

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. 2018030536

DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on April 26, 2018.

Claimant's foster father/legal guardian represented claimant who was present at the fair hearing.

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

The matter was submitted on April 26, 2018.

ISSUES

1. Is claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) as a result of an intellectual disability or a disability closely related to an intellectual disability or that requires treatment similar to that required for individuals with an intellectual disability (the "5th Category") that constitutes a substantial disability?

2. Is IRC required to conduct its own testing to determine claimant's eligibility for regional center services?

## FACTUAL FINDINGS

### JURISDICTIONAL MATTERS

1. On February 8, 2018, IRC notified claimant that he was not eligible for regional center services.

2. On March 6, 2018, claimant's foster father/legal guardian filed a fair hearing request appealing that decision and the matter was set for hearing.

### DIAGNOSTIC CRITERIA FOR INTELLECTUAL DISABILITY

3. The *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*, (DSM-5) contains 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.

### THE "FIFTH CATEGORY"

4. Under the "fifth category" the Lanterman Act provides 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" but does not provide services for "other handicapping conditions that are solely physical in nature."<sup>1</sup> Along with the other four qualifying conditions (cerebral

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<sup>1</sup> Welfare and Institutions Code section 4512, subdivision (a).

palsy, epilepsy, autism spectrum disorder, and intellectual disability), a disability involving the fifth category must originate before an individual attains 18 years of age, must continue or be expected to continue indefinitely, and must constitute a substantial disability.

The fifth category is not defined in the DSM-5. In *Mason v. Office of Administrative Hearings* (2001) 89 CalApp.4th 1119, 1129, the court 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,<sup>2</sup> 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."

On March 16, 2002, in response to the *Mason* case, the Association of Regional Center Agencies (ARCA) approved the *Guidelines for Determining 5<sup>th</sup> Category Eligibility for the California Regional Centers* (Guidelines).<sup>3</sup> In those Guidelines, ARCA noted that eligibility for Regional Center services under the fifth category required a "determination as to whether an individual functions in a manner that is similar to that of a person with mental retardation **OR** requires treatment similar to that required by individuals with mental retardation." (Emphasis in original.) The Guidelines stated that *Mason* clarified

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<sup>2</sup> The DSM-5 uses the term "intellectual disability," the condition previously referred to as "mental retardation." The cases were decided when the term mental retardation was in use and contain that term in their decisions. For clarity, that term will be used when citing to those holdings.

<sup>3</sup> The ARCA guidelines have not gone through the formal scrutiny required to become a regulation and were written before the DSM-5 was in effect and are not entitled to be given the same weight as regulations.

that the Legislative intent was to defer to the professionals of the Regional Center Eligibility Team to make the decision on eligibility after considering information obtained through the assessment process. The Guidelines listed the factors to be considered when determining eligibility under the fifth category.

Another appellate decision, *Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462, has suggested that when considering whether an individual is eligible for regional center services under the fifth category, that eligibility may be based largely on the established need for treatment similar to that provided for individuals with mental retardation, and notwithstanding an individual's relatively high level of intellectual functioning. In *Samantha C.*, the individual applying for regional center services did not meet the criteria for mental retardation. Her cognitive test results scored her above average in the areas of abstract reasoning and conceptual development and she had good scores in vocabulary and comprehension. She did perform poorly on subtests involving working memory and processing speed, but her scores were still higher than persons with mental retardation. The court noted that the ARCA Guidelines recommended consideration of the fifth category for those individuals whose "general intellectual functioning is in the low borderline range of intelligence (I.Q. scores ranging from 70-74)." (*Id.* at p. 1477.) However, the court confirmed that individuals may qualify for regional center services under the fifth category on either of two independent bases, with one basis requiring only that an individual require treatment similar to that required for individuals with mental retardation.

#### EVIDENCE PRESENTED AT HEARING

5. Claimant is an 11-year-old male. He asserted he was eligible for services on the basis of intellectual disability and/or the fifth category.

6. A March 25, 2015, report authored by Chuck Leeb, Ph.D., addressed to the superior court, documented the results of the psychological assessment Dr. Leeb

performed on March 17, 2015. Dr. Leeb administered the following tests: Adaptive Behavior Assessment System, Second Edition (ABAS-II), Alphabet Task (AT); Behavior Assessment for Children, Second Edition (BASC-2); Child Rating Scale (CRS); Developmental Test of Visual-Motor Integration (DTVMI); Expressive Vocabulary Test, Second Edition (EVT-2); Rosner Test of Auditory Analysis Skills (RTAAS); Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V); and Wechsler Individual Achievement Test, Third Edition (WIAT-III). Dr. Leeb also reviewed claimant's school district records, including teacher and staff observations. Dr. Leeb noted a history of sexual, emotional and physical abuse; paranoid schizophrenia; psychotic episodes; conduct and mood disorders; socialization problems; attention deficit hyperactivity disorder; and possible processing disorders. Claimant was on psychotropic medications, wore a diaper, and feared using the toilet.

Dr. Leeb documented claimant's test scores, none of which demonstrated claimant had an intellectual disability. Dr. Leeb wrote that claimant's behaviors were consistent with severe emotional disturbance. Based upon his evaluation, Dr. Leeb opined that claimant met the DSM-5 criteria for post-traumatic stress disorder; disruptive mood dysregulation disorder; attention deficit hyperactivity disorder; other specified schizophrenia spectrum and other psychotic disorder; conduct disorder; child neglect, confirmed; and child sexual abuse, confirmed. Dr. Leeb wrote that claimant had "a mental disorder" that met the criteria for "Severely Emotionally Disturbed." Dr. Leeb opined that it "may prove helpful" for claimant to undergo a narrow psychological evaluation, and recommended services for claimant including: speech and language evaluation, play therapy including art; empathy training; cognitive therapy; tutoring to help make up for his lost academics; individual therapy; and a 1:1 aide so he could remain in class. Dr. Leeb recommended claimant be in a special education environment focused on severely emotionally disturbed students. Dr. Leeb noted that claimant was "beginning to demonstrate the beginning of repair of his affective structure" which was

primarily due to the safety and security he felt in his current foster placement and that disruption of that placement “could be catastrophic” for claimant.

7. A February 3, 2017, Psychoeducational Assessment and Emotionally Related Mental Health Services Report documented claimant’s behavior of smearing feces and hiding soiled clothing. The report noted that claimant was to undergo a court ordered comprehensive mental health evaluation in March 2017. A Cognitive Assessment System-2 was administered to evaluate claimant’s cognitive processing. None of his scores identified an intellectual disability. The WIAT-III was administered and produced scores in the low average, borderline, and average ranges. Claimant’s scores on the WISC-V were in the low average and average ranges. The report recommended that claimant be found eligible for special education services due to a “Specific Learning Disability.”

8. A February 27, 2017, Individualized Education Plan (IEP) from claimant’s school district noted that claimant’s primary disability for special education services was “Specific Learning Disability” and his secondary disability was “Other Health Impairment.” The IEP noted that claimant was in the fourth grade, reads at a fourth grade level, struggles with text structure and connections, can write a paragraph up to 10 sentences, “communicates his needs and wants in class,” and “converses with peers and adults about topics covered in class.” Claimant’s fine and gross motor skills were age appropriate, he “gets along well with peers and adults, except for one to two times per week when he makes inappropriate or mean comments to other students. He has some inattentive and impulsive behaviors during instruction that require redirection to stay on task.” Claimant was able to take care of his personal needs at school under adult supervision. His behavior was noted to impede his learning. He performed best in small group settings. Issues regarding feces and bathroom behavior were noted and plans to address these issues were discussed. Claimant wore a pull-up diaper.

In the “discrepancy eligibility” portion of the IEP report, it was noted that the IEP team found “a severe discrepancy between intellectual ability and achievement based on valid standardized tests”; that the IEP team found “a severe discrepancy based on alternative measures as specified on the assessment plan”; and that the IEP team found “a severe discrepancy between intellectual ability and achievement as a result of reduced order in one or more of the basic psychological processes”; noting that these discrepancies were in mathematics calculation and mathematics problem solving and were due to claimant’s auditory processing and attention disorders. The IEP report noted that claimant’s foster father did not believe the district had assessed claimant in all areas of his disabilities and wanted him placed in an emotionally disturbed student classroom setting.

9. An April 11, 2017, report from UCLA’s neuropsychiatric hospital documented claimant’s stay from March 20, 2017, to April 13, 2017 [*sic*]<sup>4</sup>. While hospitalized, the WISC-V was administered and indicated intellectual functioning at the lower limit of the low average range with performances on all domains in the low average to average ranges. There was “scatter among the subtest scores and significant discrepancies between the domains.” The hospital diagnosed claimant with (1) post-traumatic stress disorder, history of childhood neglect and abuse; and (2) attention deficit hyperactivity disorder.

10. Referrals to the regional center from the Los Angeles County Department of Children and Family Services sought evaluation for eligibility under the fifth category.

11. A medication form from Riverside County Mental Health documented medications claimant has been prescribed. The medications were prescribed to treat

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<sup>4</sup> The report was dated two days before claimant was discharged but described treatment provided up to the day of discharge. No explanation for this was offered at hearing.

claimant for (1) Mood Disorder NOS and (2) Attention Deficit Hyperactivity Disorder, Combined Presentation.

#### WITNESS TESTIMONY

12. Sandra Brooks, Ph.D., is an IRC staff psychologist who conducts assessments to determine eligibility. She reviewed the records introduced at this hearing, as well as the additional medication record claimant produced, and she listened to the testimony of claimant's social worker and foster father. Dr. Brooks explained why IRC did not find claimant eligible for regional center services and that the newly produced medication form and claimant's witnesses' testimony did not alter that determination. Dr. Brooks explained how none of claimant's records contained test scores documenting an intellectual disability or a condition closely related to an intellectual disability or requiring treatment similar to that required for one with an intellectual disability. She noted that the records did contain numerous psychological/psychiatric diagnoses but none of those diagnoses satisfy regional center eligibility criteria. As Dr. Brooks stated, although agencies have referred claimant to the regional center for evaluations, IRC's review of the records have demonstrated that he does not qualify for regional center services. Dr. Brooks also explained that outside agencies frequently do not understand regional center eligibility criteria and refer patients all the time for evaluations even though those individuals do not have qualifying developmental disabilities.

Dr. Brooks also addressed claimant's request for IRC to "test claimant." As she explained, a number of tests have been performed to evaluate claimant's cognitive abilities. These are the same tests that IRC would perform if no testing had been conducted by his school district and/or his treaters/evaluators. Dr. Brooks testified that none of claimant's test scores indicated that he qualifies for regional center services under intellectual disability or the fifth category. Dr. Brooks explained why IRC could rely



on those previously performed tests and could use them to determine eligibility and why IRC did not need to perform any additional testing on claimant.

Dr. Brooks's testimony was credible, persuasive, and supported by the records.

13. Claimant's social worker described claimant's behaviors, including his practice of smearing feces, and the many referrals to regional centers made by claimant's treaters/evaluators. Her testimony established her caring and compassion for claimant but did not demonstrate that he qualified for regional center services.

14. Claimant's foster father operates a special-needs foster family home. He described claimant's many issues and disturbing behaviors, and how he was not fully informed of them prior to claimant being placed in his home. He described claimant's worsening behaviors since being released from the UCLA psychiatric hospital this spring. Claimant's foster father believes claimant requires a high level of care and does not understand why claimant is not eligible for regional center services since claimant's treaters/evaluators are constantly referring claimant to the regional center for services. He described the great love and bond that he and claimant have established, how he believes the system has failed claimant, and how he desperately wants to get him the help he needs. He repeatedly requested during his testimony that IRC "test" claimant, but as Dr. Brooks explained, there is no testing IRC could perform that claimant had not already undergone and that testing has shown that claimant does not have an intellectual disability. Although claimant's foster father's testimony was heartfelt and sincere, it did not establish that claimant was eligible for regional center services.

## LEGAL CONCLUSIONS

### BURDEN AND STANDARD 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 of proof 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 that originates before an individual attains 18 years of age;

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 intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability, but shall not include other handicapping conditions that are solely physical in nature.

5. California Code of Regulations, title 17, section 54000,<sup>5</sup> 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) Originate before age eighteen;

(2) Be likely to continue indefinitely;

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<sup>5</sup> The regulations still use the term "mental retardation," instead of the term "Intellectual Disability."

(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 introduced in this hearing demonstrated that claimant has a diagnosis of intellectual disability or that he has a disability closely related to an intellectual disability or that he requires treatment similar to that required for individuals with an intellectual disability that constitutes a substantial disability. Thus, he also does not qualify under the fifth category. Although claimant does have numerous other mental health, emotional, and psychiatric conditions, those are not qualifying conditions. Further, claimant's school never qualified claimant for special education services based on a qualifying developmental disability. Even if it had, a school providing services to a student under a disability is insufficient to establish eligibility for regional center

services. Schools are governed by California Code of Regulations, Title 5 and 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.

The evidence also did not establish that IRC must perform its own testing of claimant. As Dr. Brooks explained, all the testing that IRC would perform has already been conducted and demonstrated that claimant does not have an intellectual disability or a condition similar to an intellectual disability or requiring treatment similar to the treatment given to individuals with an intellectual disability. The test results on which IRC relied to make its determination regarding eligibility were sufficient for IRC to evaluate claimant.

## 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.

Claimant's appeal that IRC should perform its own testing of claimant is denied. The testing on which IRC relied to determine eligibility was sufficient for IRC to evaluate him. IRC shall not be required to perform any additional testing of claimant.

DATED: May 2, 2018

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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.**