

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. 2018061141

DECISION

Theresa M. Brehl, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on August 14, 2018.

Jennifer Cummings, Program Manager, Fair Hearings and Legal Affairs, Inland Regional Center, represented Inland Regional Center (IRC).

Claimant's mother represented claimant, who was present during the hearing.¹

The matter was submitted on August 14, 2018.

ISSUE

Is claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) based on diagnoses of Autism Spectrum Disorder, Intellectual Disability, and/or a condition closely related to an

¹ Claimant's mother speaks Spanish, and a Spanish language interpreter translated the hearing.

Intellectual Disability or that requires treatment similar to that required for individuals with an Intellectual Disability (the “fifth category”)?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. On June 12, 2018, IRC notified claimant that he was not eligible for regional center services. On June 21, 2018, claimant submitted a Fair Hearing Request, appealing IRC’s decision. He authorized his mother to represent him.

DIAGNOSTIC CRITERIA FOR AUTISM SPECTRUM DISORDER AND INTELLECTUAL DISABILITY

2. Official notice was taken of excerpts from the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5)*, which IRC’s expert, Holly A. Miller, Psy.D., referenced during her testimony.² As Dr. Miller explained, the *DSM-5* provides the diagnostic criteria used by psychologists to make diagnoses of Autism Spectrum Disorder and/or Intellectual Disability, which an individual must have to qualify for regional center services based on Autism Spectrum Disorder and/or Intellectual Disability.

3. Under the *DSM-5*, the criteria necessary to support a diagnosis of Autism Spectrum Disorder include: persistent deficits in social communication and social interaction across multiple contexts; restricted, repetitive patterns of behavior, interests, or activities; symptoms that are present in the early developmental period; symptoms that cause clinically significant impairment in social, occupational, or other important areas of functioning; and disturbances that are not better explained by intellectual disability or global developmental delay.

² Dr. Miller’s hearing testimony and opinions are discussed in more detail below.

4. The *DSM-5* provides three diagnostic criteria which must be met to support a diagnosis of Intellectual Disability: deficits in intellectual functions (such as reasoning, problem solving, abstract learning and thinking, judgment, and learning from experience) “confirmed by both clinical assessment and individualized standardized intelligence testing”; deficits in adaptive functioning “that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility”; and the onset of these deficits during the developmental period. Intellectual functioning is typically measured using intelligence tests. The *DSM-5* states, “[i]ndividuals 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). Clinical training and judgment are required to interpret test results and assess intellectual performance.”

GENERAL BACKGROUND INFORMATION

5. Claimant is a 21-year-old male who received special education services while in school and graduated from high school. Claimant’s mother declined to testify under oath, but she stated during her opening statement that claimant desired regional center services to help him find a job. Claimant’s mother also stated that she did not believe claimant suffered from autism.³ Claimant testified briefly about being the victim

³ Despite this statement, claimant’s mother was reluctant to narrow the issues to be considered during this hearing other than conceding that no one had ever diagnosed claimant with epilepsy or cerebral palsy. Therefore, because IRC’s expert had evaluated whether claimant suffered from Autism Spectrum Disorder, it was included as part of the issue to be considered.

of bullying while he was in middle school. He stated that his school's principal did not assist him when the bullying occurred, and that he had friends before the bullying occurred, but he became withdrawn afterwards.

Most of the information regarding claimant's background and his condition was described in school and medical records claimant provided IRC related to his request for regional center services.

CLAIMANT'S SCHOOL RECORDS

6. An Individualized Education Program IEP Data Summary, dated December 12, 2014, when claimant was 17 years and four months old and in twelfth grade, indicated he "first entered special education" in April 2001, and he was eligible for special education services based on a primary disability of "Specific Learning Disability" and a secondary disability of "Speech and Language Impairment." Although this document included options to indicate disabilities due to "Autism" and/or "Intellectual Disability," neither of those options was chosen. Claimant received the following special education services when he was in twelfth grade: specialized academic education for 550 minutes a week, language and speech therapy for 30 minutes a week, and vocational/career assessment counseling and guidance for 60 minutes a year.

The "Summary of Present Levels of Student Performance Areas" in the 2014 IEP document provided the following information:

- "READING [Claimant] is able to read class textbook with assistance from teacher and/or instructional assistant. He struggles with multisyllabic [*sic*] words and substitutes them with like sound words. He has difficulty with reading comprehension."
- "MATH [Claimant] is able to perform basic calculation using double digits in addition, subtraction, division, and multiplication. He has passed the Algebra requirement."

- "WRITTEN EXPRESSION [Claimant] can write his thoughts on paper with lots of mistakes in spelling, punctuation, word choice, and sentence structure. He has difficulties expressing his thoughts using the writing process."
- "LANGUAGE/COMMUNICATION/SPEECH [Claimant] is able to communicate his words and needs to teachers, peers at a high school campus. [Claimant] exhibits mild disfluency [sic]. He benefits from cues to self-monitor his own speech skills. [Claimant] currently receives speech therapy to address dysfluency. His speech is very fluent when reading, however, when he is speaking in conversation, disfluency arises. He is more disfluent as he gets excited about a topic."
- "SOCIAL BEHAVIOR (Cooperation, Attention, Social/Acceptance, Responsibility) [Claimant] is well behaved in the classroom. He is respectful and very cooperative to his teachers, and very helpful to his peers and teachers. He is well liked by his peers."
- "PHYSICAL SKILLS (Gross/Fine Motor) [Claimant] has attended regular P.E. [H]is physical skills are age appropriate."
- "SELF HELP SKILLS, FUNCTIONAL SKILLS, INDEPENDENT SKILLS, ACTIVITIES OF DAILY LIVING [Claimant] takes care of personal needs independently on a high school campus."
- "PREVOCATIONAL/VOCATIONAL/CAREER/EXPLORATORY INFORMATION/WORK EXPERIENCE [Claimant] is interested in going to college or trade school for video game design."

The "Comments" section of the 2014 IEP document contained additional information regarding claimant's performance and behaviors at school. Claimant's regular education math teacher reported that claimant was "very assertive on his worksheets. He asks for help and is persistent about comprehension. Once he

understands, he does very well. He is a hard worker and has a B+." His speech therapist reported that claimant had "improved with being aware of what speech fluency strategies are and can utilize them during structured activities (reading a paragraph). However, he tends to become disfluent during unstructured speech activities." Claimant was described as an English Language Learner, and based on his test scores, he did not progress in the areas of "Listening, Reading; and Writing." His attendance and behaviors were described as "good," and he was noted to be "working towards a high school diploma." He had earned 180 credits and he needed 220 credits to earn his diploma.

No documents were offered as evidence regarding any evaluations conducted by any schools claimant attended other than the December 2014 document that concerned his performance and the special education services he received during twelfth grade.

CLAIMANT'S KAISER PERMANENTE MEDICAL RECORDS

September 2010 Visit

7. On September 2, 2010, when claimant was 13 years old and in eighth grade, his mother brought him to see a psychiatric therapist at Kaiser Permanente. At that visit, they met with a licensed clinical social worker. The record of this visit noted claimant's chief complaint was: "The mother is worried that beginning last year in middle school, he was suspended 5 times for having been involved in fighting. The mother is concerned that this year (8th grade), patient may experience the same problem. According to the mother, he gets teased a lot because of his disabilities. He gets frustrated and will either use foul language or hit them." The medical record also stated that claimant's mother indicated claimant "was 'the trouble maker'. . . and has been in special education classes since Kindergarten. He began speech therapy in the 2nd grade. He has a speech impediment which the other kids tease. His learning disabilities are limit [*sic*] as well." The medical record for this visit also noted that

claimant "indicated that he has close friends; the problem [s/c] are the kids that tease him" and that he enjoyed basketball and swimming. Notes of the mental status examination during the visit indicated that, other than his speech, his presentation was within normal limits. With respect to his speech, the following was noted: "pronunciation problems, stuttering as well."

The following diagnoses were listed: Adjustment Disorder with Mixed Disturbance of Emotions and Conduct and Learning Disabilities. The following "Treatment Plans & Recommendations" were listed: "1. Patient to work on anger management/interventions discussed today," and "2. Mother will intervene with the school teacher/staff as needed."

October 2015 Visit

8. Claimant went to Kaiser again on October 14, 2015, when he was 18 years old, with chief complaints of anger and depression. He again saw a licensed clinical social worker. Claimant's sister accompanied him to help due to his speech impediment. The medical record noted the following regarding "Why Patient is Seeking Help Now," for symptoms that had been "ongoing since patient was 8 years old":

Pt's sister describes Pt having increasing arguments and anger outburst [s/c] in the home related to issues with his father's absence and abuse. Pt states he yells/screams, curses, throws objects, punches, and cries when he is upset. Pt states his aggression comes from family comparing him to his father and resentment towards mother for not taking advantage of the opportunity to leave due to father's behavior. Pt was encouraged by sister to come for therapy. Pt's sister is currently seeking therapy for family issues.

Under the "History of Present Illness" heading, the medical record stated:

Pt is the youngest of 2 and reports two half sisters [sic]. Pt's sister reports acting out behaviors started when Pt was 8 years old, following an incident at school where he was bullied by a group of peers. Pt states bullying continued through the age of 16. Pt attributes this ongoing behaviors [sic] to his father [sic] absence and maltreatment. "I've been taking it out on my mom because I'm still mad she didn't let us move away to live with my aunt. I'm mad she didn't get us out."

The following additional information was provided under the "Social History" heading:

Family of Origin: Born in Anaheim, moved to Bloomington when he was 5 years old. Pt has 1 sister from both parents and two half sisters [sic]. Parents have a dysfunctional relationship. . . . Pt reports parents were never married and Father is an alcoholic and neglected the family. "He spent a lot of money on alcohol, spanked us but mostly when we were bad and when he was drunk, and I think he hit my mom one time but never saw it. He didn't leave no [sic] bruises or anything but I would cry a lot and he would say mean things". Pt stated his aunt offered to move his family to Missouri to live with her for a while but mother declined the offer. Pt resents mother for not removing them for [sic] their environment. Pt states he is unaware of his father's

whereabouts. "All I know is that he lives in a mobile home somewhere. I don't know."

Education: HS graduate

Employment History: worked at after school program for 2 months

Relationship History: no prior relationships

Significant Developmental Issues: Speech impediment

The medical record for this visit listed the following diagnoses: Unspecified Depressive Disorder, Parent Child Relational Problem, and Family History of Substance Abuse. The "Treatment Plans & Recommendations" included goals for claimant to recognize symptoms of increasing tension, anxiety, and agitation; use coping skills "such as drinking water, timeouts, playing video games, reading books, walking away, listening to music, watching a video on youtube [sic] to reduce depression and angry outbursts"; and use effective communication skills. Individual therapy and anger management were also recommended. Claimant was to follow up with a licensed clinical social worker.

Individual Psychotherapy and Group Psychotherapy Visits

9. Claimant returned to Kaiser for individual psychotherapy sessions on November 23, 2015, and January 5, 2016, for the same reasons he sought treatment on October 14, 2015. He also attended group psychotherapy sessions on January 14, 2016, (transition group), and January 22 and 28, 2016, and February 12, 2016, (anger management classes).

The medical record for the November 23, 2015, individual therapy visit stated:

Patient has recently been verbally mean towards his mother.

... This patient is angry (yelling and screaming) with his

mother for not having left the father sooner. The mother with this patient and his sister left the father this spring.

This patient graduated from high school. He was in a Severely Emotionally Disturbed classroom along with receiving speech services at the school. The family has tried to put him on disability yet was denied. Patient hasn't tried to get a job nor enroll in schooling since graduating. This means that he has had a lot of time to think about the frustrations with his family situations-both in the present and in the past. Videogames is [sic] his way of calming himself. He reported that he has been employed as a childcare afterschool worker. He is thinking of getting a job yet thus far hasn't moved those thoughts into action. He is considering enrolling in community college for the spring yet again hasn't done so yet. He wasn't able to explain why he hasn't been more productive since graduating. This patient doesn't drive (no explanation given for this).

Notes from the January 4, 2016, visit similarly described discussions regarding claimant's relationships with members of his family. The January 4, 2016, medical record also included the therapist's observation of claimant, which stated:

Patient was alert and oriented to person, place, time and situation. Longterm [sic] and short term memory appeared to be intact. Motor activity normal. Good eye contact. Mood angry and sad with affect within a normal range-some tearfulness. Speech consisted of stuttering yet was normal in

pace and content. Dressed casually. Grooming good. Insight adequate. Judgment adequate.

The diagnoses listed in the records regarding his individual therapy sessions included: Depression, Unspecified; Parent Child Relational Problem; Counseling for Family Member of Alcoholic; Stuttering and Stammering, Childhood Onset; and History of Child Physical Abuse. Claimant declined medication at each visit, and he indicated during the January 4, 2016, visit that he planned to begin a weekly anger management class. The notes in the medical records regarding his attendance at group therapy sessions indicated that the focus was on "controlling anger."

Psychiatric Evaluation with Medical Doctor and Referral for Psychological Testing

10. On April 8, 2016, when claimant was 18 years old, he saw Alexandra Clark, M.D., at Kaiser Permanente for an initial psychiatric evaluation. The medical record for that visit stated that he presented with "COGNITIVE IMPAIRMENT" and "MOOD DISORDER." The History of present illness was described as follows:

[Claimant] is a [s/c] 18 year old male with history of childhood adversity (physical abuse from father who suffered from alcohol dependence), learning disability, special education in school. Inability to perform at expected age level. Patient is unable to retain, process, and learn new information. He also has a speech impediment. The patient's mother and sister report the patient has been having these same issues all his life. He did not start to speak until he was 7 years old. During his high school year [s/c], his teachers told his mother that he was at a grade 5th [s/c] in elementary

school level. He is also impulsive. He is very rigid with his routine and has a very difficult time when someone tells him no. He ends up yelling, cursing, throwing objects. He had not hit his mother or sister. He does not have sexually inappropriate behaviors.

The mental status exam notes stated that his eye contact was "avoidance, decreased"; affect was "flat, inappropriate"; his speech was "selectively mute, paucity, slow"; his thought process was "concrete, perseverations, poverty of content"; and his judgment was "unclear." The doctor listed the following diagnoses: Under Axis I-Organic Mood Disorder, Intellectual Disability, Autism Spectrum Disorder, with the comment "RULE OUT" below that list; and Axis III (Patient active problem list)-Stuttering, Childhood Onset; History of Child Physical Abuse; Dietary Surveillance and Counseling; Depression, Unspecified; Obesity; and Learning Difficulties. The medical record for this visit did not describe any psychological testing. Claimant was prescribed Prozac and Dr. Clark recommended that claimant participate in therapy and undergo psychological testing.

The Kaiser Permanente records included the following progress note, dated April 8, 2016, from a Kaiser psychologist, Johanna Walthall, Ph.D.:

Hi Dr. Clark,

Learning disability assessments are not a covered medical benefit. [Claimant] was seen in special education throughout high school and in an SED class; mother should provide the paperwork from the schools for review. We can't assess him here for learning issues and it's likely already documented by the school if it is truly an issue.

If you'd like [claimant] assessed for Autism, please place a Tapestry referral to PSYCHIATRY (**not** pediatrics) and I'll do a 60 minute screening with him. I'm dubious based on the ED placement at school but more than happy to take a look as your note lists concerns for ASD. If he screens negative, I'll send him back to Dr. Gutierrez for the cognitive. Otherwise I'll do the cognitive as part of a full ASD eval in our Adult Clinic.⁴

In the medical record regarding a follow up appointment with Dr. Clark on July 1, 2016, the only diagnosis listed was "Organic Mood Disorder." During that visit, claimant's mother told the doctor that claimant had stopped taking the medication prescribed after one week because he did not believe it was helping him. The subjective notes also stated: "Per his mother his irritability and anger have continue [*sic*]. He yells at her and curses when she asks him to do any household chores. As mentioned in the last appointment, he needs help/assistance with AIDLS,⁵ shopping, driving, cooking, bills/finances, etc." The doctor prescribed Lexapro and recommended that claimant participate in "THERAPY/Other interventions."

⁴ There was no evidence provided regarding whether Dr. Walthall ever evaluated claimant.

⁵ There was no definition of the acronym, "AIDLS," in the records. It appeared that it may have been meant to refer to "ADLs," a common abbreviation for "Activities of Daily Living," or "IADLs," a common abbreviation for "Instrumental Activities of Daily Living."

Neuropsychological Evaluation

11. Claimant saw Laura Gutierrez, Psy.D., for a neuropsychological evaluation at Kaiser Permanente's Fontana Department of Psychiatry on September 27 and 29, 2016, when claimant was 19 years old. Dr. Gutierrez's report included the following background information, based on her review of records and her interview of claimant and his mother:

[Claimant] presents with a longstanding history of learning and speech disability, and concomitant participation in special education and speech therapy. . . . [Claimant] was described as experiencing an improvement in expressive language around age 7, and acquiring reading around age 10. Records additionally indicate [claimant] presents with difficulties recalling details of class lecture (12th grade IEP: 12/12/2014). [Claimant] reportedly graduated from high school in 2015, and briefly attempted community college although discontinued after finding this to be too difficult. [Claimant] has no vocational history. He recently qualified for Social Security/Disability Income.⁶

[Claimant's] medical history is significant for obesity, learning disability (sister), and family history of Parkinson's disease (maternal grandfather). [Claimant's] mother also reported

⁶ No other evidence was presented regarding whether claimant has been receiving Social Security Disability benefits or the basis upon which such benefits may have been granted.

she experienced difficulty with reading and mathematics during grade school, and repeating the 1st grade four times.

Behaviorally, [claimant] recently initiated counseling and psychiatric services secondary to increased anger and irritability associated with parent-child conflict, and longstanding exposure to domestic violence. A diagnosis of organic mood disorder is documented. In his academic setting during middle school, [claimant] was reportedly the victim of bullied [*sic*]. In high school, however records (12th grade IEP: 12/12/2014) describe him as "well-behaved", "respectful and very cooperative with his teachers", as well as being helpful and well-liked by his peers. [Claimant] currently denied any significant emotional distress, although acknowledged conflict with mother at times surrounding chores/housework (e.g., "she says it in a mean way").

Presently, [claimant] was oriented to self and place. He oriented to year and day of the week, and not month or date ("10/1/2016"). He was unable to comment on the purpose of the evaluation or identify his referring provider. Expressive language was characterized by significant dysfluency (e.g., stutter), although this improved as rapport was established. [Claimant] was described as experiencing deficits in comprehension, learning/memory, language (e.g., stutter), processing speed, planning/organization, and problem solving. [Claimant] is reportedly able to satisfy routine

activities of daily living independently, while benefiting from support with complex demands (e.g., healthcare/finances). Consistently, he was unable to name his medication or corresponding medical condition. [Claimant] has never driven and does not possess a driver's license. However, he is reportedly able to navigate public transportation independently. Concerns surrounding social judgment (e.g., susceptible to influence) were endorsed. [Claimant] expressed an interest in securing a driver's license and vocational opportunities.

Dr. Gutierrez administered some psychometric tests, and scores were listed in her report as being primarily in the borderline and impaired range. His full-scale I.Q. was 67, in the impaired range. The "Summary of Evaluation Findings" portion of her report stated:

Test findings indicate [claimant] possesses intact spatial perception, and Borderline range verbal and nonverbal reasoning, complex attention (e.g., divided sustained), and cognitive flexibility (e.g., mental switching). Deficit abilities include visual and verbal memory, visual attention and processing speed. The overall quotient was also in the mildly deficit range.

While the present findings may have been influenced by [claimant's] experience of significant fatigue, Borderline range intellectual abilities are thought to be consistent with [claimant's] longstanding history of special education and

current level of functioning. Furthermore, the present findings suggest [claimant] will likely continue to benefit from being provided with supports in the administration of complex demands (e.g., healthcare, finances) to ensure his best interests are maintained. He may also benefit from having a family member assigned durable power of attorney to provide support and advocacy in the administration of his affairs, while ensuring his interests are respected.

Dr. Gutierrez listed the following diagnostic impressions: "Borderline Intellectual Functioning," "Specific Learning Disability, Childhood-Onset Fluency Disorder (Stuttering)," and "Parent-Child Relational Problem." Dr. Gutierrez recommended that claimant contact the California Department of Rehabilitation. Her report did not mention the regional center.

Speech-Language Pathology Evaluation and Follow-Up Visits

12. On June 28, 2018, when claimant was 20 years old, he saw Alicia Andrews-Briones, M.S., CCC-SLP, a speech language pathologist at Kaiser, for a speech-language pathology evaluation regarding his stuttering. Ms. Andrews-Briones's evaluation report and medical records regarding follow-up appointments were provided to IRC for the first time during the hearing and were received as evidence. Andrews-Briones's evaluation provided the following regarding claimant's stuttering history:

[Claimant] and parent believe that his stuttering may have started in Pre-K. Mother would like [claimant] to find a job. She stated that he is becoming isolated and is anxious about interacting with others. He had difficulty making new friends. Mother reported that 2 years ago [claimant] was evaluated

by a psychologist via Kaiser and a referral was sent to Regional Center for job support. Regional Center denied his request to receive support for finding a job. . . . [Claimant] reported that his strategies to support greater fluency include: stay calm, take a deep breath, relax and don't get mad or excited "because that triggers it." [Claimant's] mother stated that stuttering worsens when he talks with someone new and mother reminds him "to slow down and close his eyes and it gets better."

Ms. Andrews-Briones's June 28, 2018, report listed a diagnosis of "Stutter, Childhood Onset," described claimant's speech language diagnosis as "Moderate-Severe Fluency Disorder," and recommended home exercises and follow-up appointments. The report also listed the following "Other speech-language concerns": "[Claimant] was also delayed in language, he did not speak until 4 years of age and he has an intellectual disability." The report did not indicate the source of the information that led Ms. Andrews-Briones to note claimant suffered from an "intellectual disability."

Claimant had follow-up speech therapy visits on July 26, 2018, and August 2, 2018.

DR. HOLLY A. MILLER'S EXPERT OPINION TESTIMONY

13. Holly A. Miller, Psy.D., is a staff psychologist at IRC, where she has worked since 2016. Her duties include conducting psychological assessments to determine regional center eligibility. She received her Bachelor of Arts Degree in Psychology from the University of California, Riverside in 2002; Master of Science Degree in Psychology from the University of La Verne in 2006; and Doctor of Psychology Degree from the University of La Verne in 2009. She is licensed as a clinical psychologist by the State of

California. Before working as a staff psychologist for IRC, Dr. Miller worked as a clinical supervisor for Olive Crest from 2013 to 2016. She has also worked as a part-time clinical psychologist at Foothills Psychological Services since 2013.

14. Dr. Miller was a member of the eligibility determination team that considered whether claimant was eligible for regional center services. She reviewed all the records supplied by claimant, including the speech-language pathology report claimant submitted during the hearing, and concluded that claimant is not eligible for regional center services. Dr. Miller testified at the hearing regarding her analysis of the records she reviewed and her opinion that claimant is not eligible for regional center services.

15. Based on her review of all the records, Dr. Miller opined that claimant is not eligible for regional center services because he does not meet the diagnostic criteria for Autism Spectrum Disorder or Intellectual Disability, and he does not suffer from a condition similar to, or that requires treatment similar to, Intellectual Disability (the "fifth category"). Additionally, based on her record review, she did not believe an additional assessment by IRC was warranted because there were no records indicating that claimant suffered from deficits that could be related to Autism Spectrum Disorder, Intellectual Disability, or the fifth category before he was 18 years old. Dr. Miller noted that the records she reviewed supported a finding that claimant has a learning disability and deficits in speech and language, but those findings did not support eligibility for regional center services.

Although some of his cognitive scores on an assessment performed when he was an adult showed him in the borderline and impaired ranges, Dr. Miller pointed out that there was no evidence showing that his current cognitive deficits were the result of a developmental disability, as opposed to being related to his mental health issues and conflicts he experienced in his home while growing up. There was also not enough

information for Dr. Miller to opine regarding whether claimant may have suffered a decline in his functioning. Regarding the notation in the recent speech-language pathology report that claimant suffered from “intellectual disability,” Dr. Miller pointed out that report did not explain the source of that information and the author, a speech pathologist, was not qualified to make such a diagnosis.

If claimant had suffered from Autism Spectrum Disorder, Intellectual Disability, or the fifth category during the developmental stage, Dr. Miller would have expected to see something in his school records raising concerns that he may suffer from those conditions. However, based on the IEP document claimant provided IRC, he received special education services for a Specific Learning Disability and Speech Language Impairment, which are not conditions upon which regional center service eligibility may be based. Dr. Miller did not see anything in the school records that indicated claimant suffered from Autism Spectrum Disorder or Intellectual Disability. She pointed to language in the 2014 IEP document showing that he was cooperative with his teachers, got along well with his peers, was able to attend to his personal needs independently, was able to express his wants and needs, and once he understood, he did well in math. Those descriptions of claimant during his senior year in high school indicated to Dr. Miller that claimant did not suffer from Autism Spectrum Disorder or Intellectual Disability or qualify for regional center services under the fifth category.

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 and 500.)

2. “‘Preponderance of the evidence means evidence that has more convincing force than that opposed to it.’ [Citations.]” (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) “The sole focus of the legal definition of ‘preponderance’ in the phrase ‘preponderance of the evidence’ is on the *quality* of the evidence. The *quantity* of the evidence presented by each side is irrelevant.” (*Ibid.*, italics in original.) “If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it [citation].” (*People v. Mabini* (2001) 92 Cal.App.4th 654, 663.)

STATUTORY AUTHORITY

3. The Lanterman Act is set forth at Welfare and Institutions Code section 4500 et seq.

4. 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. . . .

5. 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.

6. California Code of Regulations, title 17, section 54000,⁷ provides:

⁷ The regulation still uses the former term “mental retardation” instead of “intellectual disability.”

(a) "Developmental Disability" means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

- (1) Originate before age eighteen;
- (2) Be likely to continue indefinitely;
- (3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

- (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 psychosocial 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.

7. 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.

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. However, the criteria for special education eligibility are not the same as the eligibility criteria for regional center services found in the Lanterman Act and California Code of Regulations, title 17. The fact that a school may be providing services to a student based on the school’s determination of an autism disability or intellectual disability is not sufficient to establish eligibility for regional center services.

APPLICABLE CASE LAW

10. In *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1127, the Fourth District Court of Appeal discussed the language in the Lanterman Act regarding the fifth category and determined the language was not impermissibly vague. The appellate court explained that finding as follows (*Id.* at pp. 1128-1130.):

In the instant case, the terms “closely related to” and “similar treatment” are general, somewhat imprecise terms. However, section 4512(a) does not exist, and we do not apply it, in isolation. “[W]here the language of a statute fails to provide an objective standard by which conduct can be judged, the required specificity may nonetheless be provided by the

common knowledge and understanding of members of the particular vocation or profession to which the statute applies.” [Footnote omitted.] Here, the Lanterman Act and implementing regulations clearly defer to the expertise of the DDS and RC professionals and their determination as to whether an individual is developmentally disabled. General, as well as specific guidelines are provided in the Lanterman Act and regulations to assist such RC professionals in making this difficult, complex determination. Some degree of generality and, hence, vagueness is thus tolerable.

The language defining the fifth category does not allow such subjectivity and unbridled discretion as to render section 4512 impermissibly vague. The fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded. Furthermore, the various additional factors required in designating an individual developmentally disabled and substantially handicapped must apply as well.

While there is some subjectivity involved in determining whether the condition is substantially similar to mental retardation and requires similar treatment, it is not enough to render the statute unconstitutionally vague, particularly when developmentally [*sic*] disabilities are widely differing and difficult to define with precision. Section 4512 and the implementing regulations prescribe an adequate standard or

policy directive for the guidance of the RCs in their determinations of eligibility for services.

EVALUATION

11. The Lanterman Act and the applicable regulations set forth criteria that a claimant must meet to qualify for regional center services. There is no question that claimant suffers from a learning disability and speech language impairment for which he received special education services and that he currently suffers from some cognitive deficits. His mother justifiably wants to make sure her son receives any and all services for which he is eligible. However, the evidence introduced at this hearing was not sufficient to prove by a preponderance of the evidence that claimant suffers from Autism Spectrum Disorder, Intellectual Disability, or meets the criteria for eligibility under the fifth category. In particular, there was no evidence showing that claimant's current cognitive difficulties originated before he was 18 years old. Accordingly, claimant is not eligible to receive regional center services at this time. Thus, his appeal from IRC's determination that he is ineligible to receive regional center services must be denied.

ORDER

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

DATED: August 24, 2018

THERESA M. BREHL

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.