

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2018061151

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter in San Bernardino, California, on October 15, 2018.

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

There was no appearance on behalf of claimant.

The matter was submitted on October 15, 2018.

ISSUE

Is IRC's original determination finding claimant eligible for regional center services under a diagnosis of intellectual disability clearly erroneous in light of IRC's recent comprehensive reassessment?

FACTUAL FINDINGS

BACKGROUND

1. On May 29, 2018, IRC served claimant's authorized representative with a Notice of Proposed Action (NOPA) explaining why an interdisciplinary team at IRC had found claimant was no longer eligible for regional center services. In the letter, IRC explained that the original determination finding claimant eligible for regional center services on the basis of an intellectual disability is clearly erroneous given a recent reassessment.

2. Following the NOPA, claimant's authorized representative filed a Fair Hearing Request in disagreement with IRC's determination. Claimant's authorized representative and individuals from IRC subsequently held an informal meeting to discuss the matter. Following the meeting, IRC adhered to its original determination.

3. A Notice of Hearing and Order Continuing the original hearing date were properly served on claimant's authorized representative at the same address where she had been corresponding with IRC since the time she filed the Fair Hearing Request on claimant's behalf. IRC also sent a letter reminding claimant's authorized representative about the hearing on October 4, 2018, via certified mail, and included the exhibits it intended to present at hearing.

4. IRC's representative, Ms. Neal, also called claimant's authorized representative on October 12, 2018, to remind her about the hearing. At that time, claimant's authorized representative told Ms. Neal that she wanted a continuance; Ms. Neal stated that if she wanted a continuance she would have to request one from OAH, and at any rate, IRC would oppose the continuance. Neither IRC nor OAH received any communication from claimant's authorized representative regarding a continuance.

5. Notice of hearing being proper; claimant is therefore in default. This hearing ensued.

DIAGNOSTIC CRITERIA FOR INTELLECTUAL DISABILITY

6. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) contains the diagnostic criteria used to diagnose intellectual disability. Intellectual disability is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. Three diagnostic criteria must be met in order to receive a diagnosis of intellectual disability: Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience; deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility; and, the onset of these deficits must have occurred during the developmental period. Intellectual functioning is typically measured using intelligence tests. Individuals with an intellectual disability typically have intelligent quotient (IQ) scores at or below the 65-75 range.

The essential features of intellectual disability are deficits in general mental abilities and impairment in everyday adaptive functioning, as compared to an individual's age, gender, and socio-culturally matched peers.

EVIDENCE PRESENTED AT HEARING

7. The following documentary evidence was presented by IRC: the Notice of Proposed Action dated May 29, 2018; Informal Meeting Letter dated July 5, 2018; claimant's most recent Individualized Program Plan (IPP) dated January 8, 2018; claimant's Client Development Evaluation Report dated January 8, 2018; two Individualized Education Plans (IEP's) from claimant's school district dated December 5, 2017, and December 12, 2016; a Multidisciplinary Psychoeducational Report from claimant's school district dated April 25, 2016; a psychological assessment completed by

Edward Frey, Ph.D., on August 18, 2014; a psychological assessment completed by Ruth Stacy, Psy.D., on February 21, 2018; and IRC's eligibility determination. Dr. Stacy also testified at the hearing. The following is a summary of Dr. Stacy's testimony and the documentary evidence presented.

8. Dr. Stacy is a staff psychologist at IRC. She has also held positions at IRC such as Senior Intake Counselor and Senior Consumer Services Coordinator. She has been involved in assessing individuals who desire to obtain IRC services for 27 years. In addition to her doctorate degree in psychology, she also holds a Master of Arts in Counseling Psychology, a Master of Arts in Sociology, and a Bachelor of Arts in Psychology and Sociology. Dr. Stacy is an expert in the diagnosis of persons with intellectual disabilities and in the assessment of persons for regional center eligibility under the Lanterman Act.

9. Claimant is a six-year-old boy receiving regional center services as a result of a 2014 intellectual disability diagnosis by Edward Frey, Ph.D. Prior to Dr. Frey's evaluation, claimant had been receiving Early Start services. Dr. Frey found claimant very difficult to assess, because of claimant's inattention and distractibility. Claimant was also only 2 years and 9 months old at the time of the assessment. Nonetheless, Dr. Frey found claimant eligible for regional center services. In his evaluation, Dr. Frey wrote:

The Interdisciplinary Team is advised that claimant meets the diagnostic criteria for Global Developmental Delay. This diagnosis is subsumed under the category of Intellectual Disability. Thus, he should be viewed as a child with an unspecified level of Intellectual Disability until the diagnosis is fully clarified at a time of reassessment. ...

Dr. Frey recommended claimant be reassessed in two to three years, and for claimant's parents to seek assistance from the school district in obtaining claimant speech, language, and occupational therapy from the school district through special education.

10. An assessment completed in 2014 by claimant's school district found claimant did have speech and language impairment, but did not qualify for special education services under the category of intellectual disability. The evaluator explained:

When comparing claimant to age peers he demonstrates significant delays in cognitive skills accompanied by delays in adaptive behavior. However, he has splinter skills such as identifying letters and appropriately using cause and effect toys that is not typical for a child with such a delay. Also, he has significant language delays that are affecting many of the skills that he would be typically developing by this age. It is the opinion of this assessor that at this time there is not significant information to consider him as intellectually disabled. ...

11. A psychological assessment completed by claimant's school psychologist in April 2016 determined claimant was eligible for special education services under a diagnosis of speech and language impairment and intellectual disability. However, Dr. Stacy concluded that the diagnosis for intellectual disability was not correct, even under California Code of Regulations, title 5, which is a separate set of standards used to qualify children for special education services. Specifically, she referred to claimant's adaptive scores on the Adaptive Behavioral Assessment System, Third Edition (ABAS). Dr. Stacy said that claimant's ABAS scores placed him in the low average or borderline

range of functioning, however, a person who is intellectually disabled would not normally have scores as high as 75 and 81 on the ABAS.

12. Dr. Stacy conducted her evaluation of claimant on February 21, 2018, when he was six years old. She utilized the following measures: Wechsler Preschool and Primary Scale of Intelligence, Fourth Edition (WISC-IV) and the Vineland Adaptive Behavior Scales, Third Edition (Vineland). She also reviewed all records provided to IRC and conducted a diagnostic interview. On the WISC-IV, claimant tested in the average to low average range across several subtests, and was extremely low in one subtest area. On the various indexes, which included verbal, visual, and IQ tests, claimant tested in the borderline to low average range. During all tests, claimant was inattentive, active, and distracted. Some subtests were not completed because claimant lost interest in them. The lower scores were determined to be an underestimation of claimant's true cognitive skills due to the high level of inattention and distractibility. Claimant's adaptive functioning on the Vineland was determined to be in the moderately low range overall.

Dr. Stacy concluded that claimant does not meet criteria for intellectual disability, but does meet the diagnostic criteria for ADHD and Language Disorder. These diagnoses do not qualify an individual for services under the Lanterman Act.

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LEGAL CONCLUSIONS

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

2. Welfare and Institutions Code section 4643.5, subdivision (b), provides:

An individual who is determined by any regional center to have a developmental disability shall remain eligible for services from regional centers unless a regional center,

following a comprehensive reassessment, concludes that the original determination that the individual has a developmental disability is clearly erroneous.

3. In a proceeding to determine whether a previous determination that an individual has a developmental disability "is clearly erroneous," the burden of proof is on the regional center to establish that the individual is no longer eligible for services. The standard is a preponderance of the evidence. (Evid. Code, § 115.) Thus, IRC has the burden to establish by a preponderance of the evidence that its previous eligibility determination "is clearly erroneous."

4. Welfare and Institutions Code section 4512, subdivision (a), defines developmental disability as 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. A developmental disability also includes "disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability." (*Ibid.*) Handicapping conditions that are "solely physical in nature" do not qualify as developmental disabilities under the Lanterman Act. (*Ibid.*)

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

(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

¹ Although the Lanterman Act has been amended to eliminate the term "mental retardation" and replace it with "intellectual disability," the California Code of Regulations has not been amended to reflect the currently used terms.

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.

(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. A preponderance of the evidence established that the original determination by IRC finding claimant eligible for regional center services under a diagnosis of intellectual disability is clearly erroneous, in light of Dr. Stacy's comprehensive

reassessment and other documentary evidence. Claimant did not present any evidence to rebut IRC's evidence. Thus, claimant is no longer eligible for regional center services.

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ORDER

Claimant's appeal from the Inland Regional Center's determination that he is no longer eligible for regional center services is denied.

DATED: October 19, 2018

KIMBERLY J. BELVEDERE

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.