

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2017040984

DECISION

Susan J. Boyle, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on June 19, 2017, in San Bernardino, California.

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

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

The matter was submitted on June 19, 2017.

ISSUE

Is claimant eligible for regional center services under the "fifth category" referenced in the Lanterman Developmental Disabilities Services Act (Lanterman Act) on the basis that he has a disabling condition closely related to an intellectual disability or that requires treatment similar to that required for individuals with an intellectual disability?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. Claimant is a 21 year-old man who lives with his mother and father.
2. Through his mother, claimant sought regional center services based upon a claim that he had a disabling condition that was closely related to an intellectual disability or that required treatment similar to that required for individuals with intellectual disabilities.
3. By letter dated April 13, 2107, IRC advised claimant that it reviewed his records and determined that "no 'intake' services" would be provided because he did not have a substantial disability as defined by the Lanterman Act. For this reason, IRC found claimant was not eligible to receive regional center services.
4. On April 18, 2017, claimant's mother signed a Fair Hearing Request appealing IRC's decision. In his hearing request, claimant disagreed with IRC because he believed he was eligible for regional center services based upon his having a disabling condition closely related to an intellectual disability or one that required treatment similar to that required for individuals with intellectual disabilities.
5. On May 3, 2017, claimant's mother and IRC staff met to discuss claimant's request for a fair hearing. By letter dated May 3, 2017, Ms. Zermeño summarized the meeting and IRC's decision that claimant was not eligible for regional center services. Claimant's mother reported that claimant received special education services by his public school district under the category of Specific Learning Disability which "is specifically excluded from eligibility for regional center services" Ms. Zermeño referred to a June 29, 2016, evaluation of claimant performed by a psychologist that found claimant's tests results suggest "an underestimate of his actual abilities." Based on an analysis of claimant's records, IRC did not offer claimant services.

EDUCATIONAL RECORDS

6. An Individualized Education Program (IEP) prepared by claimant's school district dated September 30, 2013, when claimant was 17 years-old shows that claimant was receiving special education services based on a classification of "Specific Learning Disability." He was expected to graduate from high school in June 2014; he had not passed his high school exit examinations but would be exempted from that requirement. Comments in the IEP noted that claimant "has difficulty with writing, reading comprehension and study skills." He also had trouble with "unstructured" time. The IEP stated there were no concerns regarding claimant's adaptive daily living skills.

Claimant's special education teacher wrote that claimant was failing three classes because he was missing assignments. He was passing the rest of his classes. The IEP noted that a psychoeducational assessment report determined claimant's "predicted level of ability is estimated to fall within the below average range of intelligence." Claimant was found to continue "to meet special education eligibility criteria under the category of Specific Learning Disability."

NEUROPSYCHOLOGICAL EVALUATION

7. Dr. Laura Elena Gutierrez, a psychologist with Kaiser Permanente, evaluated claimant on June 29, 2016, when claimant was 20 years-old. Dr. Gutierrez wrote that claimant presented "with a history of psychiatric concerns and longstanding academic difficulties." She wrote he had a history of obesity, stutter, depressive disorder, and anxiety disorder. Dr. Gutierrez noted claimant had psychiatric and behavioral health services secondary to emotional dysphoria. He experienced worry, increased irritability, sleep disturbances, repetitive facial hair plucking, self-harm, and having thoughts of not wanting to live. He was engaged in excessive use of videogames and social media with limited motivation for any other activities.

8. Dr. Gutierrez administered tests to determine claimant's intellectual functioning, memory functioning, expressive language functioning, higher cortical functioning, attention/concentration, processing speed, and psychological functioning. On the Wechsler Adult Intelligence Scale-IV, claimant received scores of 74 and 77. Based on these scores, Dr. Gutierrez concluded that claimant had borderline intellectual abilities with a number of intact cognitive abilities and fluctuating performance on others. She stated, however, that claimant's "deficits may represent an underestimation of [claimant's] current abilities." She encouraged claimant to "maintain consultation with psychiatry" and suggested he "may benefit from continued behavioral health intervention" Dr. Gutierrez further wrote that claimant "may benefit from establishing contact with the Inland Regional Center for additional support/resources under possible 5th category consideration."

SITUATIONAL ASSESSMENT PERFORMED BY EXCEED

9. Between January 31, and February 17, 2017, after claimant graduated from high school, he participated in a Situational Assessment performed by EXCEED. EXCEED evaluated the following: claimant's functional capacity in a work setting; work related capabilities and stamina; work habits, skills and social behaviors in a job setting; ability to work under minimal supervision; and level of support that could be expected from others. Claimant's disabilities were listed as "borderline intellectual functioning, Attention Deficit Hyperactivity Disorder (ADHD), depressive disorder, and anxiety disorder."

10. Claimant was introduced to work experiences at a CVS drugstore (basic stocking tasks), Walmart (electronics department), a tattoo establishment (janitorial), EXCEED's office (typing and general office), and a public library (volunteer opportunities), from which he could chose the job settings he wanted to work in. He opted to work at the EXCEED office for the opportunity to work with computers and at

the tattoo establishment. When claimant learned all new employees of the tattoo establishment, including him, started by performing job duties related to cleaning rather than drawing, he chose to complete his assessment period at EXCEED. EXCEED noted that claimant was on time for each shift, and he was slow and tired after two to three hours of work. He had fair to moderate social skills when working at EXCEED. When he worked at the tattoo establishment his social skills were rated poor. Claimant required prompts and reminders to execute multi-step tasks and lacked focus. An instructor reported a concern that claimant's lack of focus could be due to "inner thoughts and lack of motivation [that] interfered with his following directions." Claimant's work performance was at its best when claimant worked with computers. He worked better when assisted by another person, but worked much slower when alone. The EXCEED instructor concluded that claimant was "not ready for work."

TESTIMONY OF MICHELLE M. LINDHOLM, PH.D., BCBA-D

11. 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 included reviewing records and documentation, performing comprehensive intellectual assessments, and evaluating individuals' eligibility for regional center services.

12. Dr. Lindholm reviewed claimant's educational records, the EXCEED evaluation, Dr. Gutierrez's neuropsychological assessment and the eligibility criteria in the Lanterman Act, which IRC is mandated to follow in determining eligibility. Based on the information contained in the records, and applying the eligibility criteria, Dr. Lindholm concluded claimant did not qualify for regional center services.

Dr. Lindholm stated claimant's record did not show claimant was substantially disabled by a qualifying medical condition for which IRC services could be provided. Specifically, she did not find claimant fit the criteria for fifth category eligibility which

requires an individual to demonstrate a disabling condition closely related to an intellectual disability or one that requires treatment similar to that required for individuals with an intellectual disability. Dr. Lindholm noted that claimant's intellectual scores of 74 and 77 placed him in the borderline range and did not suggest claimant was intellectually disabled. She also stated that an individual was less likely to qualify under the fifth category when he or she scored above 70 in intellectual ability assessments. In reaching her conclusion that claimant was not eligible for IRC services, Dr. Lindholm also relied on Dr. Gutierrez's opinion that claimant's psychiatric diagnoses likely decreased claimant's scores on intellectual ability assessments and that his true abilities were higher than the test scores revealed. Dr. Lindholm opined that claimant's comprehension suffered because of lack of attention which impacted test score results. Depression and anxiety are not conditions like intellectual disability under the fifth category and do not provide a basis for eligibility for services.

13. Dr. Lindholm also noted that claimant's adaptive skills were rated age appropriate and showed he functioned in the below average to average range with a few deficits. This is another indicator that claimant does not qualify for IRC services under the fifth category. Further, claimant was eligible for special education services under the Specific Learning Disability category. Individuals with only Specific Learning Disabilities are expressly excluded by the Lanterman Act from receiving services from regional centers.

14. Dr. Lindholm stated reassessing claimant would not provide information that would be significant in determining whether claimant was eligible for IRC services because the results would likely be similar to those determined by Dr. Gutierrez; the results would be impacted by claimant's mental health issues, and claimant is outside of the developmental age of 18. Therefore, a reassessment would not be useful to an eligibility determination.

EVIDENCE PRESENTED ON CLAIMANT'S BEHALF

15. Claimant's parents are frustrated and desperate to find help for their son. They turned to IRC because Dr. Gutierrez's report said claimant could benefit from IRC services. From that statement, they believed IRC would help them and claimant. They are understandably trying to do the best for their son and are exploring all avenues they can to help him.

16. Claimant's extended family members do not live nearby and are not able to provide help or support. Claimant's father expressed a hope that IRC could help claimant because claimant listened to what others said more than his parents.

17. Claimant's parents said they see claimant exhibit behaviors other than those that are reflected in his records. Claimant's father candidly stated he was in denial about his son's condition and assumed he would grow out of it and get better. He said it was not until his son's later IEP meetings that the school district began telling him and his wife more about claimant's level of functioning. He did not understand the impact claimant's diagnoses would have on claimant's life. He and claimant's mother are searching for answers to help claimant be a happy and productive member of his community.

18. Claimant is depressed and has anxiety when he is at home with his parents. He does not comprehend basic things, and his parents have trouble understanding that "he doesn't get it." If claimant does not like a task, he will not show any effort to complete it. He spends most of his time isolated by playing computer games. In school, he functioned better with one-on-one assistance.

DIAGNOSTIC CRITERIA FOR INTELLECTUAL DISABILITY

19. Intellectual disability is addressed in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*, (DSM-V). The DSM-

V contains the diagnostic criteria used for 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 notes that, with regard to Criterion A, "individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally ± 5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65 - 75 (70 ± 5)." The DSM-V cautions that IQ tests must be interpreted in conjunction with considerations of adaptive function. It states that "a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score." The reverse, that a person with an IQ score above 70 with appropriate adaptive behavior functioning would be less comparable to an individual with an intellectual disability, is also true.

With regard to Criterion B, the DSM-V provides that "Criterion B is met when at least one domain of adaptive functioning – conceptual, social, or practical – is

sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community.”

FIFTH CATEGORY ELIGIBILITY

20. The Lanterman Act provides for assistance to individuals with “disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability.” (Welf. & Inst. Code, § 4512, subd. (a).) This is known as the “fifth category.” Eligibility however, may not be based on “other handicapping conditions” that are solely resulting from learning disabilities or psychiatric disorders. (Cal. Code. Regs., tit. 17 § 54000, subd. (c)(1), (2).) Like the other four qualifying conditions (cerebral palsy, epilepsy, autism, and intellectual disability), the fifth category condition must originate before an individual attains age 18 years of age, must continue or be expected to continue indefinitely, and must constitute a substantial disability.

The fifth category is not a diagnosis 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 [intellectual disability], with many of the same, or close to the same, factors required in classifying a person as [intellectually disabled]. Furthermore, the various additional factors required in designating an individual developmentally disabled and substantially handicapped must apply as well.”

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 developmental disability. 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 Act. (Welf. & Inst. Code, § 4500, et seq.) The purpose of the Act is to rectify the problem of inadequate treatment and services for developmentally disabled individuals 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 is suffering from a substantial developmental disability 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 individuals with an intellectual disability. (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. Welfare & Institutions Code section 4512, subdivision (l)(1), provides:

“Substantial disability” means the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

- (A) Self-care.
- (B) Receptive and expressive language.
- (C) Learning.
- (D) Mobility.
- (E) Self-direction.
- (F) Capacity for independent living.
- (G) Economic self-sufficiency.

6. 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).)

7. 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 retardation¹, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.
- (b) The Developmental Disability shall:
 - (1) Originate before age eighteen;
 - (2) Be likely to continue indefinitely;
 - (3) Constitute a substantial disability for the individual as defined in the article.
- (c) Developmental Disability shall not include handicapping conditions that are:
 - (1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.
 - (2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

[¶] . . . [¶]

- 8. When an individual is found to have a developmental disability as defined

¹ The regulations have not been amended to replace "mental retardation" with "intellectual disability."

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 his integration into the mainstream life of the community. (Welf. & Inst. Code, § 4501.)

EVALUATION

9. To be eligible for regional center services, claimant must prove that he has a substantial disability that is attributable to a developmental disability recognized under the Lanterman Act that originated before the age of 18. In his Fair Hearing Request, claimant asserted he was eligible for regional center services under the fifth category because he had a disabling condition closely related to intellectual disability or that required treatment similar to that required for individuals with an intellectual disability. Claimant bears the burden of proof in showing that a preponderance of the evidence supports his claims. Claimant did not meet his burden.

10. Claimant's contention that he is eligible to receive services and supports from IRC based upon the fifth category may be established through evidence that claimant has a disabling condition closely related to an intellectual disability or that requires treatment similar to that required by an individual who has an intellectual disability. (*Samantha C. v. Department of Developmental Services* (2010) 185 Cal.App.4th 1462). Establishing eligibility based on the fifth category cannot be based upon handicapping conditions that are solely learning disabilities or psychiatric disorders. (Cal. Code Regs., tit. 17 § 54000, subd. (c)(1), (2).) For the reasons stated above, claimant has not met his burden to prove that he is entitled to regional center services under the fifth category. He has not proven a disabling condition closely related to an intellectual disability or that required treatment similar to that required by those with an intellectual disability; that originated before the age of 18; and that was not solely a learning disability.

11. IRC's eligibility team reviewed the available documentation and determined that claimant was not eligible for services. These determinations have been described as difficult and complex, particularly as they relate to the fifth category of eligibility. (*See, Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1129.) The language of the Lanterman Act and the implementing regulations "clearly defer to the expertise of the [Department of Developmental Services] and the [regional center] professionals and their determination as to whether an individual is developmentally disabled." (*Id.*, at p. 1129.) The evidence does not support overturning IRC's determination that claimant is ineligible for IRC supports and services.

ORDER

Claimant's appeal from Inland Regional Center's determination that claimant was not eligible for services based upon claimant having a disabling condition closely related to intellectual disability or one that requires treatment similar to that required for individuals with intellectual disabilities is denied.

DATED: July 3, 2017

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 (90) days.