuropsychological evaluation by claimant's first grade teacher but because of the family's move to San Bernardino the assessment was never carried out. Additionally, claimant's mother stated that she suspected claimant of having autism since he was an infant. Loma Linda reviewed claimant's school records noting that testing in 2010 determined claimant's IQ to be 92, a score in the average range of intellectual ability. However, during the Loma Linda IQ testing, claimant scored 20 points below that, in the impaired range of intellectual functioning. Accordingly, the report noted, "Due to the discrepancy between the two assessment findings, the following should be interpreted with caution." The report then details claimant's test results on the psychological testing administered. The report stated a second time that because of the discrepant findings the results should be interpreted with caution but concluded that because of the low IQ testing and the mother's and claimant's report of poor adaptive skill functioning, a diagnosis of mild mental retardation was warranted. However, a diagnosis of autism could not be made with certainty because claimant did not exhibit all the criteria for the diagnosis

9. Claimant introduced several articles on autism. However, those articles were insufficient to establish eligibility.

10. Claimant's Individualized Education Program (IEP) demonstrated that he was eligible for services with a primary disability of specific learning disability. The school district never identified claimant as mentally retarded or having autism. The school records noted that claimant had an auditory processing disorder. The school records documented his poor attendance, inattentiveness and failure to turn in homework, but otherwise documented good adaptive functioning and socialization skills. Nothing in the school records supported a diagnosis of mental retardation or autism.

11. A May 12, 2011, letter from claimant's attorney at the Disability Rights Legal Center outlined requested modifications to his IEP but nothing in that letter established eligibility.

12. Various medical records introduced did not establish eligibility and one document was merely a referral from a physician for a regional center evaluation, which was conducted.

13. Michelle Lindholm, Ph.D., an IRC staff psychologist, testified that based upon her review of all of the documents, she determined that claimant is not eligible for services. Claimant's request to be reevaluated was denied.

14. Claimant's mother testified about the various records introduced, her frustration with the school district as she believed her son was merely "passed along," and her belief that he is mentally retarded based upon the Loma Linda evaluation. Nothing in her testimony established that her son was eligible for regional center services in light of the other testimony and evidence introduced.

LEGAL CONCLUSIONS

BURDEN OF PROOF

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

STATUTORY AUTHORITY

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

3. Welfare and Institutions Code section 4501 states:

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

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

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

"'Developmental disability' means a disability which originates before an individual attains age 18, continues, or

can be expected to continue indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature."

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

"(a) 'Developmental Disability' means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(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."

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

"(a) 'Substantial disability' means:

- (1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and
- (2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:
 - (A) Receptive and expressive language;
 - (B) Learning;
 - (C) Self-care;
 - (D) Mobility;
 - (E) Self-direction;
 - (F) Capacity for independent living;
 - (G) Economic self-sufficiency.
- (b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of

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

APPELLATE AUTHORITY

7. The purpose of the Lanterman Act is to provide a "pattern of facilities and services . . . sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life." (Welfare and Institutions Code section 4501; *Association of Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

8. The Lanterman Act enumerates legal rights of persons with developmental disabilities. A network of 21 regional centers is responsible for determining eligibility, assessing needs and coordinating and delivering direct services to individuals with developmental disabilities and their families within a defined geographical area. Designed on a service coordination model, the purpose of the regional centers is to "assist persons with developmental disabilities and their families in securing those services and supports which maximize opportunities and choices for living, working, learning, and recreating in the community." The Department of Developmental Services allocates funds to the centers for operations and the purchasing of services, including funding to purchase community-based services and supports. (*Capitol People First v. Department of Developmental*

Services (2007) 155 Cal.App.4th 676, 682-683.)

EVALUATION

9. The Lanterman Act and the applicable regulations set forth criteria that a claimant must meet in order to qualify for regional center services. None of the documents introduced in this hearing demonstrated that claimant had a diagnosis of mental retardation, a condition similar to mental retardation requiring similar treatment, or autism. The burden was on claimant to establish his eligibility for regional center services. Claimant introduced no evidence demonstrating that he was eligible to receive regional center services or that he should be re-evaluated by IRC.

ORDERS

Claimant Miguel V.'s appeal from the Inland Regional Center's determination that he is not eligible for regional center services and supports is denied. Claimant is ineligible for regional center services and supports under the Lanterman Developmental Disabilities Services Act.

Claimant's request for IRC to re-evaluate him is denied.

DATED: March 12, 2012

_____/s/_____
MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings

NOTICE

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