

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

v.

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2018101013

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter in San Bernardino, California, on November 27, 2018.

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

Claimant's mother and father appeared on behalf of claimant, who was not present.

The matter was submitted on November 27, 2018.

ISSUE

Is claimant eligible for regional center services under the Lanterman Act as a result of intellectual disability, or a disabling condition closely related to an intellectual disability or that requires treatment similar to a person with an intellectual disability (fifth category)?

## FACTUAL FINDINGS

### JURISDICTIONAL MATTERS

1. On September 24, 2018, IRC notified claimant, a six-year-old-girl, that she was not eligible for regional center services because the records provided to IRC did not establish that he had a substantial disability as a result of an intellectual disability, autism, cerebral palsy, epilepsy, or a disabling condition closely related to an intellectual disability or that required similar treatment needs as an individual with an intellectual disability.

2. On October 9, 2018, claimant's mother filed a Fair Hearing Request on claimant's behalf appealing IRC's determination.

3. On November 1, 2018, according to a letter drafted by IRC, the parties held an informal telephonic meeting to discuss claimant's eligibility. Following the meeting, IRC adhered to its original determination finding claimant ineligible for regional center services. IRC explained:

At this time, IRC is standing by its decision that claimant is not eligible for regional center services. The records indicate that claimant's cognitive abilities are in the borderline to low average range. She is currently receiving special education services under the categories of other health impairment and speech and language impairment. The records available do not support that claimant has a qualifying condition for regional center services nor does she have a substantial handicap as a result of a qualifying condition. ...

## DIAGNOSTIC CRITERIA FOR INTELLECTUAL DISABILITY

4. The American Psychiatric Association's 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. Intellectual functioning is typically measured using intelligence tests. Individuals with intellectual disability typically have intelligent quotient (IQ) scores in the 65-75 range.

## DIAGNOSTIC CRITERIA FOR THE FIFTH CATEGORY

5. Under the fifth category, the Lanterman Act provides assistance to individuals with disabling condition closely related to an intellectual disability or that requires similar treatment as an individual with an intellectual disability but does not include other handicapping conditions that are "solely physical in nature." A disability involving the fifth category must also have originated before an individual attained 18 years of age, must continue or be expected to continue indefinitely, and must constitute a substantial disability.

The Association of Regional Center Agencies Guidelines (ARCA Guidelines) provide criteria to assist regional centers in determining whether a person qualifies for services under the fifth category. The ARCA Guidelines provide that the person must function in a manner similar to a person with an intellectual disability or who requires treatment similar to a person with an intellectual disability.

### Functioning Similar to a Person With an Intellectual Disability

6. A person functions in a manner similar to a person with an intellectual disability if the person has significant sub-average general intellectual functioning that is accompanied by significant functional limitations in adaptive functioning. Intellectual

functioning is determined by standardized tests. A person has significant sub-average intellectual functioning if the person has an IQ of 70 or below. Factors a regional center should consider include: the ability of an individual to solve problems with insight, to adapt to new situations, and to think abstractly and profit from experience. (ARCA Guidelines, citing Cal. Code Regs., tit. 22, § 54002.) If a person's IQ is above 70, it becomes increasingly essential that the person demonstrate significant and substantial adaptive deficits and that the substantial deficits are related to the cognitive limitations, as opposed to a medical problem. It is also important that, whatever deficits in intelligence are exhibited, the deficits show stability over time.

Significant deficits in adaptive functioning are established based on the clinical judgements supplemented by formal adaptive behavioral assessments administered by qualified personnel. Adaptive skill deficits are deficits related to intellectual limitations that are expressed by an inability to perform essential tasks within adaptive domains or by an inability to perform those tasks with adequate judgement. Adaptive skill deficits are not performance deficits due to factors such as physical limitations, psychiatric conditions, socio-cultural deprivation, poor motivation, substance abuse, or limited experience.

#### Treatment Similar to a Person With an Intellectual Disability

7. In determining whether a person requires treatment similar to a person with an intellectual disability, a regional center should consider the nature of training and intervention that is most appropriate for the individual who has global cognitive deficits. This includes consideration of the following: individuals demonstrating performance based deficits often need treatment to increase motivation rather than training to develop skills; individuals with skill deficits secondary to socio-cultural deprivation but not secondary to intellectual limitations need short-term, remedial training, which is not similar to that required by persons with an intellectual disability;

persons requiring habilitation may be eligible, but persons primarily requiring rehabilitation are not typically eligible as the term rehabilitation implies recovery; individuals who require long-term training with steps broken down into small, discrete units taught through repetition may be eligible; the type of educational supports needed to assist children with learning (generally, children with an intellectual disability need more supports, with modifications across many skill areas).

### Substantial Disability

8. The ARCA Guidelines refer to California Code of Regulations, title 17, sections 54000 and 54001 regarding whether a person has a substantial disability. This means the person must have a significant functional limitation in three or more major life areas, as appropriate for the person's age, in the areas of: communication (must have significant deficits in both expressive and receptive language), learning, self-care, mobility, self-direction, capacity for independent living; and economic self-sufficiency.

### CRI DU CHAT SYNDROME<sup>1</sup>

9. Claimant suffers from Cri Du Chat Syndrome (the Syndrome). The Syndrome is a rare genetic disorder caused by a missing section on a particular chromosome known as Chromosome 5. Children with the Syndrome will typically have delayed development and some degree of intellectual disability. Sometimes, material from another chromosome may be missing as well. Physical symptoms of a child may

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<sup>1</sup> The description of Cri Du Chat Syndrome was obtained from a document provided by IRC in its exhibit packet, and was not contested by claimant's parents. The source of the information is unknown, as there was no source information contained on the exhibit.

include: a high-pitched cat-like cry at birth; low birth weight; small head; rounded face; flattened nose bridge; eyes spaced wide-apart; folds of skin over the eyelids; abnormalities of the palate; small chin; and malformation of the ears. Health challenges of a person with the Syndrome include: difficulties with eating and swallowing; gastric reflux; constipation; high rate of infections; poor muscle tone; eye problems; hearing loss; skeletal deformities; hernias; and kidney problems.

The severity of the condition can vary. Some persons are only mildly affected and are able to reach their developmental milestones with speech therapy. Other children may be profoundly intellectually disabled, unable to walk, unable to talk, and may have a decreased life span. A majority of children with the Syndrome fall in between these two extremes.

Recommended treatments for person with this Syndrome include physiotherapy; speech therapy; communication alternatives (such as sign language); and occupational therapy to teach coping strategies and new skills.

#### EVIDENCE PRESENTED BY CLAIMANT'S PARENTS

10. Claimant's parents submitted a letter from claimant's pediatrician, Michael S. Yu, M.D. Dr. Yu wrote:

[A]ll children with [the Syndrome] have associated global developmental delay (motor, fine motor, and higher level functioning). Accordingly, claimant ... has required extensive physical, occupational, and speech therapy to help treat her syndrome. Medially it is crucial that these services be continued and given the nature of her syndrome I cannot see a circumstance where they would be justifiably discontinued.

...

11. Claimant's mother believes claimant should qualify for regional center services under the fifth category. Claimant is not a typical child. Claimant has other siblings that were far more developed at the age of six. Claimant functions like a three-year-old child. She has difficulties in school, judgement, and planning. Claimant is very happy most of the time and willing to learn. There are some days when claimant is able to put on her shoes but not tie them; on other days, she may not be able to put on her shoe. Claimant does not have the judgement to refrain from touching something that is hot. Even when told not to reach for the item because it is hot, she will nonetheless still try to touch it. She will touch an item that is sharp or dangerous without realizing that the item has those qualities. She has pulled batteries out of toys and the metal off of pencil tips and chewed them. She has eaten an eraser. Claimant's mother has volunteered in a kindergarten class before and typical six-year-olds do not engage in this behavior. Claimant receives protective supervision from In-Home Supportive Services and claimant's mother is the provider. Claimant cannot recognize colors or letters, but she is improving. Claimant's mother feels like they are being punished because they have worked very hard to get claimant where she is currently at intellectually.

#### EVIDENCE PRESENTED BY IRC

12. Holly Miller, Psy.D., is a staff psychologist at Inland Regional Center. She obtained her Doctor of Psychology in 2009, and already held a Master of Science in Psychology and Bachelor of Arts in Psychology. Dr. Miller has served in a variety of positions, including clinical supervisor where she was in charge of the mental health services provided by the County of Riverside Department of Public Social Services. She served in various internships, all of which involved conducting or assisting in psychological assessments. She has published scholarly works in two peer-reviewed professional journals and has won awards in her field. Dr. Miller also has extensive

experience in the assessment and diagnosis of individuals seeking to obtain regional center services under the Lanterman Act, and in serving on the multi-disciplinary team for IRC to review the cases of those seeking services. Dr. Miller is an expert in the diagnosis of intellectual disability, and in the determination of whether a person qualifies for regional center services under intellectual disability or the fifth category.

13. Dr. Miller reviewed documents provided by claimant, which included school records, *psychoeducational* assessments, records from claimant's participation in the Early Start program, speech and language assessment reports, gross motor perception reports, pediatric eye examination results, an occupational therapy visual perception report, claimant's individualized education plan (IEP), and a letter from claimant's pediatrician. Dr. Miller's testimony and the records are summarized as follows:

14. Typically, a person who is found eligible under the fifth category will have an IQ of 70 or below, and have corresponding challenges in adaptive and cognitive functioning. The deficits in cognitive and adaptive skills are also typically consistent over time; the deficits also must not be secondary to a medical or psychiatric condition.

15. With respect to a letter from claimant's pediatrician mentioning that all children have global delays, it is important to note that global delay is a completely different category than intellectual disability in the DSM-5. According to the DSM-5, global delay is:

[a] diagnosis that is reserved for persons under five years of age when the clinical severity level cannot be reliably assessed during early childhood. This category is diagnosed when an individual fails to meet expected developmental milestones in several areas of intellectual functioning, and applies to individuals who are unable to undergo systematic



assessments of intellectual functioning, including children who are too young to participate in standardized testing. ...

Thus, to the extent claimant may have met the diagnostic criteria for global delay under the DSM-5, she is now six years old, so it would no longer apply. Moreover, global delay is not a diagnosis that qualifies a person for regional center services under the Lanterman Act.

16. Claimant qualified for Early Start services at age three at the Orange County Regional Center (OCRC). In August 2015, the OCRC closed claimant's case because she turned three years of age and did not meet the criteria under the Lanterman Act to qualify for OCRC services going forward.

17. A consent form to test claimant for special education services dated June 24, 2015, showed that claimant's school psychologist found her to be, overall, in the "average to low average range in cognitive functioning." Gross motor skills were found to be in the low average range. Academics were in the low range. Claimant's speech and language skills were found to be "low," and speech and language as well as occupational therapy was recommended. It was also recommended that claimant be placed in a special day class as opposed to the general education setting.

18. Claimant's IEP, dated June 25, 2015, showed claimant qualified for special education services under the categories of "established medical disability" and "speech or language impairment." According to Dr. Miller, and as demonstrated in the IEP, claimant was not functioning cognitively below a child of her age at the time of the IEP. Claimant demonstrated the following receptive language skills: follows routine, familiar with directions and gestural cues, identifies familiar objects from groups of objects without cues, identifies photographs of familiar objects, understands a variety of verbs relating to self-care, understands analogies, understands symbolic play, and uses gestures and vocalizations to request objects and other items. There were no substantial

impairments noted in her gross motor skills. Claimant tested as "average" in grasping and below average in her visual abilities.

19. Claimant's IEP dated August 24, 2017, shows claimant is now receiving special education services under the categories of "other health impairment" and "speech and language impairment." The IEP noted that claimant has difficulty participating in regular activities because of her motor skills and speech skills, which impact her ability to state her wants and needs correctly and in an understandable manner. The majority of her speech problems appear to be in the area of articulation, as opposed to cognition. The IEP noted that claimant has made "excellent progress" in her motor skills over the past year and "continues to show good interaction with her peers and teachers." Claimant is "happy and likes socializing with others." Claimant responds well to praise in instances where she is having difficulty doing something, and although she struggles to stay focused, she will re-focus on activities with prompts. Regarding claimant's interactions with her peers, the IEP stated:

Claimant engages in play sequences with her peers through two or more exchanges, and is oftentimes a leader with play sequences. Claimant shows a preference for some adults over others, and responds more consistency with those adults when redirected or presented with a directive.

Claimant demonstrates nice pretend play skills in the classroom (e.g. dressing up as a princess, playing doctor/patient, pretending to take care of a baby). Claimant is able to establish and maintain proximity with peers during unstructured child directive activities. Claimant responds to effective initiations from peers (e.g., hugs, holds hands).

Claimant will join peers in a cooperative activity, but requires

support with her approach . ... During All the Arts instruction (Drama), claimant is able to interact with her peers in shared activities that oftentimes become cooperative efforts (e.g. building a house from a familiar story, playing a character, etc.) Claimant has shown improvement in her ability to spend longer times in each choice area, and engage with the materials accordingly. Claimant recognizes acceptable/unacceptable behavior in the classroom, and will oftentimes direct her peers to make good choices in the classroom. ...

Regarding claimant's adaptive skills, the IEP stated:

Claimant is able to remove her outer wear independently, and hang up her backpack in her cubby. Claimant is able to remove/put on her shoes on [sic] the correct foot. She is able to put on/take off dress items (hats, shirts, jackets) independently. Claimant is able to request snack/food items, and request help when needed. She prefers to be independent, and will oftentimes attempt to perform skill [sic] on her own. Claimant demonstrates the following social dining skills with verbal support: remains in her seat, eats her food, wipes her face, assists with clearing table, pushes in chair, and throws away trash. Claimant may require some verbal reminders to focus on the task at hand, as she can become interested in what her peers are doing. In the area of bathrooming skills, claimant is able to pull pants up/down,

fasten (w or w/o support), remove diaper (correctly identifying whether she is wet or dry), sit on toilet, wipe (with teacher providing paper), and flush toilet. ... Claimant is able to complete hand-washing/drying.

Claimant's 2017 IEP does not show any significant functional limitations in three or more areas of a major life activity, or any significant deficit in claimant's cognitive or adaptive skills.

20. In an October 12, 2017, Triennial Psychoeducational Assessment, the evaluators administered to claimant a battery of cognitive and adaptive assessments. The standardized tests administered included verbal and nonverbal assessments. According to Dr. Miller, as supported by the assessment report, claimant's performance was scattered among multiple abilities, but overall, fell in the mid to upper borderline range and the low average range. Claimant's cognitive abilities improve markedly on nonverbal tests as opposed to verbal tests. This type of performance is not what would be expected for a person who has an intellectual disability. The assessment report specifically considered claimant's performance across all the assessments and concluded that "claimant does not appear to meet the eligibility criteria under Intellectual Disability as her nonverbal ability is within the low average range . ..."

21. Claimant's most recent IEP dated August 22, 2018, shows claimant continues to be eligible for special education services under the categories of "other health impairment" and "speech and language impairment." The IEP stated that claimant has progressed in the area of communication since her last IEP and "continues to do well in attempting and demonstrating her skills."

22. Dr. Miller did not provide testimony regarding several other reports contained in IRC's Exhibit packet. Those reports generally were focused on claimant's speech and visual challenges, and were not conducted by psychologists or persons

qualified to render a diagnosis as to a person's cognitive or adaptive abilities. The reports show claimant does have impairments in her speech, as well as in her visual abilities.

23. Based on the records provided, Dr. Miller concluded claimant is not eligible for regional center services under intellectual disability or the fifth category. Claimant exhibits strengths (nonverbal abilities) and weaknesses (verbal abilities). However, a person with an intellectual disability, or a person who functions like a person with an intellectual disability, has consistent deficits across all areas. Claimant's cognitive and adaptive skills do not show significant deficits, and she is not served in school under the special education category of intellectual disability. One of her IEP's specifically excluded intellectual disability as a qualifying diagnosis. Claimant's scores in the various batteries of cognitive and adaptive testing are higher than what one would expect with a person who has an intellectual disability. Her speech and language difficulties, as well as her visual problems, appear to be secondary to her medical condition as opposed to a developmental disability. Finally, even if claimant did have an intellectual disability or required treatment similar to a person with an intellectual disability, the records do not show she has significant functional limitations in three or more areas of a major life activity, as required.

## 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, 500.)

## 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 provides:

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 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.

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

(a) "Developmental Disability" means a disability that is attributable to mental retardation<sup>2</sup>, 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:

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<sup>2</sup> 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.

(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. Claimant's parents clearly want the best for their daughter, and the many services that have been provided by claimant's school, such as speech and occupational therapy, have assisted claimant in her abilities. However, eligibility under the Lanterman Act, and in consideration of the ARCA Guidelines and applicable regulations, does not depend on whether the claimant has benefitted from past interventions or will continue to benefit from them; eligibility depends on whether a claimant currently suffers from a qualifying condition or a condition that causes her to function similar to a person with an intellectual disability or that requires similar treatment as a person with an intellectual disability. The burden is on claimant to show by a preponderance of the evidence that she qualifies for services.

A preponderance of the evidence does not show claimant is eligible for regional center services based on a diagnosis of intellectual disability. Dr. Miller's expert testimony was credible and unrebutted by any other expert or documentary evidence sufficient to overcome her conclusion that claimant is ineligible. Claimant's records show

she suffers from speech, language, and visual difficulties, most likely attributable to her medical condition. Her cognitive and adaptive abilities vary, and she is stronger in the area of nonverbal cognitive abilities than verbal cognitive abilities. In reviewing claimant's IEP's and the records provided, claimant has shown improvement over time in both cognitive and adaptive skills. A person with an intellectual disability typically exhibits deficits across all areas, and the deficits remain consistent over time. Claimant also has never been served in special education under the category of intellectual disability; to the contrary, intellectual disability was specifically excluded as a qualifying diagnosis in her 2015 IEP. In sum, claimant does not meet the diagnostic criteria for intellectual disability under the DSM-5.

For the same reasons discussed above, claimant does not meet the criteria for regional center eligibility under the fifth category, because she does not function like a person with an intellectual disability.

A person may also be found eligible for regional center services under the fifth category if he or she requires "treatment similar to" a person with an intellectual disability. Claimant does receive speech and language, as well as occupational therapy. She is also placed in a special day class to accommodate her needs. Persons with intellectual disabilities often receive speech and language therapy as well as occupational therapy, and also attend special day classes. There is a distinction, however, between *services* received by an individual and the *treatment* received in order to render a person eligible under the fifth category. In other words, to be eligible under the fifth category, a claimant must establish he or she requires "treatment similar to" a person with an intellectual disability. Establishing that claimant merely uses "services" similar to those of a person with intellectual disability is not sufficient. A preponderance of the evidence did not show that claimant requires treatment similar to a person with an intellectual disability.

Finally, a person seeking eligibility under the Lanterman Act must have a diagnosis of a qualifying condition (i.e. intellectual disability or the fifth category) as well as be substantially disabled as a result of that qualifying condition. Even assuming claimant met the diagnostic criteria for an intellectual disability or the fifth category, the records provided do not show claimant has significant functional limitations in three or more major life activities. Claimant's IEPs specifically show a well-adjusted child who has the ability to interact with her peers, conduct herself appropriately, and respond to prompts when necessary. While claimant may need help in some areas of self-care and in getting her to refocus on the activity before her, there is nothing in the records provided that show claimant's deficits in adaptive skills are substantially disabling to such a degree as to render her eligible for regional center services at this time.

## ORDER

Claimant's appeal from the Inland Regional Center's determination that she is not eligible for regional center services and supports based on a diagnosis of intellectual disability or the fifth category is denied.

DATED: December 6, 2018

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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.**