

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. 2018070250

DECISION

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on August 21, 2018.

Claimant's mother and father represented claimant.

Leigh-Ann Pierce, Program Manager, represented Inland Regional Center (IRC).

The matter was submitted on August 21, 2018.

ISSUE

Is claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) as a result of autism or an intellectual disability or a condition closely related to intellectual disability or to require treatment similar to that required for individuals with intellectual disability (fifth category) that constitutes a substantial disability?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. On June 1, 2018, IRC notified claimant that after it completed an intake evaluation it determined that he was not eligible for regional center services.

2. On June 19, 2018, claimant's father filed a fair hearing request, appealing IRC's decision. In his hearing request, claimant's father stated he believed that claimant qualifies for regional center services under the Autism Spectrum Disorder (ASD) category.

BACKGROUND

3. Claimant is an eight-year-old boy. At his school, claimant receives special education services and qualifies for these services due to Autism and Speech or Language Impairment. Claimant's school district referred claimant to IRC for services.

DIAGNOSTIC CRITERIA FOR AUTISM SPECTRUM DISORDER

4. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5)* identified criteria for the diagnosis of Autism Spectrum Disorder. The diagnostic criteria 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 function; and disturbances that are not better explained by intellectual disability or global developmental delay. An individual must have a *DSM-5* diagnosis of Autism Spectrum Disorder to qualify for regional center services.

THE "FIFTH CATEGORY" AND DIAGNOSTIC CRITERIA FOR INTELLECTUAL DISABILITY

5. The *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 under the eligibility criterion of intellectual disability. Intellectual functioning is typically measured using intelligence tests. Individuals with intellectual disability typically have intelligent quotient (IQ) scores in the 65-75 range. Under the "fifth category," the Lanterman Act provides assistance to individuals with disabling conditions found to be closely related to intellectual disabilities or to require treatment similar to that required for intellectually disabled individuals but does not include other handicapping conditions that are solely physical in nature.

Along with the other four qualifying conditions (cerebral palsy, epilepsy, autism, 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.

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EVIDENCE PRESENTED BY IRC

6. Ruth Stacey, Psy.D., IRC staff psychologist, testified at the hearing and is licensed as a psychologist in California. Dr. Stacey has been a staff psychologist at IRC since 2015. Her duties include assessing potential clients for eligibility under the Lanterman Act. Before she became licensed as a psychologist, she worked as a Senior Counselor at IRC for 15 years. Dr. Stacey is familiar with the applicable laws and regulations containing the eligibility criteria for regional center services.

In assessing claimant's eligibility for regional center services, Dr. Stacey considered the criteria under the *DSM-5* for Autism Spectrum Disorder and Intellectual Disability and reviewed the reports of two psychologists: Veronica A. Ramirez, Psy.D., and Thomas F. Gross, Ph.D., who evaluated claimant and performed testing as part of the IRC intake process. Dr. Stacey also considered the claimant's December 11, 2017, Individualized Education Plan Multi-Disciplinary Report. After reviewing the information contained in these reports, Dr. Stacey concluded that claimant does not meet the eligibility criteria for regional center services under the autism, intellectual disability or fifth category diagnoses.

Dr. Stacey based her conclusion that claimant does not qualify for regional center services on Drs. Gross's and Ramirez's findings and opinions as contained in their reports. Dr. Gross's evaluation and report is summarized as follows: He conducted a comprehensive evaluation of claimant on March 13, 2018. He reviewed records, including claimant's Multi-Disciplinary Assessment Report from his Individualized Education Plan, he interviewed claimant, and he administered the following psychological assessments to him: Vineland Adaptive Behavior Scale III, Child Autism Rating Scale 2-ST (CARS) and the Leiter International Performance Scale-3rd Edition. Based on the information he obtained from his evaluation of claimant, Dr. Gross found that claimant does not have ASD or Intellectual Disability and he does not function in a manner similar to a person with Intellectual Disability.

Regarding his conclusion that claimant does not have an intellectual disability, Dr. Gross cited claimant's Full Scale IQ of 79 on the Leiter International Performance Scale-3rd Edition to indicate that he has low average to high borderline nonverbal intellectual ability.

In support of his conclusion that claimant does not have ASD, Dr. Gross first cited claimant's score on the CARS. Claimant obtained a score of 26 on the CARS, with a score

of 29.5 being indicative of ASD. Notwithstanding this score, Dr. Gross recognized that claimant has some features of ASD, but he did not believe he meets the “full syndrome” of criteria for ASD under the *DSM-5*. Dr. Gross identified the following features claimant displayed suggesting that he has ASD: repetitive hand flapping, he often rocks himself and stares off as if in his own world, he engages in restricted, repetitive, patterns of behavior, and he will butt his head into a wall. Dr. Gross commented that claimant’s self-stimulating behavior may be manifestations of a sensory processing disorder and he recommended that claimant be evaluated by an occupational therapist. He commented further that the repetitive clapping may be associated with a tic disorder and he recommended that claimant see a neurologist to rule out this condition.

With features indicative of ASD noted, Dr. Gross, nonetheless, believed that claimant does not exhibit the full-scale symptoms identified under the *DSM-5*: persistent deficits in social communication and social interaction across multiple contexts and claimant was not reported to have deficits in emotional reciprocity. Dr. Gross found further that claimant responds appropriately to the gestures of others and their body language, he displays adequate contact, and he had adequate eye contact with Dr. Gross during their interview.

7. After Dr. Gross assessed claimant on March 13, 2018, to assist IRC in determining whether claimant qualifies for services under the autism category, IRC asked Dr. Ramirez to assess claimant. On May 29, 2018, Dr. Ramirez conducted an assessment of claimant in which she administered the Autism Diagnostic Observation Schedule (ADOS), interviewed claimant’s parents, made observations of claimant and reviewed applicable records. At the hearing Dr. Stacey testified that the ADOS test is considered the “gold standard” of assessments used to assess individuals for ASD.

Under the ADOS claimant obtained a Social Affect and Restricted Behavior total score of 5. Dr. Ramirez interpreted this result to suggest that claimant does not have ASD.

In reaching this conclusion, Dr. Ramirez made detailed observations of claimant when she evaluated him and determined that his behaviors did not indicate he had ASD. She observed that claimant presented with socially modulated eye contact, directed facial expressions towards the examiner and she observed him frequently socially reference his parents when he was unsure of his response to questions she posed to him. He frequently sought Dr. Ramirez's attention and when she was writing notes, claimant said, "Hey, look at this" to gain her attention. He also frequently asked questions about different toys and engaged in imaginative play. During one play activity, claimant spontaneously contributed to the enactment of the activity and he laughed when Dr. Ramirez pretended to spill juice. She noted that claimant's parents reported he has a friend he plays with and he will request play dates. His parents also reported that he "has always been social and interested in peers" and he has had "good eye contact since he was young." Regarding other behaviors Dr. Ramirez observed, claimant appeared to be fixated on playing with two toys but while doing so he always attempted to engage her in his play with the toys. She observed him engage in stereotypical hand movements during the evaluation.

Based on the information she obtained from her evaluation, Dr. Ramirez made the following diagnostic impression of claimant: Attention Deficit/Hyperactivity Disorder, Combined presentation, by history.

8. Dr. Stacey's testimony that claimant does not qualify for regional services under the ASD, Intellectual Disability or fifth category categories was credible and consistent with the evidence in the record, specifically, Dr. Ramirez's and Dr. Gross's opinions as detailed in their reports.

9. In the context of his possible eligibility for regional center services, Dr. Stacey addressed claimant's qualification under Autism for school services at the hearing. Dr. Stacey correctly explained that claimant's qualification for school services under this category does not establish that he is eligible for regional center services. California Code of Regulations, title 5, section 3030, provides the eligibility criteria for special education services required under the California Education Code. The criteria for special education eligibility are not the same as the eligibility criteria for regional center services found in the Lanterman Act. A school providing services to a student under ASD is insufficient to establish eligibility for regional center services. Regional centers are governed by California Code of Regulations, title 17. Title 17 eligibility requirements for services are more stringent than those of title 5.

CLAIMANT'S PARENT'S TESTIMONY AND ARGUMENT

10. Claimant's mother stated that she believes claimant has ASD based on the report of the school psychologist and because he repetitively claps his hands and has facial gestures that she believes are typical of ASD

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. In a proceeding to determine eligibility, the burden of proof is on the claimant to establish she meets the proper criteria. The standard is a preponderance of the evidence. (Evid. Code, § 115.)

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.*) "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 54000,¹ 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

¹ The regulation still uses the former term “mental retardation” instead of “intellectual disability.”

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.

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.

REGULATION GOVERNING ELIGIBILITY FOR SPECIAL EDUCATION SERVICES

8. California Code of Regulations, title 5, section 3030, provides the eligibility criteria for special education services required under the California Education Code. The criteria for special education eligibility are not the same as the eligibility criteria for regional center services found in the Lanterman Act. The fact that a school may be providing services to a student under an autism disability is not sufficient to establish eligibility for regional center services, as regional centers are governed by California Code of Regulations, title 17. Title 17 eligibility requirements for services are different than those of title 5.

APPLICABLE CASE LAW

9. The court in *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1127, discussed the language in the Lanterman Act regarding the fifth category and found the language not impermissibly vague. The 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

10. Claimant did not prove by a preponderance of the evidence that he qualifies for regional center services under an autism or intellectual disability or fifth category diagnosis. Claimant did not offer evidence to contradict Dr. Stacey's credible opinion that claimant was not eligible under these categories and her opinion was based upon the evaluations of two psychologists who evaluated claimant and administered psychology tests to him.

ORDER

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

DATED: August 30, 2018

ABRAHAM M. LEVY

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.