

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of Claimant

vs.

Inland Regional Center,

Service Agency.

OAH No. 2012120860

DECISION

Beth Faber Jacobs, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on September 30, 2013.

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

Claimant's mother represented claimant, who was present for most of the hearing.

The record remained open for the filing of closing argument. Claimant's written argument was received as further testimony, and the regional center was given an opportunity to submit additional evidence and argument.¹ The matter was submitted on November 6, 2013.

¹ IRC's closing argument was received as Exhibit 21. Claimant's closing argument that was deemed additional testimony was received as Exhibit A. IRC's response to claimant's submission was received as Exhibit 22.

ISSUE

Is claimant eligible for regional center services because she has a condition that is closely related to mental retardation, or because she has a condition that requires treatment similar to that required for individuals with mental retardation?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. Claimant is an unconserved adult. She requested that her mother represent her in these proceedings. On November 13, 2012, IRC notified claimant's mother that claimant was not eligible for regional center services.
2. During an informal meeting held on January 15, 2013, claimant's mother requested services for claimant under what is commonly referred to as "the fifth category," under Welfare and Institutions Code, section 4512, subdivision (a), and asserted that claimant has a condition that is closely related to mental retardation or that she has a condition that requires treatment similar to that required for individuals with mental retardation.
3. Claimant's mother signed and timely filed a fair hearing request appealing the regional center's decision to deny eligibility. The Area Board authorized claimant's mother to represent claimant. The matter proceeded to hearing.

EVIDENCE PRESENTED AT THE HEARING

4. Claimant is an eighteen year old female. Her biological mother was addicted to drugs and likely used drugs while she was pregnant with claimant. Claimant was born early and weighed four pounds. She was neglected as a baby; she was left alone, repeatedly sedated with Nyquil, and received little physical contact. As an infant, she frequently banged her head against the crib, a characteristic associated with infants

who have been sensory-deprived. Claimant was eventually removed from her birth family and placed in foster care. At the age of one year, five months, claimant was placed in a foster home with the woman who ultimately adopted her, her representative in this matter.

5. Claimant was slow to walk and slow to talk. She did not say her first words until she was 24 months old.

6. In 1997, when claimant was 2 years, 7 months, Rita Collins-Faulkner, Ph.D., conducted a developmental evaluation to determine claimant's current level of cognitive, social, emotional, and adaptive function for the purpose of treatment planning and potential adoption. Dr. Collins-Faulkner concluded that claimant had significant delays in numerous areas. Verbally, claimant tested at approximately 14 to 16 months, reflecting a significant delay. On the Vineland Adaptive Behavior Scales, claimant's age-equivalent scores were 1-6 in the communication domains, 1-7 in daily living skills domains, and 1-10 in socialization domains.

7. Claimant's representative adopted claimant and her younger sister when claimant was three years old.

8. Claimant did not receive early start services from the regional center. However, when claimant was three years old, the regional center concluded that claimant had a combined language age of score of 24 months.

9. In 1998, when claimant was three years, 2 months, her school district evaluated her to determine if she was eligible for special education services. The school district evaluators, consisting of a psychologist and a language and speech specialist, felt that claimant gave the appearance of a child with fetal alcohol syndrome. They concluded that claimant was functioning cognitively at about 32 months of age, placing her within the "low average" range of cognitive functioning. They added:

When compared with previous evaluations, it appears as though [claimant's] cognitive functioning is catching up to age mates as time goes on which suggests that she has a developmental delay versus mental retardation.

The district evaluated claimant's adaptive behavior and found she obtained an Adaptive Behavior Composite of 80, in the 9th percentile. The district concluded that claimant's cognitive abilities were in the low average range, that her adaptive behavior was similar to that of a 28 month old, that her pre-academic and language skills were delayed, and that, while she had the facial features of a child with fetal alcohol syndrome, she did not display the behavioral characteristics of a child with fetal alcohol syndrome.

Her language skills were placed at the 5th percentile, as a child of 2 years, 6 months.

The district concluded that claimant qualified for special education services under the area of speech and language.

10. Over the next several years, claimant developed additional academic and social challenges. She manifested attention difficulties. In 2003, when she was almost 9 years old, she was moved to the school district's "non-severe handicapped" program. She remained eligible for special education under the category of "other health impaired." District testing results found average nonverbal intellectual functioning and written language, but below average visual motor integration skills, reading, and math. The records reflect diagnoses of ADHD and ADD. At age 11, one report indicated claimant was easily distracted, that she engaged in several compulsive acts, had symptoms of anxiety, and that she showed possible cognitive function problems and problems with short term memory.

11. When she was 11 years old, claimant had a brain scan at UCLA. The report was not introduced into evidence. Philip Corrado, Ph.D., reviewed the report's physical findings and found them to be "consistent with possible areas of consolidation of diffuse neuronal injury, traumatic brain injury or possible learning disorder."

12. Academically, claimant performed below basic in history and in math but was given all A's and one B in her special education classes.

13. Claimant was picked on in high school and made poor social choices. Her mother decided to home school claimant to shield her from the pressures that appeared to be overwhelming to her.

14. The district conducted another evaluation in December 2009, when claimant was 15 years old and in the 9th grade. Claimant's mother completed the Behavior Assessment System for Children, also known as the BASC-2 parent rating scales. Numerous results were in the "clinically significant" range, reflecting "a high level of maladjustment." These areas included "Atypicality," "Withdrawal", and "Hyperactivity." The scores placed claimant as being "at risk" in the areas of aggression, conduct problems, attention problems, adaptability, social skills, leadership, and activities of daily living. Based on claimant's self-assessment under the BASC-2, claimant's responses placed her at clinically significant for internalizing problems, atypicality, anxiety, and a sense of inadequacy. She ranked "at risk" in the emotional symptom index, social stress, inattention/hyperactivity, and interpersonal relations.

The Corrado Report

15. In July 2012, when claimant was 17 years old, she had an extensive evaluation by Philip Corrado, Ph.D., QME. Claimant was referred to Dr. Corrado by her psychologist, Ronald Morgan, Ph.D. Dr. Corrado did not testify, but his report, dated July 12, 2012, was received in evidence. According to the report, he met with claimant for 10

hours, reviewed prior testing, the brain scan results, and medical reports. He conducted numerous assessments, and he scored and evaluated the data.

Dr. Corrado reviewed claimant's psychiatric history. Claimant told him that she frequently gets depressed and anxious, and she worries about her future. He reviewed records showing that as a younger girl, claimant would pull her hair until she had bald spots. She washed her hands repeatedly and compulsively. She periodically had behavioral outbursts. In September 2012, claimant physically attacked her sister by punching her in the eye. Claimant's mother told her the behavior was unacceptable and that she would have to leave if her behavior continued. In response, claimant threw a glass jar at her mother's head. Claimant ran to a nearby Walgreen's Pharmacy where she reported that her mother kicked her out. The police were called. Claimant was placed on a psychiatric hold for one week, and she was prescribed Depakote and Risperdal.

16. Dr. Corrado noted that claimant was at a 4th grade level in math, 6th grade level in language skills, 8th grade level in social studies. He performed WAIS-IV intelligence tests; claimant's full scale IQ was an 87. Dr. Corrado administered tests to evaluate claimant's attention. Based on the testing he conducted, Dr. Corrado concluded that claimant was not suffering from ADHD. Dr. Corrado administered the Trail Making Test Part A and Part B, designed to measure areas of executive functioning. Dr. Corrado's report explained executive function with respect to claimant, as follows:

Executive function refers to one's ability to initiate, maintain, monitor, and stop complex behavior. It also refers to one's ability to plan, organize, and problem solve. Executive function is an important component in human behavior. [Claimant] is experiencing significant problems on tasks which require cognitive flexibility. This means she is unable

to govern the ability to switch behavioral responses according to the context of the situation.

18. Dr. Corrado concluded that claimant's brain scan showed impairment to the areas of that brain that regulate emotion, thinking, judgment, and response inhibition. He concluded that her brain scan and performance on tasks that "tap the executive function domain suggest that she may be suffering from Dysexecutive Syndrome (DES) formerly called frontal lobe syndrome."

19. Dr. Corrado diagnosed claimant under the Diagnostic and Statistical Manual – IV, and concluded that on Axis I, she had a diagnoses under 294.9 Cognitive Disorder NOS (Dysexecutive Syndrome) and 299.80, Pervasive Development Disorder Not otherwise specified – (PDD-NOS). Dr. Corrado concluded that based on his clinical examination and findings, claimant was not suffering from mental retardation, Attention Deficit Hyperactivity Disorder or learning disorders. He added:

[Claimant] is suffering from a cognitive disorder NOS, as evidenced based on her brain scan and poor performance on tests that tap executive functioning. This is consistent with her past behavior where she has had difficulties with regulating her emotions and has demonstrated poor behavioral controls. For example, as when she physically attacked her sister and threw objects at her mother. This reaction may be due to her difficulties with thinking, planning, and judgment. [Claimant] has also displayed an inability to form close and warm attachments to others; she does not have any friends and appears to have difficulty making and sustaining friendships. She has a past and

current history of engaging in a variety of bizarre and stereotypical movements including hair pulling, hand washing, biting her lip, swinging her legs, bizarre hand movements and staring.

It is this evaluator's opinion that [claimant] will be unable to function her own without supervision. It is doubtful that she will be able to find employment and support herself in the future. She does not appear to be someone who will be able to live independently. Her deficits in executive functioning will cause her significant difficulties in the academic, vocations, and interpersonal arenas. [Claimant's] adoptive mother worries about [claimant's] future well-being and does not think that [claimant] will be able to function on her own. I concur . . . and also believe [claimant] will be unable to function independently.

20. Dr. Corrado's report stopped short of addressing the elements of eligibility for regional center services under the fifth category². He did not state whether, in his opinion, claimant had a disabling condition closely related to mental retardation or

² The "fifth category" refers to a category of regional center eligibility that includes "disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature." (Welf. & Inst. Code, § 4512, subd. (a); emph added.) It is the category under which claimant is asserting regional center eligibility.

whether claimant required treatment similar to that required for individuals with mental retardation. Instead, he concluded by recommending the regional center “consider providing services” to claimant:

I also strongly recommend that the regional center consider providing services to this young lady, who obviously has an impaired ability to perceive social situations, regulate her emotions, exercise proper judgment, and inhibit impulses. Without intervention, [claimant] will be unable to function as a successful and productive adult in society.

21. Dr. Corrado recommended ongoing therapy with Dr. Morgan, regional center evaluation, and a psychiatric evaluation for appropriateness of psychotropic medications.³

22. Dr. Corrado’s curriculum vita was not provided, and there was no testimony concerning his training, experience, or focus of practice.

Paul Greenwald, Ph.D.

23. Paul Greenwald, Ph.D., is a licensed clinical psychologist and a staff psychologist with the Inland Regional Center. He conducted an evaluation of the claimant in response to claimant’s request for regional center services and testified at the hearing. Dr. Greenwald obtained his bachelor’s degree in 1974 from the University of Miami and in 1987, received a doctorate in clinical psychology from the California

³ It was not clear whether Dr. Corrado was recommending psychotropic medications for claimant or suggesting that they were not appropriate and that respondent should be evaluated for discontinuation.

School of Professional Psychology. From 2006 through 2008, Dr. Greenwald provided psychological services for individuals with developmental disabilities, including those on the Autism spectrum. Dr. Greenwald has spent seven years evaluating children and adults for eligibility under the Lanterman Act and has served as a clinical psychologist with the service agency since 2008.

24. Dr. Greenwald reviewed the records provided to the regional center and concluded that claimant is not eligible for regional center services under any basis, including the fifth category. He noted that at times, claimant had been diagnosed with having ADHD, that she was initially provided special education under the district's administrative category of "speech language," and later under a category identified by the district as "other health impaired." When she was three years old, a partial evaluation was made by the regional center but it was insufficient to determine whether claimant was eligible for regional center services.

25. Dr. Greenwald concluded that claimant may have a cognitive impairment, but her impairment does not constitute mental retardation. He noted that her intelligence had been tested on four different scales, and in each, she scored in the low average to average category. He testified that a substantial impairment would be an IQ score of 70 or less, across the board. In contrast, he noted that claimant's full IQ was a score of 87, which did not, to Dr. Greenwald, show mental retardation or a condition similar to mental retardation. To Dr. Greenwald, he would expect an individual in the fifth category to be no higher than the mid-70's on an IQ test. He acknowledged that one of claimant's IQ numbers was a score of 77, but he felt this limitation was better explained by the claimant's ADHD diagnosis. Another test showed claimant to have 2 scores in the average range, 2 in the low average, and 2 in the borderline area.

26. Dr. Greenwald testified that fifth category eligibility required both a determination that the claimant had a condition close to mental retardation and that the claimant requires treatment required by individuals with mental retardation.

27. During the hearing, official notice was taken of Welfare and Institutions Code section 4512, subdivision (a), and that the fifth category "shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature." (Welf. & Inst. Code, § 4512, subd. (a), *emph. added.*)

28. Dr. Greenwald testified that claimant did not require treatment required by individuals with mental retardation because claimant is not mentally retarded. He stated that providing training for claimant similar to that required for individuals with mental retardation would be "iatrogenic" (counterproductive or harmful) for her. He thought she would be "annoyed" by the types of "treatment" provided.

29. Dr. Greenwald prepared a report reflecting his evaluation and assessment. One of the pages included his summary of claimant's adaptive functions in a chart format. Based on the Street Skills Survival Questionnaire (SSSQ), Dr. Greenwald identified three areas where he felt claimant's scores showed significant adaptation deficits: the use of tools, measurements, and health and safety. During cross-examination, Dr. Greenwald stated that many of the numbers in the chart on his report were incorrect. He corrected some. Following a break, he corrected others. Over 25 numbers on his report were ultimately changed. Dr. Greenwald testified that the numbers were wrong because of a proof-reading error. After the numbers were corrected, some domains were scored lower, some were higher. With the changed numbers, Dr. Greenwald testified that claimant's scores reflected deficiencies in the areas of health and safety, public services, and tools.

Dennis Saller

30. Dennis I. Saller, MS, LEP, an educational psychologist, evaluated claimant and testified on her behalf. Mr. Saller received his master's degree in school psychology in 1995. He is currently in private practice in educational psychology and works with children requiring special education. He is not familiar with the Lanterman Act. When he suspects a client is eligible for regional center services, he refers the client to a service agency for evaluation.

31. Mr. Saller brought a new report to the hearing that was substituted for the report he originally provided to claimant. The list of assessments or tests he performed was significantly shorter in the revised report.

32. Mr. Saller stated that he agreed with the conclusions of Dr. Corrado. According to Mr. Saller, an executive function impairment is a developmental disability, and that most people "don't get better" from it. He characterized executive function disorders as those including Autism, Asperger's, and ADHD. He felt the effects of having an executive function deficiency overlaps with mental retardation. He agreed that claimant did not meet the criteria for mental retardation or for having a specific learning disability, but he felt that claimant had a disabling condition closely related to mental retardation.

33. One of the assessments Mr. Saller used was the Delis Rating of Executive Functions (D-REF.) His report characterized the D-REF as

A set of rating forms specifically designed to assist in the assessment of children and adolescents suspected of having behavioral and cognitive problems often associated with attention deficit/hyperactivity disorder (ADHD), autistic disorder, Aspergers [sic] disorder, traumatic brain injury, learning disability, and other developmental, psychiatric,

neurological, and medical conditions known to impact executive functioning.

34. Mr. Saller relied upon supporting information provided by claimant and her 17 year old sister. He concluded that claimant “will likely have difficulty performing day-to-day tasks, using social judgment, and managing finances (also due to weak math skills).” He opined that claimant “will need Regional Center Services in order to function adequately” and stated that her “history demonstrates a consistent need for services similar to what a child with intellectual deficiency⁴ receives, and therefore, will require into her adulthood.

35. Although he concluded that claimant did not have ADHD or a learning disability, four of the six recommended resources he suggested to claimant’s family addressed ADHD or learning disabilities. There was no evidence that any of the recommended recourses related to mental retardation or a condition closely related to mental retardation.

Ronald Morgan, Ph.D.

36. Ronald Morgan, Ph.D., has been claimant’s psychologist, and he testified on her behalf. He graduated from the University of Colorado in 1983 and received his license to practice psychology in 1991. Dr. Morgan was a senior psychologist with the California Department of Corrections and supervised other psychologists. He did a fellowship in child and adolescent psychology and worked for the Orange County juvenile courts. For a number of years, he was involved in research and treatment of young parolees. He currently has a private practice in Corona.

⁴ With the recently issued DSM V, “mental retardation” is also referred to as an intellectual deficiency.

37. Dr. Morgan has not previously been involved in regional center eligibility determinations, but believes claimant has intellectual and adaptive deficiencies that make her eligible for regional center services. He first met claimant at age five when he was treating one of her sisters. He treated claimant from April through November 2012 by engaging in talk therapy with claimant to help her cope with her emotions. He acknowledged that cognitive therapy is not as effective for a person with mental retardation. He diagnosed her under the DSM-IV with a cognitive disorder, not otherwise specified.

38. Dr. Morgan referred claimant to Dr. Corrado, and he also relied heavily on Dr. Corrado's report. Dr. Morgan agreed with Dr. Corrado's opinion that claimant has impaired frontal lobe functioning, and that she does not process things appropriately or like most people do. According to Dr. Morgan, claimant is not aware of social cues, and she has cognitive limitations in her ability to plan, to problem solve, and to reason effectively. He stated that she is not able to benefit from experience, has impaired reasoning ability, and she lacks cognitive flexibility. For all these reasons, Dr. Morgan concluded that claimant has a disabling condition closely related to mental retardation. While he agreed she is not mentally retarded, he believes claimant's intellectual functioning is sub-average. Dr. Morgan further opined that claimant has a substantial disability with significant functional limitations in the areas of learning, self-direction, the capacity for independent living, and in her ability to support herself.

Claimant's Mother

39. Claimant's mother has eight children; three are adopted, including claimant and claimant's half-sister, who is not developmentally delayed. Over the years, claimant's mother has been a foster mother to many children, including six foster children with mental retardation. Claimant's mother currently operates a board and care residence for three to four adult males who are mentally retarded.

40. Claimant's mother believes that claimant has had developmental obstacles since infancy. She was slow to walk, to talk, and had strange repetitive behaviors as a child. Claimant repeated kindergarten, started special education classes in the second grade, and remained in special education through middle school. According to claimant's mother, claimant makes poorer choices than some of the intellectually challenged residents in her care, and claimant often appears to be more impaired in her ability to function in the world than some of her residents, all of whom are regional center clients.

41. Claimant's mother began to home-school claimant in high school when claimant began making poor choices and was becoming a victim of constant harassment and abuse by other students. She started hanging out with the wrong people. Claimant's mother fears that claimant is not equipped to take care of herself. She lacks stranger awareness and will go with a stranger if asked. Claimant's mother recited numerous instances where claimant showed poor judgment. Once she almost gave away the family dog to a stranger who told her the dog belonged to him. Another time she was walking home from school with her sister when a male stranger suggested she race him to his truck. Claimant began to follow him. Had claimant's sister not intervened, claimant would have gone with the stranger. She also talked about the incident where claimant became angry at home - when she punched her sister in the eye and threw a glass jar at her mother, left the residence, went to a retail store, and was taken by police to the hospital where she was on a 5150 hold and eventually released with prescriptions for psychotropic medications.

42. Claimant's mother stated that claimant has great difficulty with all skills of independent living such as cooking, money management, employment, public transportation, and social interactions. She believes claimant is eligible for regional center services.

ADDITIONAL INFORMATION

43. In 2002, the Association of Regional Center Agencies (ARCA) issued standards for making eligibility determinations under the fifth category. The ARCA standards are not regulations and they do not have the force of law.

The ARCA standards are complex, but generally they suggest that regional center evaluators assess whether an individual "functions" similarly to a mentally retarded person or requires similar "treatment." According to the ARCA standards, individuals who function similarly to mentally retarded people have low borderline intelligence, with I.Q. scores ranging from 70 to 74 and significant deficits in adaptive skills. Treatment questions concern the nature of the required "training and intervention." Under the ARCA standards, evaluators should consider whether the individual demonstrates performance based deficits, has skill deficits secondary to intellectual limitations (but not socio-cultural deprivation), requires habilitation (but not rehabilitation), or requires long term training broken down into discrete units taught by repetition. Under ARCA, subdivision I, "persons requiring habilitation may be eligible if the disability is acquired before age 18 and is a result of traumatic brain injury or disease."

LEGAL CONCLUSIONS

THE BURDEN AND STANDARD OF PROOF

1. In a proceeding to determine whether an individual is eligible for services, the burden of proof is on the claimant to establish that he or she has a qualifying diagnosis. The standard of proof required is preponderance of the evidence. (Evid. Code, § 115.)

2. A preponderance of the evidence means that the evidence on one side outweighs or is more than the evidence on the other side, not necessarily in number of

witnesses or quantity, but in its persuasive effect on those to whom it is addressed.
(*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

THE LANTERMAN ACT

3. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Developmental Disabilities Services Act (the Lanterman Act). (Welf. & Inst. Code, § 4500, et seq.) The purpose of the Lanterman Act is to rectify the problem of inadequate treatment and services for the developmentally disabled, and to enable developmentally disabled individuals to lead independent and productive lives in the least restrictive setting possible. (Welf. & Inst. Code, §§ 4501, 4502; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) The Act is a remedial statute; as such it must be interpreted broadly. (*California State Restaurant Association v. Whitlow* (1976) 58 Cal.App.3d 340, 347.)

4. An applicant is eligible for services under the Lanterman Act if he can establish that he is suffering from a substantial disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or what is referred to as the fifth category – a disabling condition closely related to mental retardation or requiring treatment similar to that required for mentally retarded individuals. (Welf. & Inst. Code, § 4512, subd. (a).) A qualifying condition must also start before the eligible person's 18th birthday and be expected to continue indefinitely. (Welf. & Inst. Code, § 4512.)

5. Welfare and Institutions Code section 4512, subdivision (l), defines "substantial disability" as the existence of significant functional limitations in three or more of the following areas of major life activity:

- (1) Self-care;
- (2) Receptive and expressive language;
- (3) Learning;

- (4) Mobility;
- (5) Self-direction;
- (6) Capacity for independent living;
- (7) Economic self-sufficiency.

6. California Code of Regulations, title 17, section 54001, subdivision (a) defines "substantial disability" as a condition that 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." It must constitute a significant functional limitation in three or more of the areas of major life activity, identical to the seven listed above in Welfare and Institutions Code section 4512, subdivision (l).

7. California Code of Regulations, title 17, section 54000, also defines "developmental disability" and the nature of the disability that must be present before an individual is found eligible for regional center services. It states:

- (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
 - (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.

8. Two appellate decisions have addressed the issue of fifth category. In *Mason v. Office of Administrative Hearings* (2001) 89 CalApp.4th 1119, 1129, the court of appeal found that "[t]he 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." (*Id.*, at 1129.) The *Mason* court also emphasized that "it was the intent of those enacting the Lanterman Act and its implementing regulations not to provide a detailed definition of 'developmental disability' so as to allow greater deference to the [regional center] professionals in determining who should qualify as developmentally disabled and allow some flexibility in determining eligibility so as not to rule out eligibility of individuals with unanticipated conditions, who might need services." (*Id.* at p. 1129.)

Samantha C. v. Department of Developmental Services (2010) 185 Cal.App.4th 1462 also addressed fifth category eligibility. It affirmed that fifth category eligibility exists for those individuals who have a disabling condition that is not solely psychiatric in nature or solely a learning disability, but nonetheless requires treatment similar to that required by individuals who are mentally retarded.

9. When an individual is found to have a developmental disability, as defined under the Lanterman Act, the State of California, through a regional center, accepts

responsibility for providing services to those persons to support their integration into the mainstream life of the community. (Welf. & Inst. Code, § 4501.)

EVALUATION

10. Claimant has a history of developmental and behavioral challenges. However, all experts agreed that her intellectual capacity is too high for claimant to be classified as mentally retarded, and that she does not have autism disorder, cerebral palsy, or epilepsy. To qualify for regional center services, claimant must qualify under the fifth category – she must have a substantially disabling condition that is closely related to mental retardation or one that requires treatment similar to that required for individuals with mental retardation.

11. The fact that claimant's school district has identified claimant as needing special education under the category of "Other Health Impaired" does not establish regional center eligibility. "Other Health Impaired" is an administrative category used by the local school district under the California Code of Regulations, title 5. In contrast, regional center eligibility is addressed in the Lanterman Act and in California Code of Regulations, title 17. Because the regional center is statutorily required to use different criteria of eligibility than a school district, the basis for claimant's special education eligibility has no bearing on whether claimant is eligible for regional center services.

12. Dr. Greenwald testified that claimant did not meet eligibility under the fifth category because her intelligence was too high, and on that basis, she could not have a condition closely related to mental retardation. He felt that her areas of conflict were normal areas of adolescent conflict and although he agreed there were three areas of deficient adaptive functioning, he felt that her adaptive functioning was, in general, good. In conveying his opinion, Dr. Greenwald did not recognize that the fifth category includes two separate bases for eligibility, one of which is that claimant has a disabling condition that requires treatment similar to that required to individuals with mental

retardation, even if the condition is not closely related to mental retardation. In addition, Dr. Greenwald made a wholesale change to his written report during cross examination when he changed over 25 numbers on his adaptive functioning chart for claimant based on what he called a “proof reading error.” For these reasons, Dr. Greenwald’s testimony on the core issue of whether claimant is eligible under the fifth category was not persuasive. However, the regional center did not have the burden of persuasion in this case.

13. Dr. Corrado reported that claimant’s ability to make decisions is impaired and her judgment is poor due to an executive function deficiency that is reflected on her brain scan. He reported that this is not a learning disability but a cognitive disorder involving claimant’s frontal lobe that seriously impacts her functional abilities. He found that her executive functioning limitations (what he called a “Disexecutive Syndrome”) resulted in serious disabilities that will require significant supervision and interventions in order for claimant to function independently in the community.

14. Dr. Morgan identified four areas of greatest handicap that constituted a substantial disability for claimant – the areas of learning, self-direction, capacity for independent living, and economic self-sufficiency.⁵

15. Both of the experts who testified for claimant relied on Dr. Corrado’s report. Dr. Corrado did not testify, and his curriculum vita was not included. While his report found that claimant has a disabling condition, it did not state that claimant’s disabling condition is closely related to mental retardation. Nor did it state that claimant requires treatment similar to that required for individuals with mental retardation. His

⁵ Dr. Greenwald’s revised adaptive functions chart also identified three areas where claimant’s scores reflected a substantial disability – in the use of tools, in the area of health and safety, and in using public services.

only mention of mental retardation was a conclusion that claimant is not mentally retarded, a conclusion agreed upon by all the experts.

16. Both Mr. Saller and Dr. Morgan went further than Dr. Corrado and testified that claimant has a condition closely related to mental retardation. However, neither Mr. Saller nor Dr. Morgan conveyed expertise or experience in identifying, diagnosing, treating, or otherwise working with mentally retarded individuals. Mental retardation is addressed in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, (DSM-IV-TR)*, which version all experts relied upon in their diagnoses. The DSM-IV-TR includes diagnostic criteria for mental retardation and states:

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, "[s]ignificantly subaverage intellectual functioning is defined by IQ of about 70 or below..."

17. Insufficient evidence was provided to establish that when an individual has an IQ of 87, that the individual's executive function deficiency, including an inability to process, to benefit from experience, to reason, or have cognitive flexibility, constitutes a condition closely related to mental retardation within the meaning of Welfare and Institutions Code section 4512.

18. Mr. Saller opined that claimant will “need regional center services in order to function adequately.” Claimant relied on the appellate decision in *Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462 for the premise that even without low IQ scores, an individual may be eligible for regional center services if the individual has a condition requiring the same treatment as individuals who are mentally retarded. Because of evidentiary insufficiencies in claimant’s case, *Samantha C.* is not dispositive.

19. In *Samantha C.*, the individual applying for regional center services did not meet the criteria for mental retardation. Her WAIS-III test results scored her above average in the areas of abstract reasoning and conceptual development and she had good scores in vocabulary and comprehension. She performed poorly on subtests involving working memory and processing speed, but her scores were still higher than persons with mental retardation. The court reaffirmed the Welfare and Institutions Code provision that individuals may qualify for regional center services under the fifth category on either of two independent bases, with one basis for eligibility being a substantial disability that is not solely psychiatric in nature, nor solely a learning disability, but that requires treatment similar to that required for individuals with mental retardation.

20. In concluding that the claimant in *Samantha C.* was eligible for regional center services under the fifth category, the court observed that there was significant evidence about the treatment required for individuals with mental retardation and significant evidence that *Samantha C.* required the same kind of treatment, even though she had average intelligence scores:

[*Samantha C.*’s expert] testified at great length that her clients with mental retardation and with fifth category eligibility both needed many of the same kinds of treatment,

such as services providing help with cooking, public transportation, money management, rehabilitative and vocational training, independent living skills training, specialized teaching and skill development approaches, and supported employment services. The testimony was undisputed that Samantha needed all of these types of treatment. (*Samantha C. v. State Department of Developmental Services*, *supra*, 185 Cal.App.4th 1462, 1493.)

21. In contrast, the evidence in this case stopped short. Dr. Corrado did not say claimant had a condition closely related to mental retardation or that claimant needed services required by those with mental retardation, and he deferred to the regional center for whether claimant was eligible for regional center services. The regional center concluded that claimant did not have a condition closely related to mental retardation and that treatment required for those with mental retardation was contraindicated for claimant. Dr. Morgan and Mr. Saller did not convey knowledge about the training or service needs of mentally retarded individuals. Neither articulated the specific treatments required by mentally retarded individuals or by claimant. Neither had experience in working with regional center clients. Their opinion that claimant “needed” regional center services lacked sufficient foundation to meet the burden of persuasion.

In this matter, claimant had the burden of proof. She has challenges and disabilities, and may need assistance to function as an independent adult. There are other agencies and programs for which claimant may be eligible. But based on the evidence provided in this record, the weight of the evidence did not establish that claimant has a condition closely related to mental retardation, or that she requires

treatment similar to that required by mentally retarded individuals. Claimant did not establish that she is entitled to regional center services under the Lanterman Act.

ORDER

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

DATED: November 22, 2013

BETH FABER JACOBS

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.