BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CLAIMANT, and INLAND REGIONAL CENTER, Service Agency.	OAH No. 2013100623

DECISION FOR ELIGIBILITY UNDER MENTAL RETARDATION AND FIFTH CATAGORY

Susan J. Boyle, Administrative Law Judge, Office of Administrative Hearings, State of California heard this matter on October 15, 2014, in San Bernardino, California.

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

Claimant's mother, represented claimant, who was present during the hearing.

The matter was submitted on October 15, 2014.

ISSUES

1. Is IRC required to provide intake services, including an assessment of claimant, to determine if he is eligible for regional center services under the Lanterman Act based on, mental retardation[1], or a disabling condition closely related to mental

[1] The Lanterman Act requires regional centers to provide services for individuals who have a developmental disability, including "mental retardation." The term "mental retardation" was recently replaced in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, (DSM-V)*, with the term

retardation or that requires treatment similar to that required for individuals with mental retardation?[2]

2. Is IRC required to provide intake services, including an assessment of claimant, to determine if he is eligible for regional center services under the Lanterman Act based on a diagnosis of epilepsy?

3. Is IRC required to provide intake services, including an assessment of claimant, to determine if he is eligible for regional center services under the Lanterman Act based on a diagnosis of cerebral palsy?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. Claimant is a 20-year-old young man who lives with his mother.

2. Claimant's mother sought regional center services for claimant based upon her claim that he had mild mental retardation, autism and seizures.

3. By letter dated September 13, 2013, IRC advised claimant that it reviewed his records and determined that "[a]n intake assessment is not warranted at this time because the documents submitted did not suggest the possibility of a qualifying diagnosis."

4. On October 9, 2013, claimant's mother signed a Fair Hearing Request appealing IRC's decision. In the hearing request claimant's mother stated that she disagreed with IRC because it made its decision without having sufficient medical

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"intellectual disability." However, in keeping with the language of the Lanterman Act, the term mental retardation will be used in this decision.

[2] This is referred to as the "Fifth Category."

records on which to base its determination and without first conducting an assessment of claimant.

5. During the hearing claimant's mother withdrew the claim that claimant had a developmental disability resulting from autism.

BIFURCATION OF ISSUES

6. Prior to the taking of evidence, IRC asserted that it was not prepared to present evidence in the hearing related to whether claimant had a developmental disability based upon a diagnosis of epilepsy. Ms. Pierce represented that claimant failed to appear at a medical appointment that had been scheduled by IRC to evaluate his claim that he had a qualifying disability based upon epilepsy. The parties agreed that the hearing would go forward on the issue whether claimant had a qualifying disability based upon mental retardation or under the Fifth Category and that claimant would attend a medical evaluation on November 4, 2014, to assess his eligibility for regional center services based upon a diagnosis of epilepsy. The parties further agreed that if there was a disagreement with the assessment of whether claimant was eligible for regional center service based upon epilepsy, a separate hearing would be held on that issue.

During the hearing, claimant's mother suggested that claimant could be eligible for regional center services based on cerebral palsy. IRC agreed to expand the medical assessment scheduled for November 4, 2014, to include an assessment of whether claimant had a qualifying disability based on cerebral palsy.

CLAIMANT'S RECORDS

Transfer from South Central Los Angeles Regional Center

7. An "In Inter-Regional Center Transmittal" sheet transferred claimant's case from the South Central Los Angeles Regional Center (SCLARC) to IRC effective

September 1, 2013. It appeared that the SCLARC file was closed in 1998. No further records were provided to IRC from SCLARC.

Claimant's School Records

8. Claimant received special education services in high school. Individual Education Programs (IEP) that were developed for claimant by the Riverside SELPA in 2011 and 2013 were presented in evidence. The 2011 IEP noted that claimant's "Original Special Ed Entry Date" was April 20, 2003. Other than the 2011 and 2013 IEPs and a "Record Review Psychoeducational Report" prepared in March 2013, no other school records were offered or received into evidence.

9. The 2011 IEP was developed when claimant was sixteen and in tenth grade. It provided that he was eligible for special education services based on a specific learning disability. No other disability was determined.

Comments in the IEP included that claimant "has been working really hard this year by completing his assignments, following directions, and meeting teacher directions [sic]. We really [are] proud of [claimant] he has made great gains this year." In assessments of claimant's academic achievements he was found to be "Far Below Basic" in English/ Language Arts, Mathematics, and Science. It was also noted that claimant was "still reading at a 3rd grade level but has trouble with comprehension." The IEP provided that claimant would be in a special education classroom "for all core academic subjects." The IEP found that claimant communicated well with peers and adults, had appropriate gross and fine motor development, was socially appropriate, had age appropriate daily living skills and had a history of seizures and asthma. He indicated that he would like to be a photographer and was interested in having a home of his own after graduating from college.

10. The 2013 IEP was developed when claimant was eighteen years old and in twelfth grade. His entitlement to special education services continued based on a specific learning disability.

Comments in the 2013 IEP included that claimant "works well with others. He is currently working as a peer tutor and enjoys it. He is creative and looking forward to a career related to fashion.[3]" It was also noted that claimant "is able to make his wants and needs known. He communicates with both adults and peers appropriately. He is able to modify his manner of speech to match his audience." The IEP further stated that claimant was very social, loved to interact and help others, followed most rules, was respectful and participated in class discussions.

An assessment in English/Language Arts found him to be "Below Basic," and an assessment in Social Science found him to be "Far Below Basic." No other academic categories were assessed. Annual goals developed in the 2012 IEP[4], for reading comprehension/training, writing/employment and math/independent living were designated as "Not Met" in the 2013 IEP. The IEP again provided that claimant would be in a special education classroom for all "core classes."

11. The "Record Review Psychoeducational Report" (Record Review) was prepared for the 2013 IEP. It reviewed assessments conducted in 2003, 2006, and 2009, grades received in various classes, claimant's attendance and disciplinary record, and comments from teachers. The Record Review concluded that claimant continued to need special education services based on a specific learning disability.

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[3] Claimant presented at the hearing in very fashion-forward attire and showed a unique individual style that was creative while remaining appropriate for the occasion.

[4] Although the 2013 IEP referenced a 2012 IEP it was not offered into evidence.

TESTIMONY OF MICHELLE M. LINDHOLM. PH.D.

12. Michelle M. Lindholm, Ph.D. is a licensed clinical psychologist. She was employed by IRC as a psychologist assistant in 2003; she became a clinical psychologist with IRC in 2011. Her duties in both positions include reviewing records and documentation, performing comprehensive intellectual assessments, and evaluating individuals' eligibility for regional center services.

Dr. Lindholm reviewed claimant's records, and she met and observed him during the hearing. She opined that claimant was not eligible for IRC services based on mental retardation or under the Fifth Category. She testified that a person with a specific learning disability was not, without more, qualified for regional center services.

13. Dr. Lindholm determined that the information contained in claimant's records was not consistent with a person who had a mental retardation or Fifth Category. She noted that the assessment scores in the Record Review show a scatter pattern; some scores are below average and some are above. She stated that the scores of a person with mental retardation or who falls within the Fifth Category would be consistently low and would not show the scatter pattern present in claimant's assessment scores. The scattered scores are indicative of a person with a specific learning disability. Dr. Lindholm testified that none of the information contained in the IEPs or the Record Review indicated to her that claimant has a qualifying disability that would entitle him to IRC services.

14. On cross examination, Dr. Lindholm was shown an adoption report that indicated that claimant, at age six, "has been diagnosed with a seizure disorder and developmental delays." Dr. Lindholm testified that the adoption report suggested that claimant may have been eligible for regional center services at age six, but that the report would have had to have been supported by additional evidence to confirm

eligibility. The adoption report did not alter Dr. Lindholm's opinion that claimant, at age 20, did not qualify for IRC services based upon mental retardation or Fifth Category.

CLAIMANT'S MOTHER

15. Claimant's mother is claimant's adoptive mother and biological aunt; her brother is claimant's biological father. Claimant's mother adopted claimant and his brother. She stated that claimant's biological mother was on drugs and drank alcohol during her pregnancy with claimant. Claimant's mother testified that claimant had seizures as a baby and was developmentally delayed.

Claimant's mother is a fierce protector of claimant and his brother. She "put [her husband] out of the house" to keep the boys because her husband had a felony conviction which jeopardized the adoption. She has taken every action she could to help claimant succeed. She sought IRC services because she feels claimant has some problem, but she does not know what it is or what to do. She is dedicated to seeing claimant achieve success. Her love and devotion to claimant is palpable and admirable. When she emotionally described herself trying to help claimant as, "I am just a mom," her daughter, who sat next to her at the hearing, spontaneously said to her "You are a great mom."

Claimant's mother is concerned that claimant spends most of his time in the house. She said he likes to draw things she described as "scary stuff." She wants to learn what is wrong with claimant and get him the help he needs.

EVIDENCE PRESENTED ON BEHALF OF CLAIMANT

16. In addition to the adoption report, claimant's mother introduced a letter dated June 27, 2014, from Iglal El Henawi, M.D. Dr. Henawi stated that claimant "has Seizure disorder, mental retardation, and delayed development, he is seeking treatment by neurologist." Also introduced were two letters from A.K. Jaffer, M.D., a board certified

neurologist, relating to his examinations of claimant. The letters are dated July 31, 2014, and December 3, 2012, and are pertinent to the issue whether claimant has a seizure disorder, which was not at issue in this hearing.

LEGAL CONCLUSIONS

THE BURDEN AND STANDARD OF PROOF

1. In a proceeding to determine whether an individual is eligible for regional center 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.) 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

2. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4500, et seq.) The purpose of the 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 Lanterman 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.)

3. An applicant is eligible for services under the Lanterman Act if he or she 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 age 18 and be expected to continue indefinitely. (Welf. & Inst. Code, § 4512.)

4. California Code of Regulations, title 17, section 54000, 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: [¶] . . . [¶]

(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."

5. 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 and supports to that person to support his or her integration into the mainstream life of the community. (Welf. & Inst. Code, § 4501.)

6. "Services and supports" for a person with a developmental disability can include diagnosis and evaluation. (Welf. & Inst. Code, § 4512, subd. (b).)

7. A regional center is required to perform initial intake and assessment services for "any person believed to have a developmental disability." (Welf. & Inst. Code, § 4642.) "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 . . . ." (Welf. & Inst. Code, § 4643, subd. (a).) To determine if an individual has a qualifying developmental disability, "the regional center may consider evaluations and tests . . . that have been performed by, and are available from, other sources." (Welf. & Inst. Code, § 4643, subd. (b).)

8. California Code of Regulations, title 5, section 3030, provides the eligibility criteria for special education services required under the California Education Code. The criteria for special education eligibility are not the same as the eligibility criteria for regional center services found in the Lanterman Act.

EVALUATION

9. Claimant's Fair Hearing Request sought to require IRC to provide an assessment and/or review additional records to determine if he qualified to receive other services and supports from IRC. In this hearing, he asserted that he was eligible for services based upon mental retardation, or a fifth category condition closely related to

mental retardation, or that required treatment similar to that required for individuals with mental retardation.

Eligibility Based Upon Mental Retardation

10. The DSM-V contains the diagnostic criteria used for mental retardation (intellectual disability). It provides that three criteria must be met:

A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.

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

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

The DSM-V further notes that the "levels of severity (of mental retardation) are defined on the basis of adaptive functioning, and not IQ scores, because it is the adaptive functioning that determines the level of supports required." According to a chart of expected characteristics of an individual with mild mental retardation, children and adults would have "difficulties in learning academic skills involving reading, writing, arithmetic, time, or money, with support needed in one or more areas to meet age-related expectations." Additionally, communication and social judgment are immature and the individual may be easily manipulated by others. Mild mentally retarded

individuals "need some support with complex daily living tasks . . . . In adulthood, supports typically involve grocery shopping, transportation, home . . . organizing, nutritious food preparation, and banking and money management."

11. Claimant did not prove by a preponderance of the evidence that his school records contain sufficient evidence for IRC to believe he has mental retardation such that IRC is required to provide a further assessment or intake services. IRC properly determined, based upon the records it reviewed, that claimant is not eligible for IRC services. His assessment score results and observations by teachers of his social interactions do not support a finding that claimant has mental retardation.

Eligibility Based Upon the "Fifth Category"

12. Under the "fifth category," the Lanterman Act provides for 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." (Welf. & Inst. Code § 4512, subd. (a), emphasis added.) Further, a developmental disability does not include conditions that are "solely psychiatric disorders." (Cal. Code. Regs., tit. 17 § 54000, subd. (c)(1).) Like 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.

13. The fifth category is not defined in the DSM-V. 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."

13. For the same reasons claimant is found ineligible for IRC services for mental retardation, he did not prove by a preponderance of the evidence that his school records contain sufficient evidence for IRC to believe he has a developmental disability under the Fifth Category such that IRC is required to provide a further assessment or intake services. IRC properly determined, based upon the records reviewed that claimant is not eligible for IRC services under the Fifth Category.

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ORDER

Claimant's appeal from Inland Regional Center's decision not to provide intake services and assess claimant's eligibility for regional center services based upon mental retardation and/or Fifth Category is denied.

DATED: October 29, 2014

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SUSAN J. BOYLE

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.