

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Eligibility of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2015101097

DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California (OAH), heard this matter in San Bernardino, California, on January 27, 2016.

Juanita Mantz, DPD, claimant's attorney, represented claimant, who was not present at the fair hearing.

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

The matter was submitted on January 27, 2016.

ISSUE

Is claimant eligible for regional center services under the Lanterman Act as a result of a diagnosis of intellectual disability?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. On October 1, 2015, IRC notified claimant that he was not eligible for regional center services.
2. On October 21, 2015, claimant's attorney filed a fair hearing request appealing that decision and this hearing ensued.

DIAGNOSTIC CRITERIA FOR INTELLECTUAL DISABILITY

3. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, (DSM-5)*, identifies the diagnostic criteria used for intellectual disability. Three diagnostic criteria must be met: deficits in intellectual functions, deficits in adaptive functioning, and the onset of these deficits during the developmental period. An individual must have a *DSM-5* diagnosis of intellectual disability to qualify for regional center services. Intellectual functioning is typically measured using intelligence tests. Individuals with intellectual disability typically have IQ scores in the 65-75 range.

EVIDENCE PRESENTED AT HEARING

4. Claimant is a 19-year-old male. Claimant is currently incarcerated awaiting trial. He asserted he was eligible for regional center services on the basis of intellectual disability.
5. A November 28, 2006, initial multidisciplinary team report from claimant's school district, written when claimant was in the fourth grade, noted that he was referred because of concerns with his low academic skills across the curriculum, his lack of completion of school assignments, and his lack of response to interventions. The purpose of the evaluation was to determine whether he was eligible for special education

intervention. Claimant's social and education history was outlined. He had substantial periods of absence from school since kindergarten. His current teacher reported all his academic skills were far below basic levels. Claimant did not complete assignments and had trouble being independent during class time. Claimant participated in several intervention programs and received modified instruction and preferential seating, but still had delays. He was observed in the classroom and intellectual tests were administered. Claimant's index scores on IQ testing showed a wide range of variability. He performed within the average range on the learning index and processing speed; the low average to average range on sequential and simultaneous indexes; and in the borderline and below average ranges for verbal comprehension, perceptual reasoning, working memory, planning, acquired knowledge and nonverbal problem solving. His testing indicated overall cognitive abilities between the second and sixth percentile; however, his actual performance on standardized academic testing showed a variety skills in the average range, including reading comprehension skills. Math skills and spelling were in the low average range. The report noted:

Because ability testing is designed to predict achievement, and the cognitive testing is far below achievement, the cognitive testing appears to be an underestimate of [claimant's] true abilities. Possible reasons for the underestimate may include a language delay concurrently identified by the language pathologist and the flat disengaged affect [claimant] presented during testing sessions. [Claimant's] inconsistent profile shows strengths and weaknesses [claimant's] actual cognitive abilities are most likely in the low average range when compared to his same-aged peers.

The writing tests indicated this area was not an area of need for claimant. His performance was within the average range on the visual processing tests. Claimant scored below average in the auditory processing tests, but again this was thought to be an under estimation of his abilities. Claimant scored low on the communication skill testing but the language pathologist believed this was due to a language delay. Reading test scores were in the average, low average and below average ranges. Teachers noted claimant's skills were stronger depending on whether he was writing on a topic in which he was interested. Claimant's math and writing skills were noted to be far below grade level expectations and California standards. On social emotional functioning, claimant had attention issues, hyperactivity, a short attention span, and was easily distracted. The report concluded claimant's ability testing appeared to be an underestimate of his true ability and his deflated performance appeared due to his deflated affect during testing sessions. His area of suspected disability was language or speech disorder. Claimant met eligibility requirements for special education under a language delay.

This report did not support claimant's contention that he was eligible for regional center services on a basis of intellectual disability.

6. The November 18, 2009, triennial special education report, conducted when claimant was in seventh grade, documented his frequent absences and tardies. Claimant was receiving modified instruction and assistance with his school work. His cognitive ability was below average on testing, but this was thought to be merely an estimate of his present level of functioning because it did not indicate his potential given his other scores. Consistent with previous test results, his cognitive testing was far below his achievement. Claimant's auditory perception was in the low average to significantly below average ranges. Visual perceptive skills were in the low average range. Claimant's academic achievement was in the low average ranges. Claimant's visual motor skills were in the average range. Claimant met the eligibility criteria for special education as a student with a

specific learning disability. Overall there was a statistically significant discrepancy between claimant's estimated intellectual ability and his academic performance. The discrepancy was thought to be due to processing disorders in the areas of auditory and visual processing skills

Nothing in this report demonstrated claimant qualified for regional center services based on a diagnosis of intellectual disability.

7. On February 23, 2015, Jennifer Bosch, Ph.D., authored a report regarding her psychological evaluation of claimant to assist the Superior Court in claimant's criminal proceeding. During the interview claimant described his family history, his history of a head injury as a child, and stated he was in special education classes in school. Claimant did not graduate from high school, but wanted to obtain his GED. This was claimant's first arrest and he was aware of the charges against him. He explained he was high on marijuana and methamphetamine at the time the incident occurred, he did not mean it, and he knew what he was doing was wrong. After conducting her evaluation, Dr. Bosch concluded "there were no indications whatsoever of a severe mental disorder which would affect competency to move forward" with the criminal proceeding. While claimant denied a history of mental illness, he did report a history of depression due to a recent breakup and his incarceration. During the assessment both judgment and insight were intact with appropriate affect observed. Dr. Bosch noted:

It was obvious from early on in the assessment process the [claimant] suffers from mild cognitive delays with these delays and lack of fund of knowledge effecting, to a certain extent, how he performed during the assessment and in particular on the competency examination. He put forth his best effort but struggled to find the answers to some of the questions asked. Past historical testing would indicate

cognitive deficits with his overall IQ falling in the borderline range with IQ a consistent factor not likely to change over time by more than a few points give or take. Despite his deficits, [claimant] did prove that he is able to learn new concepts and is receptive to learn new things.

[¶] . . . [¶]

[Claimant] is able to aid in his defense in a rational manner and able to understand some of the basic court concepts but this examiner highly recommends [claimant] participate in some form of a competency class. If this is not possible then the [claimant's] attorney will have to educate [claimant] as to the areas of the court process where there are deficits having likely to repeat these concepts over again more than once before [claimant] is able to grasp what he has been taught.

Nothing in this report indicated claimant was eligible for regional center services based on a diagnosis of intellectual disability.

8. On April 1, 2015, Reneé Wilkinson, Ph.D., authored a report regarding her evaluation to determine claimant's competency to stand trial. Dr. Wilkinson interviewed claimant and reviewed jail records and Dr. Bosch's report. Dr. Wilkinson noted there was no evidence of a substantial mental illness. There was evidence of deficits in cognitive functioning. Previous testing revealed a borderline IQ. During Dr. Wilkinson's evaluation, claimant was alert and oriented to person, place, time, and situation. His attention and concentration were intact. He was able to answer questions on topic without losing track. He had difficulties with simple calculation. Recent and remote memory was variable. He answered "I don't know" to many competency related questions, but demonstrated he was

able to learn concepts when they were presented in a simple manner. Dr. Wilkinson concluded claimant was mentally competent to understand the nature of the criminal proceedings, he did not have a substantial mental illness, but he had intellectual deficits. Claimant possessed borderline intellectual functioning and limited exposure to the criminal court and therefore his attorney would likely have to provide explanations along the way during the criminal proceedings.

This report did not support claimant's contention that he was eligible for regional center services on the basis of a diagnosis of intellectual disability.

9. On April 13, 2015, Patricia Kirkish, Ph.D., conducted a psychological assessment of claimant for his criminal proceeding and authored a report. Dr. Kirkish reviewed claimant's history, including his extensive drug history and two incidents where he was knocked unconscious. Claimant's remote memory appeared generally intact, his recent memory indicated he was unable to spontaneously recall any words even when prompted, and his fund of general information was slightly less than expected for having completed 11 years of education. His concentration was poor and he was unable to calculate simple arithmetic problems due to his learning disability. He had a superficial understanding of the judicial proceedings against him and he did not seem to have a solid, rational appreciation for the adversarial nature of the judicial process his rights, or realistic consequences of the decisions.

Dr. Kirkish attributed claimant's lack of understanding to his lack of knowledge and cognitive limitations. Claimant would need focused tutoring and significant repetition, simplification and discussion at court. Dr. Kirkish did not find claimant to be suffering from an acute psychiatric condition that required medication. His disability involved a limited cognitive ability and he needed a structured program to become familiar with the judicial concepts and procedures. Claimant required accommodation for his deficits in order to achieve an adequate, rational understanding of the judicial procedures and consequences

he faced. Claimant was cognitively impaired, not psychiatrically symptomatic. His cognitive limitations impaired his ability to adequately appreciate the decisions and consequences of the judicial proceedings and his limitations were sufficiently severe to require a structured program with staff skilled in working with developmentally disabled individuals.

Despite the opinions and use of the word "developmentally disabled," Dr. Kirkish did not perform any kind of testing or assessments that would indicate claimant is eligible under the Lanterman Act for regional center services.

10. On September 4, 2015, Michael McCormick, Psy.D., performed a psychological evaluation for IRC. Thereafter, Dr. McCormick wrote a report summarizing his findings and opinions. Dr. McCormick interviewed claimant and administered various tests. On the Wechsler Adult Intelligence Scale, Fourth Edition, the test used to measure an individual's overall cognitive ability, claimant received a score of 69, placing him in the extremely low range, indicating significant difficulties completing some of his activities of daily living. Claimant's scores on working memory tests were in the extremely low range, indicating significant problems performing mental manipulations in his head. His perceptual reasoning index was in the low average range, indicating an ability to pay attention to details, integrate parts into a cohesive whole, and manipulate visual stimuli in his head. On adaptive functioning tests, claimant received scores in the average range, indicating he did not have significant struggles completing his activities of daily living. There was a clinically significant discrepancy between two of his composite scores, suggesting his adaptive functioning scores were not an accurate reflection of his adaptive functioning ability. Given those ranges, Dr. McCormick opined that one must look at each of his index scores to uncover his true strengths and weaknesses. Other test scores were within the average and below average ranges.

Based upon his assessment, Dr. McCormick's DSM-5 diagnoses were Unspecified

Neurodevelopment Disorders per history; Alcohol Use Disorder, Moderate, In a Controlled Environment; Cannabis Use Disorder, Severe, In a Controlled Environment; and Stimulant Use Disorder, Amphetamine Type, Moderate, In a Controlled Environment. Dr. McCormick opined claimant's test results suggested he has a significant cognitive disability, but he did not exhibit significant impairment in his adaptive functioning. All of claimant's scores fell within the below average to average ranges. Claimant's 2006 assessment did not suggest he qualified for regional center services on the basis of intellectual disability as he was only diagnosed with language delay. Claimant had used substances heavily over the past two to three years which could also have negatively affected his cognitive abilities. Dr. McCormick opined that claimant did not have a developmental disability and did not qualify for regional center services.

11. Michelle Lindholm, Ph.D., IRC staff psychologist, testified in this hearing. Dr. Lindholm reviewed claimant's records, his assessments, and the witness interviews to determine claimant's eligibility for regional center services. Based upon all of the information she reviewed, Dr. Lindholm concluded claimant was not eligible for regional center services on the basis of intellectual disability. Dr. Lindholm credibly explained that the variability in claimant's scores indicated his abilities exceeded his test scores. Further, because of that great variability in test scores, using a full IQ score (69) was not the best predictor of claimant's IQ because it did not provide a true evaluation of claimant's intellectual ability. Additionally, Dr. Lindholm explained that one cannot take the full scale IQ score in isolation; instead, one must look at all the subtests, and all the other tests administered, as well as the relevant history. She noted that claimant had extreme absences from school during the early formative years that could explain many of his low test scores.

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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,¹ 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 The regulations still use the term mental retardation, not intellectual disability.

- (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.

EVALUATION

7. 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 or testimony introduced in this hearing demonstrated that claimant possesses

a diagnosis of intellectual disability. The burden was on claimant to establish his eligibility for regional center services. As claimant introduced no evidence demonstrating that he was eligible to receive regional center services, his appeal of IRC's determination that he is ineligible to receive services must be denied.

ORDER

Claimant'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.

DATED: February 9, 2016

_____/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.