

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2016100704

DECISION

On November 29, 2016, Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California.

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

Claimant's mother, his legal guardian, represented claimant.

Oral and documentary evidence was introduced, and the matter was submitted on November 29, 2016.

## ISSUE

Is claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) on the basis of a diagnosis of intellectual disability<sup>1</sup>?

## FACTUAL FINDINGS

### JURISDICTIONAL MATTERS

1. Claimant is a 28 year-old man who is currently incarcerated and has a history of emotional disturbances and mental illness. His mother sought regional center services for him based upon the assertion that claimant qualifies for services under the criteria of intellectual disability. Claimant's mother asserted that claimant had initially received special education services while in school based on an intellectual disability, but when he changed schools he became qualified for special education services based upon mental illness.

2. Sometime in September 2016, claimant's mother requested that IRC provide services to claimant. As part of that request, claimant's mother on behalf of claimant provided various documents to IRC, including Individualized Education

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<sup>1</sup> The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V), recently replaced the term "mental retardation" with the term "intellectual disability." Although the Lanterman Act has also been amended to eliminate the term "mental retardation" and replace it with "intellectual disability," the California Code of Regulations and some other references have not been amended to reflect that change. Regardless, the terms "intellectual disability" will be used in this decision interchangeably with the term "mental retardation."

Program (IEP) documents from 2001 and 2002, a psychiatric evaluation from Harvey W. Oshrin, M.D. from June 24, 2016, a psychiatric evaluation dated June 6, 2016, from Maurizio F. Assandri, Ph.D., a Mental Competence Evaluation dated May 18, 2016, from C. Clarizio, Ph.D., and a Riverside County Department of Mental Health Brief Assessment dated February 2, 2016.

3. On September 19, 2016, IRC notified claimant that he was not eligible for regional center services based on a review of his records because he does not have a disability that qualifies him to receive IRC services.

4. On September 26, 2016, claimant's mother filed a fair hearing request appealing IRC's decision.

#### EDUCATIONAL AND PSYCHOLOGICAL RECORDS REVIEWED BY IRC

5. Since at least 1995, when he was ten years old, claimant has had a history of behavioral problems and low academic achievement. Claimant's school records indicate that he received special education services with his school district since May 23, 1995. However, the documents provided do not include an evaluation of claimant or a primary diagnosis under which he first began receiving special education services in 1995. Instead, the documents provided related only to claimant's special education classes and included an IEP reassessment document dated November 4, 2002, an IEP reassessment document dated September 18, 2001, and IEP Annual Review documents dated May 10, 2001. Each of those IEP documents demonstrates that claimant received special education services through his school district under the primary disability of "emotionally disturbed."

6. The IEP Annual Review documents dated May 10, 2001, provided a summary of claimant's status and included his educational goals and listed a primary disability of emotional disturbance. Specifically, the 2001 documents stated that claimant underwent a psychoeducational assessment on May 12, 1999, and a functional

analysis of behavior on November 2, 1998, both of which indicated that claimant had “communicative message of behavior . . . centered around low self-esteem, worthlessness, and need of acceptance.” The documents also stated that claimant had trust issues because of his “history of abuse,” which caused him to “react aggressively.” They further stated that claimant had been hospitalized because of behaviors at school when he made weapons from sticks and made threats to other students. The documents stated that claimant had behavioral problems on the school bus and that his mother removed him from school due to the incidents. The documents noted that claimant’s “grades were excellent,” but that claimant had significant issues due to homelessness that impacted his performance. The documents further provided an evaluation of claimant’s academic progress and stated that claimant “has marginal gains in all academic areas with significant improvement in work habits and applied math and science skills,” and that claimant was more motivated in his mainstream classes of physical education and art. The documents further stated that claimant “demonstrates an ability to take care of his personal needs” and is “always neat, clean and alert.” The documents specifically noted that claimant’s behaviors impacted his learning negatively and that claimant continued to exhibit explosive behaviors in the classroom. As a result of his behavioral issues, claimant was started on home teaching. The May 10, 2001, IEP documents did not indicate that claimant had an intellectual disability, but rather indicated that claimant’s diagnosis was emotional disturbance.

7. The September 18, 2001, IEP reassessment stated that claimant’s qualifying disability was emotional disturbance and that his “emotional behaviors impact[ed] his learning and success in his classroom.” The IEP stated that claimant had been referred for a mental health assessment and the school district was attempting to reinstate therapy for claimant due to his behavioral problems. The IEP discussed the agreement to continue with home teaching for a period of time before transitioning back to a

classroom.

8. The IEP reassessment dated November 4, 2002, when claimant was fourteen, stated that claimant had "average cognitive ability based on a non-verbal assessment," and that his communication and motor development, as well as his self-help skills, were age appropriate. The IEP stated that claimant's academic skills ranged from second grade level to upper fifth grade level. The document noted that claimant's disabling condition was emotional disturbance, which affected his academics. The document specifically stated that claimant "continues to be eligible for special education as a student with an emotional disability which has persisted over a long period of time and affects his academics, peer relationships and adult relationships."

9. Pursuant to a court order, claimant was evaluated on June 3, 2016, by Maurizio F. Assandri, Ph.D., in a detention center while he was incarcerated in order to assess whether claimant was competent to stand trial. Dr. Assandri summarized his evaluation in a report dated June 6, 2016, which was received in evidence. The report noted that claimant was 27 years old and had one felony and two misdemeanor charges pending against him. The report stated that claimant began using marijuana at age 13 and continued to do so until he was arrested. Dr. Assandri noted that claimant had attempted suicide in 2010 and was given a diagnosis of Major Depressive Disorder. Dr. Assandri wrote that, in his mental status exam, claimant did not act in a bizarre manner, but rather "was just absent and did not care much to be involved with the process." Dr. Assandri noted that claimant frequently answered questions by stating "I don't know" or "I don't remember" indicating that claimant had a "non-emotional involvement with the interview process." He further noted that during the entire interview, claimant "was withdrawn" and "stared at the floor with little or no eye contact." Claimant was taking psychiatric medications at the time of his evaluation. Dr. Assandri concluded that claimant was not competent to stand trial based on claimant's chronic depression and

dis-interest in his legal situation, which prevent him from assisting his defense counsel. However, Dr. Assandri noted that claimant "has the capacity to intelligently make decision[s] with regard to his treatment." Dr. Assandri's report did not provide any information regarding an assessment of claimant's intellectual abilities.

10. Pursuant to court order, claimant was evaluated on June 24, 2016, by Harvey W. Oshrin, M.D., in a detention center while he was incarcerated in order to assess whether claimant was competent to stand trial. Dr. Oshrin summarized his evaluation of claimant in a letter to the court, which was received in evidence. Dr. Oshrin wrote in the letter that he reviewed claimant's records and conducted a clinical interview with claimant. Dr. Oshrin noted that claimant reported that he "us[ed] large amounts of marijuana on a daily basis for a long time . . . to calm him down." Dr. Oshrin also wrote that claimant admitted to him that he had a long history of mental illness, was presently mentally ill, and needed medication. Dr. Oshrin noted that claimant made poor eye contact, maintained a downcast posture, and was not really involved in the interview process. The report noted that claimant's level of cooperation in the evaluation was "only fair" and his affect was flat. Dr. Oshrin noted that claimant's thought process was "simplistic and concrete, confused and disorganized" and that claimant had "auditory hallucinations." Dr. Oshrin wrote that claimant's "[i]ntellect was estimated to be at the lower aspect of the average range, possibly borderline." Dr. Oshrin diagnosed claimant with "Schizoaffective Disorder, Depressed" and opined that claimant was not competent to stand trial because of his mental disorder, but treatment with antipsychotic medication is likely to render claimant competent to stand trial.

11. Pursuant to court order, claimant was evaluated on May 18, 2016, by C. Clarizio, Psy.D., in a detention center while he was incarcerated in order to assess whether claimant was competent to stand trial. Dr. Clarizio summarized his evaluation of claimant in a Mental Competency Evaluation report, which was received in evidence. Dr.

Clarizio reviewed a mental health assessment of claimant prior to his interview with claimant for his assessment. In his report Dr. Clarizio noted that claimant "refused to answer many questions pertaining to his mental status." Dr. Clarizio noted that claimant had poor eye contact, had simplistic responses, was sad, angry, pessimistic, depressed, mistrustful, and tearful throughout the evaluation. Dr. Clarizio wrote in his report that claimant's "intellectual ability could not be assessed due to his unwillingness to answer relevant questions" and "his reasoning abilities and abstract thinking could not be assessed" for the same reason. Dr. Clarizio concluded that claimant was not competent for trial because of his mental illness and noted that claimant had a diagnosis of Borderline Personality Disorder.

12. Finally, a Riverside County Department of Mental Health Brief Assessment document was received in evidence. The document was a summary of a mental health assessment of claimant performed by Alexandra Martinez, L.M.F.T. on February 2, 2016. The document stated that claimant had symptoms of depression, decreased interest, decreased pleasure, feelings of worthlessness, significant weight gain or loss, insomnia, low ability to concentrate, excessive anxiety, restlessness, and fear of losing control. The report contained a section titled "Intellectual Functioning" under which Ms. Martinez noted that claimant had good concentration, intact short-term and long-term memory, orientation to purpose, person, place and time. She noted that claimant had fair judgment, average abstraction, and good insight. She concluded that his "estimated intelligence" was "average."

#### TESTIMONY OF SANDRA BROOKS, PH.D.

13. Dr. Sandra Brooks received her Ph.D. in Clinical Psychology from Loma Linda University in 2006. Dr. Brooks has worked as a staff psychologist at IRC for about 10 years. Her duties in the position of staff psychologist include reviewing records and conducting evaluations to assist the multidisciplinary team to determine if potential

clients are eligible for service. During her employment at IRC, Dr. Brooks has reviewed the records of over one thousand clients or potential clients to determine their eligibility for services.

14. Dr. Brooks reviewed claimant's records but did not meet with claimant in person. As part of her review of claimant's records, Dr. Brooks reviewed Dr. Assandri's report, Dr. Clarizio's report, Dr. Oshrin's report, Ms. Martinez's report and all the school records provided by claimant. Dr. Brooks opined that the materials she reviewed do not establish that claimant is eligible for services from IRC on the basis of intellectual disability. Specifically, Dr. Brooks testified that intellectual disability is a developmental disability with both intellectual and adaptive functioning deficits in conceptual, social, and practical domains with onset of the deficits during the developmental period – prior to the age of 18, and it is diagnosed through use of criteria as outlined in the DSM-5.

15. Dr. Brooks stated that there is no indication that claimant has any deficits in intellectual or adaptive functioning with onset during the developmental period. She noted that the IEP documents provided demonstrated that claimant has an emotional disturbance and behavioral problems, which impacts his learning. However, there was no indication in any of those documents that claimant's problems with learning were caused by an intellectual disability. Furthermore, she emphasized that emotional disturbance and mental health issues are not diagnoses that qualify claimant for services under the Lanterman Developmental Disabilities Services Act.

16. Also, Dr. Brooks stated that claimant has a long history of mental health issues, and her review of all of the documents provided demonstrated that claimant had a diagnosis of emotional disturbance. Dr. Brooks noted that Dr. Oshrin opined that claimant's intellect was estimated at the lowest level of average or possibly borderline; however, nothing in his report indicated that claimant had an intellectual disability. Instead, Dr. Oshrin stated that claimant had a mental illness that required he be

committed to a hospital.

17. Dr. Brooks further testified that none of the other reports provided indicated that claimant has an intellectual disability. Specifically, Ms. Martinez's report estimated claimant's intellectual abilities as average, and Dr. Clarizio was unable to assess claimant's intellectual abilities because of his refusal to cooperate in the assessment. Dr. Brooks further noted that Dr. Assandri's assessment provided no information regarding claimant's intellectual abilities, but instead he stated that claimant's psychiatric conditions were the cause of his inability for rational thought.

18. Dr. Brooks stated that in order to qualify for services under the Lanterman Act under the diagnosis of intellectual disability, claimant would have to have evidence of a low intellectual ability prior to the age of 18. However, all of the evidence provided indicated that claimant had an average to low average intellectual functioning prior to the age of 18. She noted that Dr. Oshrin's estimate that claimant's intellect was possibly borderline was from an assessment in 2016 when claimant was 27 years old. According to Dr. Brooks, there was no evidence to indicate that claimant had a low intellectual ability prior to the age of 18.

#### TESTIMONY OF CLAIMANT'S MOTHER

19. Claimant's mother testified that claimant received special education services since he was in kindergarten. She stated that claimant was initially put in special education because of a diagnosis of a learning disability, but after he changed schools the new schools placed him in special education based on a diagnosis of emotional disturbance. Claimant's mother did not have any documentation to demonstrate that claimant had ever been placed in special education based solely on a learning disability. She stated that when claimant was in the sixth grade, he was working at a fourth grade level.

20. Claimant's mother believes that claimant should qualify for services at IRC

because he had a learning disability and received special education services while he was in school.

21. Claimant's mother believes that IRC must evaluate her son for eligibility under a diagnosis of intellectual disability while claimant is taking medications for his mental illness so that he can be stable when assessed.

#### TESTIMONY OF CLAIMANT'S AUNT

22. The sister of claimant's mother testified regarding claimant's abilities. She stated that she receives services from IRC and believes that claimant shares the same disabilities. She testified that she and her sister are trying to arrange for help for claimant when he is released from incarceration, and she believes that IRC services will benefit him.

#### THE PARTIES' ARGUMENTS

23. IRC argued that the records provided for their review failed to establish that claimant has any diagnosis that would qualify him for services under the Lanterman Act. IRC further asserted that it is not required to test claimant for intellectual disability when claimant is medicated to determine whether he is eligible for services because the records provided demonstrate he does not meet the eligibility criteria and was not intellectually disabled prior to the age of 18.

24. Claimant's mother disagreed with IRC's position that there is no evidence to show that claimant is intellectually disabled, and she believes that IRC should test claimant while he is stabilized on medications to determine if he is intellectually disabled and eligible for services.

## 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.)

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

4. An applicant is eligible for services under the Lanterman Act if he or she can establish that he or she is suffering from a substantial disability that is attributable to intellectual disability, cerebral palsy, epilepsy, autism, or what is referred to as the fifth category – a disabling condition closely related to intellectual disability or requiring treatment similar to that required for intellectually disabled 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.)

5. 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<sup>2</sup>, 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

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<sup>2</sup> Although the Lanterman Act has been amended to eliminate the term “mental retardation” and replace it with “intellectual disability,” the California Code of Regulations has not been amended to reflect the currently used terms.

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

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

8. 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).)

9. 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. A school providing services to a student under a learning disability is insufficient to establish eligibility for regional

center services. Regional centers are governed by California Code of Regulations, Title 17. Title 17 eligibility requirements for services are much more stringent than those of Title 5.

#### EVALUATION

10. Claimant's mother believed that claimant could be eligible for regional center services because he qualified for special education services from his school district. She also believed that because claimant had learning disabilities in school, he should be eligible for regional center services. Her motives are sincere and commendable.

11. The information contained in claimant's records, however, does not support a reasonable belief that claimant has a developmental disability as defined by the Lanterman Act that would trigger IRC's obligation to provide services or to procure a further assessment of claimant. Claimant's school records show that claimant suffers from mental health disorders that affect his behavior and academic performance, and these disorders do not qualify claimant for regional center services. Although Dr. Oshrin estimated in his report that claimant's intellect was in the low average to borderline range, he provided no testing or other information from which a diagnosis of Intellectual Disability could be made and his estimate was provided when claimant was 27 years old. Dr. Oshrin diagnosed claimant with mental health disorders, but did not provide a diagnosis of intellectual disability. Additionally, all other records indicate that claimant's intellectual abilities were in the average range.

12. Eligibility for special education services does not determine eligibility for regional center services. The Lanterman Act and the applicable regulations specify the criteria an individual must meet in order to qualify for regional center services. The regional center is statutorily required to use different criteria for eligibility than a school district. Accordingly, claimant's eligibility for special education services based on a

diagnosis of emotional disturbance or learning disability does not qualify him for services from the regional center.

13. Claimant's mother was credible, her testimony heartfelt, and her frustration palpable. She is clearly motivated by her desire to help her son and to obtain the services she believes are necessary to allow him to function in the world and obtain long-term employment; she undoubtedly has his best interest at heart. However, the preponderance of the evidence did not establish that claimant is eligible to receive a further assessment or other services under the Lanterman Act based on diagnosis of intellectual disability. The weight of the evidence established that claimant does not have a condition that makes him eligible for regional center services.

## ORDER

Claimant's appeal from IRC's determination that he is not eligible for regional center services and supports is denied.

DATED: December 13, 2016

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DEBRA D. NYE-PERKINS

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.**