

**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. 2019060765

DECISION

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on July 22, 2019.

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

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

The matter was submitted on July 22, 2019.

ISSUE

Is claimant eligible for regional center services under the Lanterman Act under a diagnosis of Autism Spectrum Disorder and/or Intellectual Disability or under “the fifth category”?

FACTUAL FINDINGS

Jurisdictional Matters

1. On May 9, 2019, IRC notified claimant that she was not eligible for regional center services. IRC made this decision based on records it reviewed and decided that intake services were not warranted.
2. In a fair hearing request dated May 20, 2019, claimant’s mother appealed IRC’s decision and this hearing ensued.
3. In her fair hearing request, claimant stated the following, regarding the reasons why she is eligible for regional center services: claimant’s primary care provider verified that claimant has a developmental delay, claimant has a history of a learning disability likely due to a chromosomal abnormality and her psychiatrist, Susan Cho, M.D., diagnosed her with Autism Spectrum Disorder (Autism).

Diagnostic Criteria for Autism Spectrum Disorder and Intellectual Disability

4. Official notice has been taken of excerpts from the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition

(DSM-5), which was referenced during the hearing and in records submitted as evidence. The DSM-5 identifies 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 on the basis of Autism Spectrum Disorder.

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 that "[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."

Claimant's Background

5. Claimant is 16 years old and has completed the 10th grade. Through her school district she receives in home hospital instruction due to repeated hospitalizations and mental health instability. She receives mental health services through San Bernardino County Vista Community Counseling where she is under the care of Susan Cho, M.D., a child and adolescent psychiatrist. In a letter dated September 14, 2018, Dr. Cho stated that claimant "has been diagnosed with Schizophrenia, Autism Spectrum Disorder, and Disruptive Mood Dysregulation Disorder and is currently taking medications to help her with these symptoms."

6. According to claimant's most recent Individualized Education Plan (IEP) dated February 13, 2019, claimant has engaged in emotional dysregulation resulting in unsafe behaviors such as running into traffic and threatening to hurt herself with knives and pills. She "ditches" class, endangers herself with cutting materials and once brought a weapon to school. Per her teacher's report, her grades were C+ in English, B in World History, B+ in Earth Science, C minus in IMI, B in Physical Education and D+ in Study Skills. She said she wants to be a clothing designer and work at Walmart after high school. The teacher reported that she has observed claimant express laughter, sadness, tiredness and sickness.

7. Due to her behaviors, the school recommended residential placement in a facility that incorporates mental health services and academics throughout the day. In this regard, Jeremy Chamberlain, M.S., LMFT, completed an Educationally Related Mental Health Services Residential Assessment for the District dated March 28, 2018. This report detailed multiple incidents involving claimant between December 5, 2016, and February 24, 2018, in which she tried to injure herself, expressed suicidal ideation, and on one occasion left school, became "combative" with school staff and police were

called. Claimant has had a number of hospitalizations due to hallucinations and aggressive behaviors. Claimant was recommended for educationally related residential placement to develop healthy coping strategies, boundaries, manage mood changes and anger and to increase independence skills in a highly structured educational environment supervised by staff 24 hours a day to ensure her safety. Claimant's mother declined this offer.

IRC's Decision to Deny Services

8. In two reports dated April 26, 2018, and May 2, 2019, IRC's Eligibility Team (Team) documented its findings that claimant was ineligible for regional center services. In the Team's April 26, 2018, eligibility determination the Team noted it reviewed two reports; the Fontana Unified School District's March 28, 2018, Psychological-Educational evaluation of claimant and another report dated February 23, 2018, from the school district. The Team noted that claimant received school district services under the "Emotional/Disturbance" category and the results of the evaluation detailed in the report did not support an autism diagnosis. In the Team's May 2, 2019, eligibility determination the Team stated that it reviewed the psychological report dated October 23, 2018, of Katherine Stavropoulos, Ph.D., a medical report from claimant's psychiatrist, Dr. Cho, dated September 14, 2018, and claimant's most recent IEP dated February 13, 2019. The Team, which included Ruth Stacy, Psy.D., IRC Staff Psychologist, who testified in this hearing, determined based on the records it reviewed that the results of the psychological evaluation were inconsistent with Autism Spectrum Disorder or Intellectual Disability.

9. In her testimony, Dr. Stacy summarized the findings and conclusions Dr. Stavropoulos made in her October 23, 2018, report and the findings and conclusions in the March 28, 2018, Psycho-Educational Assessment from the Fontana Unified School

District. Based on these findings, Dr. Stacy concluded that claimant does not meet the applicable DSM-5 criteria for regional center services under either the Autism or intellectual disability criteria. The findings Dr. Stacy cited to support her decision are summarized immediately below.

The October 23, 2018, Report of Katherine Stavropoulos, Ph.D.

10. Clinical Psychologist Stavropoulos works at the SEARCH Family Autism Resource Center (SEARCH). Claimant's psychiatrist, Dr. Cho, referred claimant to SEARCH to assess whether she has Autism. Dr. Stavropoulos assessed claimant on October 23, 2018, and administered the following tests: Wechsler Abbreviated Scale of Intelligence, Second Edition (WASI-II), Autism Diagnostic Observation Scales, Second Edition (ADOS-2) and Vineland Adaptive Behavior Scales, Third Edition (Vineland-III). Dr. Stavropoulos also conducted a clinical interview of claimant, interviewed claimant's mother, and talked to Dr. Cho. Dr. Stavropoulos prepared a detailed report summarizing her conclusions; her report also summarized claimant's background information. (Exhibit 10.) In addition, she reviewed, it appears, prior evaluation reports including a 2009 report from the Fontana Unified School District that summarized the results of intellectual testing administered to claimant at the time.

11. In her report, Dr. Stavropoulos provided the following summary of claimant's clinical history. Claimant received special education services based on learning disability and intellectual disability categories. She saw Dr. Cho monthly for medication management and therapy. She has been hospitalized multiple times after she reported hearing voices telling her to harm her family and has been hospitalized for suicide attempts more than once. She has been diagnosed with schizophrenia, major depressive disorder, unspecified psychosis, and intermittent explosive disorder. Claimant's mother told Dr. Stavropoulos that claimant engages in aggressive

behaviors, has angry outbursts, and difficulty controlling her emotions and communicating. Her mother also told Dr. Stavropoulos that claimant often sits in her room alone, largely unresponsive, listening to music and often is entirely unresponsive to strangers and will not talk to anyone with whom she is not familiar.

12. As part of her evaluation Dr. Stavropoulos talked to Dr. Cho who at the time had been treating claimant for a year. Dr. Cho described claimant as severely depressed and suicidal, she said claimant was largely unresponsive to questions and only nods or shakes her head in response to questions. Dr. Cho said that she had difficulty obtaining clear and consistent information from claimant, and claimant sometimes denied hearing voices or experiencing visual hallucinations and at other times told her she heard voices telling her to harm her family or herself. Dr. Cho said that claimant's affect was flat and her affect was flat before she began taking the meds Dr. Cho prescribed for her.

13. Dr. Stavropoulos found that claimant was "unresponsive" to her efforts to administer the verbal portions of the WASI and used only 10 words during the two-hour assessment. She was able to complete non-verbal subtests which make up the Perceptual Reasoning subscale. It appeared to Dr. Stavropoulos that claimant could comprehend speech, follow directions and understand what was being said to her, but she was unwilling to speak or respond. Dr. Stavropoulos commented, "it is unclear whether her difficulty with speech is psychological or physical in nature."

14. During her interview with claimant, claimant was able to tell Dr. Stavropoulos that she experienced "black-outs" where she could not remember what happened. She said these happened about once a day and she felt tired and confused after them. Claimant said she could hear but she could not see even though her eyes were open. Claimant said these blackouts felt like sleeping. Claimant told Dr.

Stavropoulos that she remembered having seizures as a child and these black outs felt similar.

15. Similar to her difficulty administering the WASI to claimant, Dr. Stavropoulos was unable to administer the ADOS assessment to claimant and, thus, it was not completed. She described claimant as “un-testable” due to her “unwillingness to speak.”

16. Claimant’s mother provided information for the Vineland assessment Dr. Stavropoulos administered. This test assessed what a child actually does in an independent manner as opposed to what the child is capable of doing. The results of this assessment show that claimant’s overall adaptive skills, her communication, and daily living and socialization skills are in the low range for her age. Claimant understands English and Spanish, can attend to a book or TV for about an hour but does not always understand what is going on. Per her mother’s report, claimant reads at the 6th grade level and can write simple compositions of less than a page’s length. During her home schooling, claimant corrects her work before giving it to the teacher; she can read tables, charts and maps with prompts from her mother or teacher.

17. With respect to daily living skills Dr. Stavropoulos found that claimant’s personal and community skills were in the low range while her domestic skills were in the moderately low range. She showers independently, dresses herself and picks appropriate clothes for the weather. She can use the appropriate restroom in public but needs reminders to use the bathroom before leaving home. Claimant is not allowed to have access to knives at home to cut or prepare food. She can use a microwave and helps her mother prepare meals. Claimant can use the phone and talks to familiar persons. Claimant can tell time and knows how to count change and distinguish between different coins or bills.

18. Claimant's socialization skills were assessed at the low range. She is not affectionate with others; she does not have "good eye contact" or attempt to comfort others when they are sad or hurt. She does not initiate play and has difficulty sharing. Claimant does not handle changes in routines well and changes in routine often lead to behavioral outbursts. She does not respond politely to strangers when introduced and will ignore them.

19. Regarding maladaptive behaviors, claimant destroys her sister's and her own possessions when provoked, she can be overly needy at times and will cling to her mother, she cries unexpectedly and often complains of feeling sick with no medical reason. Claimant's aggressive behaviors have decreased dramatically.

20. Because the ADOS could not be completed, Dr. Stavropoulos relied on previous "assessments" and her "current clinical interview" to assess whether claimant met the diagnostic criteria for Autism Spectrum Disorder and/or Intellectual Disability. In this regard she relied upon the findings contained in the 2009 Fontana Unified School District psychoeducational report when claimant was about six years old. At that time, claimant's scores in the areas of cognitive processing fell in the low average range on the WASI (Performance Scale Score of 88), in the average range on the TONI (Standard score of 95), and her verbal memory skills were in the low average to average range (Standard scores of 86 and 96). Regarding visual-motor skills, claimant performed in the above-average range (Standard score of 104). On the Woodcock Johnson her scores varied from below norm in Calculation and Applied Problems (51) with her highest score was in Letter-Word Identification (91) and Spelling (103). The report stated that her speech and language were clear and understandable, but she had difficulty speaking in complete sentences or using age-appropriate grammar.

21. Based on this information from the previous assessments, Dr. Stavropoulos found that claimant did not meet either the Autism Spectrum Disorder or Intellectual Disability DSM-5 criteria. She reached this conclusion for the following reasons: claimant's "previous psychoeducational assessment" did not note symptoms or signs of autism as her behaviors and interactions were noted to be age appropriate. Claimant's difficulties appeared to Dr. Stavropoulos to be with speaking aloud to persons she was not familiar with, in addition to a history of significant depression, psychosis and attempted suicide. Claimant's affect was flat which Dr. Stavropoulos indicated was consistent with her psychiatrist's report. She commented that her flat affect was not a side effect or product of medications.

22. Dr. Stavropoulos recommended, based on claimant's reports that she suffered from seizures, that claimant be evaluated by a neurologist. She commented in her report that that these episodes of possible seizures may be contributing to her current symptoms and a "thorough" neurological exam and testing was needed to make this determination.

The March 28, 2018, Fontana Unified School District Psycho-Educational Assessment Report

23. The Fontana Unified School District's Individualized Education Plan Team prepared a Psycho-Educational Assessment Report dated March 28, 2018. This IEP team prepared this report to re-evaluate claimant with updated cognitive functioning and, in addition, to address concerns raised by claimant's mother that claimant may have Autism. According to the report, claimant was previously assessed on March 30, 2017, to determine if she was eligible for special education services. She was deemed to qualify for such services under the Special Learning Disability and Emotional Disturbance categories.

As part of her evaluation the following assessments were administered to claimant: ADOS-2, Autism Spectrum Rating Scale (Parent Response Form), ASRS (Teacher Response Form), Comprehensive Test for Phonological Processing-2nd Edition, and Developmental Test of Visual Motor Integration, the Social Responsiveness Scale-2nd Edition (Parent Response), SRS-2 (Teacher's Response), and Comprehensive Test for Nonverbal Intelligence-2nd Edition (CTONI-2). Claimant was also administered the Adaptive Behavior Assessment System 3rd edition. In addition, the Team reviewed claimant's developmental, medical and academic history and interviewed claimant.

In the hearing, Dr. Stacy found the following assessments in this report relevant to her conclusions concerning whether claimant qualifies for regional center services under either the Autism or intellectual disability criteria: The ASRS, ADOS-2, CTONI-2 and ABAS assessments.

School Psychologist Sabrina Sandoval¹ administered the ADOS to claimant on March 20, 2018. Dr. Stacy described this test as the "gold standard" to assess for possible autism. The ADOS reviewer, based on his or her observations, completes numerical ratings in communication, conversation, and reciprocal social interaction. Ms. Sandoval found that claimant's total score of 19 exceeded the Autism cutoff point suggesting a diagnosis of an autistic disorder. The total score, however, for repetitive and restricted behaviors was zero. Ms. Sandoval further added that the 19 level Social Affect Rating Scale suggested a "high indication of autism," but she discounted this score. She wrote that the results needed to be looked at "with caution" due to

¹ Ms. Sandoval's training is not identified, so it is unclear whether she holds a Master's or Doctoral degree in psychology.

claimant's "past experienced trauma" in which claimant's "lack of eye contact, lack of offering spontaneous conversation, and inability to sustain conversation can be characteristics (of) experienced trauma." In December 2017, claimant reported to police that she was sexually abused by her father. The report prompted an increased level of counseling and an ongoing investigation. Claimant's mother disclosed that this abuse began when she was seven years old. In conflict with an autism diagnosis, psychologist Sandoval noted further that claimant demonstrated the ability to recognize emotions with different characters in the cartoon cards, book and resort scene she was shown. Ms. Sandoval noted that claimant identified the frog in the book as happy and the turtle as scared. She said the cat was mad at himself. When she was asked about emotions, claimant was able to state appropriate kinds of things made her feel happy, afraid, sad and angry. Claimant told Ms. Sandoval that when she was afraid her heart was "racing." When asked about friends and relationships, claimant was able to describe a friend she used to have.

Two other assessments, ASRS tests, were used to assess whether claimant met the criteria for autism. The ASRS assessments are based on the reports of teachers or counselors and the child's parent. As the reviewer noted, the ASRS assessment results are evaluated with other information to assess whether the child has symptoms associated with autism. The ASRS assessment based on claimant's counselor or teacher rated claimant with "elevated" classifications in social communication, social/emotional reciprocity, and "very elevated" in adult socialization, and "slightly elevated" under "the DSM-5 Scale" and peer socialization. She was otherwise rated as having "average" scores. Her total score was deemed "average."

Under the ASRS rating scale based on claimant's mother's report, claimant had a "very elevated" total score and had "elevated" or "very elevated" scores in all other areas.

In terms of measuring her intellectual functioning, as measured by the CTONI-2 assessment, claimant's non-verbal ability was measured to be a standard score of 74, which falls in the 4th percentile and placed her within the poor range when compared to same age peers. This contrasts, as the reviewer in the report noted, with claimant's performance on the CTONI-2 as reported in the March 14, 2016, report where she scored in the average range with a standard score of 80, which falls in the 44th percentile range. The reviewer commented that at the time the CTONI-2 was administered to her, in March 2018, claimant had recently disclosed the traumatic incident involving her father and, per claimant's mother, she was also adjusting to medication changes and was having a difficult time with the events that followed the disclosure of the traumatic event. The reviewer further commented that these "significant factors may explain the decrease in performance."

Claimant's social and adaptive functioning as measured under the ABAS were measured in the extremely low to low range in all adaptive domain categories including self-direction, self-care and communication. This test measures the adaptive skills needed to effectively and independently care for oneself respond to others, and meet environmental demands at home, school, work, and in the community.

Dr. Stacy's Testimony

24. As noted earlier, Dr. Stacy testified in this hearing and summarized the information contained in the evidence of record. Dr. Stacy is a licensed psychologist and since 2015 has been a staff psychologist at IRC. Based on her review of the

records, she agreed with Dr. Stavropoulos's and the Fontana Unified School District's conclusions that claimant does not meet the diagnostic criteria for either Autism or Intellectual Disability. Dr. Stacy stated that the SEARCH program where Dr. Stavropoulos works is a respected program in assessing persons for Autism.

She stated the record indicates that claimant suffers from an emotional disturbance due to trauma and this disturbance has affected her recent test results. Regarding this emotional disturbance, Dr. Stacy added that claimant has been diagnosed with Schizophrenia and Major Depression. Dr. Stacy further added that results could also have been affected by the medications she was taking. She noted that in 2009 claimant had tested at the low average range of intelligence and her scores were above the scores identified for a diagnosis of Intellectual Disability under the DSM-5.

Regarding whether claimant meets the criteria for Autism, Dr. Stacy stated that claimant's emotional disturbance, not Autism, explains her behaviors. Dr. Stacy noted that claimant's IEP documented that claimant displayed social awareness, negative attention seeking in school, which included pulling fire alarms and threats to hurt herself. These behaviors were not "across the board"; they were in the school setting. These attention seeking behaviors are inconsistent with the symptoms typically found in persons with Autism. Claimant also displayed a range of emotions that her teacher documented in the February 13, 2019, IEP, and she was able to identify emotions. Her ability to do these things is also not consistent with an Autism diagnosis. In addition, Dr. Stacy said that while the ADOS results for social interaction documented in the Fontana School District report were in the range for a possible Autism diagnosis, the score for repetitive and restricted behaviors was zero, which is inconsistent with an Autism diagnosis.

Dr. Stacy addressed the September 14, 2018 letter from claimant's psychiatrist, Dr. Cho, in which she stated that claimant has been diagnosed with Schizophrenia, Autism Spectrum Disorder, and Disruptive Mood Dysregulation Disorder. Dr. Stacy disagreed with Dr. Cho's conclusion here because Dr. Cho referred claimant to Dr. Stavropoulos to assess claimant for possible Autism and Dr. Stavropoulos found that claimant did not meet the applicable criteria for this condition. Also, Dr. Stacy noted that Dr. Cho's statement did not identify how she reached this conclusion, and for this reason her conclusion should be given no weight.

Dr. Stacy also gave no weight to the statement contained in another letter, dated July 15, 2019, from one of claimant's treating doctors, Leann K. Hoang, M.D., a pediatric and adult neurologist, that claimant "has been diagnosed" with Autism and Intellectual Disability. (Exhibit A.) Claimant submitted this letter into evidence at the hearing and Dr. Stacy reviewed it at that time. Dr. Stacy discounted Dr. Hoang's opinion in light of the standardized assessments that were done that show she does not have Autism or Intellectual Disability.

Additionally, Dr. Stacy discussed Dr. Hoang's further statement in her July 15, 2019 letter that claimant has been diagnosed with a "chromosomal abnormality."² Dr. Stacy said that "chromosomal abnormality" could mean a lot of things. Dr. Hoang did

² Claimant's primary care doctor, Laura Holzum, M.D., in a note dated July 6, 2018 (Exhibit 8), wrote that claimant "has a long history of learning disability likely due to a known chromosomal abnormality." Similar to her conclusion regarding Dr. Hoang's reference to chromosomal abnormality in her letter, Dr. Stacy commented that Dr. Holzum's statement does not clarify what claimant's chromosomal abnormality may mean for assessing her for regional center eligibility.

not explain what this chromosomal abnormality diagnosis might mean in terms of assessing claimant for regional center eligibility.

Dr. Stacy, moreover, found that claimant does not meet the criteria for regional services eligibility under the fifth category. The "fifth category" is defined under Welfare and Institutions Code section 4512, subdivision (a), as "a disabling condition closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability." It is referred to as the fifth category because it is the "fifth category" for regional center services in addition to the four other eligibility categories (cerebral palsy, epilepsy, autism spectrum disorder, and intellectual disability).

Testimony of Claimant's Mother

25. Claimant's mother expressed her deep concern for her daughter, her need to obtain services to help her, and frustrations she has had getting the services her daughter needs. She detailed claimant's troubling behaviors. She noted that claimant brought a knife to school, she has run into traffic, she displayed impulsive behaviors, she does not socially interact with others and has no desire to do so, and she does not communicate even when she has been hurt. Claimant's mother was told at the psychiatric hospital where claimant was admitted that claimant has Autism. It was not clear from the record who told her this or the basis of this statement.

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.)

Statutory Authority

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

3. Welfare and Institutions Code section 4501 states:

The State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. Affecting hundreds of thousands of children and adults directly, and having an important impact on the lives of their families, neighbors and whole communities, developmental disabilities present social, medical, economic, and legal problems of extreme importance . . .

An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage

of life and to support their integration into the mainstream life of the community. To the maximum extent feasible, services and supports should be available throughout the state to prevent the dislocation of persons with developmental disabilities from their home communities.

4. Welfare and Institutions Code section 4512, subdivision (a), defines “developmental disability” as follows:

“Developmental disability” means a disability which originates before an individual attains age 18; 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 intellectual disability, but shall not include other handicapping conditions that are solely physical in nature.

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

(a) "Developmental Disability" means a disability that is attributable to mental retardation,³ 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 psychosocial deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual

³ The regulation still uses the term "mental retardation"; the DSM-5 uses the term "intellectual disability."

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.

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.

Fifth Category

7. Under the “fifth category” the Lanterman Act provides assistance to individuals with “disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability” but does not provide services for “other handicapping conditions that are solely physical in nature.”⁴ Along with the other four qualifying conditions (cerebral palsy, epilepsy, autism spectrum disorder, and intellectual disability), a disability involving the fifth category must originate before an individual attains 18 years of age, must continue or be expected to continue indefinitely, and must constitute a substantial disability.

The fifth category is not defined in the DSM-5. In *Mason v. Office of Administrative Hearings* (2001) 89 CalApp.4th 1119, 1129, the court held that the fifth category was not unconstitutionally vague and set down a general standard: “The fifth category condition must be very similar to mental retardation,⁵ with many of the same,

⁴ Welfare and Institutions Code section 4512, subdivision (a).

⁵ The DSM-5 uses the term “intellectual disability” for the condition previously referred to as “mental retardation.” The cases cited herein were decided when the term mental retardation was in use and contain that term. For clarity, that term will be used when discussing those holdings.

or close to the same, factors required in classifying a person as mentally retarded. Furthermore, the various additional factors required in designating an individual developmentally disabled and substantially handicapped must apply as well.”

On March 16, 2002, in response to the *Mason* case, the Association of Regional Center Agencies (ARCA) approved the Guidelines for Determining 5th Category Eligibility for the California Regional Centers (Guidelines).⁶ In those Guidelines, ARCA noted that eligibility for Regional Center services under the fifth category required a “determination as to whether an individual functions in a manner that is similar to that of a person with mental retardation **OR** requires treatment similar to that required by individuals with mental retardation.” (Emphasis in original.) The Guidelines stated that *Mason* clarified that the Legislative intent was to defer to the professionals of the Regional Center Eligibility Team to make the decision on eligibility after considering information obtained through the assessment process. The Guidelines listed the factors to be considered when determining eligibility under the fifth category.

Another appellate decision, *Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462, has suggested that when considering whether an individual is eligible for regional center services under the fifth category, that eligibility may be based largely on the established need for treatment similar to that provided for individuals with mental retardation, and notwithstanding an individual’s relatively high level of intellectual functioning. In *Samantha C.*, the individual applying for regional center services did not meet the diagnostic criteria for mental retardation.

⁶ The ARCA guidelines have not gone through the formal scrutiny required to become a regulation, were written before the DSM-5 was in effect and are not entitled to be given the same weight as regulations.

Her cognitive test scores were above average in the areas of abstract reasoning and conceptual development and she had good scores in vocabulary and comprehension. She performed poorly on subtests involving working memory and processing speed, but her scores were still higher than persons with mental retardation. The court noted that the ARCA Guidelines recommended consideration of the fifth category for those individuals whose "general intellectual functioning is in the low borderline range of intelligence (I.Q. scores ranging from 70-74)." (*Id.* at p. 1477.) However, the court commented that individuals may qualify for regional center services under the fifth category on either of two independent bases, with one basis requiring only that an individual require treatment similar to that required for individuals with mental retardation.

Evaluation

8. Claimant failed to prove by a preponderance of the evidence that she has Autism Spectrum Disorder or an Intellectual Disability under the DSM-5 criteria, or that she otherwise qualifies for services under the fifth category.

This decision is based on Dr. Stavropoulos's findings and opinions, the findings and opinions contained in the Fontana Unified School District Psycho-educational assessment, and Dr. Stacy's testimony that claimant does not meet the requisite criteria based on these reports. Additional support for this decision is found in claimant's February 13, 2019, IEP. As detailed in these documents, claimant suffers from psychiatric disorders and emotional disturbance that leave her with symptoms that appear to resemble the difficulties with social interaction found in persons with Autism. Similarly, claimant's symptoms from her psychiatric condition, in addition to the trauma she reported, appear to have affected her performance on intellectual tests she took in 2018. In 2009, she performed in the low average testing range. Also,

claimant has displayed behaviors that are not consistent with or typical of the behaviors found in persons who have Autism.

With this stated, this decision is made without prejudice to allow claimant to obtain information that was not available to her at the time of the hearing, specifically, information relating to a possible seizure disorder, which Dr. Stavropoulos discussed in her report. Dr. Stavropoulos recommended that claimant obtain a thorough neurological assessment to address the possibility she has a seizure disorder. If claimant is found to have such a condition she may qualify for regional center services under the epilepsy category.

ORDER

Claimant's appeal from Inland Regional Center's determination that she is not eligible for regional center services and supports is denied. Claimant is not eligible for regional center services and supports under the Lanterman Developmental Disabilities Services Act.

DATED: July 26, 2019

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.