

**BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA**

**In the Matter of:**

**CLAIMANT**

**vs.**

**REDWOOD COAST REGIONAL CENTER, Service Agency.**

**OAH No. 2019070463**

**DECISION**

Administrative Law Judge Michael C. Starkey, State of California, Office of Administrative Hearings, heard this matter on September 11, 2019, in Eureka, California.

Claimant was represented by claimant's mother and was present at the hearing.

Kathleen Kasmire represented Redwood Coast Regional Center (RCRC), the service agency.

The record closed and the matter was submitted on September 11, 2019.

## **ISSUES**

Is claimant eligible for regional center services on the ground that she is substantially disabled by conditions found to be closely related to intellectual disability (ID) or to require treatment similar to that required for individuals with an ID? If not, is RCRC required to reassess claimant at this time?

## **FACTUAL FINDINGS**

### **Introduction and Procedural History**

1. Claimant is six years old.<sup>1</sup> She lives with her mother and multiple siblings.
2. Claimant sought regional center services from RCRC. After an evaluation and an informal meeting, RCRC representatives concluded claimant was not eligible for services on June 21, 2019. RCRC also denied a request by claimant to be reassessed. Claimant timely requested a hearing and this proceeding followed.
3. Claimant contends she is eligible for regional center services because she is substantially disabled by conditions found to be closely related to ID or to require treatment similar to that required for individuals with an ID. This is referred to as the "fifth category" of eligibility. Claimant also maintains that RCRC's clinical psychological evaluation of claimant was inaccurate and that claimant should be reassessed if she is

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<sup>1</sup> Claimant will not be referred to by name in order to protect her privacy.

not found eligible. RCRC contends that claimant is not eligible under the fifth category and there is no basis for reassessment at this time.

## **Diagnostic Criteria for Intellectual Disability**

4. The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) was published by the American Psychiatric Association in 2013. It currently serves as the principal authority for psychiatric diagnoses in the United States.

5. The diagnostic criteria for ID set forth in the DSM-5 are:

A. Deficits in intellectual functioning, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.

B. Deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.

C. Onset of the intellectual and adaptive deficits during the developmental period.

(DSM-5 at p. 33.)

6. Intellectual functioning is typically measured using intelligence tests. Individuals with intellectual disability typically have intelligent quotient (IQ) scores of 70 or lower. (DSM-5 at p. 37.)

## **Developmental and Social History**

7. Claimant's mother was physically abused during her pregnancy with claimant. Claimant was born approximately one month prematurely and spent approximately one month in the neonatal intensive care unit before she was discharged.

8. Claimant started to walk when she was one-year-old. She said her first words when she was 18 months old, but did not start speaking in simple phrases until she was four years old. She typically communicated her needs via pointing and vocalizing.

9. At two and one-half years old, claimant was enrolled in a special needs program similar to the California Early Start Program.

10. Claimant's mother reports that claimant's father physically abused claimant's mother, including one incident when claimant's mother was holding claimant. Claimant's mother reports that claimant's father also sexually abused claimant's sisters and he was deported to Mexico. The family spent years in domestic violence shelters and remains fearful that the father will escape from prison in Mexico and find them.

11. Claimant has a family history of learning disorders, ID, autism spectrum disorder (ASD), substance abuse, and mental health disorders.

12. Claimant's health history includes a large number of ear infections which led to multiple outpatient surgeries for tympanostomy tube placement,<sup>2</sup> and ultimately removal of her adenoids. Claimant has mild to moderate hearing loss, which was discovered at approximately three years of age. Claimant has severe asthma, resulting in many visits to the emergency department. Claimant is severely allergic to multiple medications and her mother reports that she can no longer undergo anesthesia due to her allergies. Claimant was also hospitalized in June 2016 after a near-drowning incident during which she stopped breathing. She was discharged within 24 hours and does not appear to have suffered long-lasting problems from that incident.

13. Claimant's toileting skills are still inconsistent. Her mother also assists her with bathing and teeth-brushing.

14. Claimant started kindergarten in 2018.

15. On November 9, 2018, claimant was referred for special education services and she was subsequently evaluated by her school district. Claimant's Oral and Written Language Scales scores were 18th percentile for listening comprehension, 7th percentile for oral expression, and 9th percentile for oral language composite. On the Expressive Vocabulary test, she scored at the 25th percentile. On the Goldman Fristoe Test of Articulation-3 she scored at the 10th percentile. She demonstrated gross and fine motor skills within the range of her peers. Claimant was observed to be shy, but showing increased confidence and participation at school. Her social emotional/behavioral skills were reported to be within the range of her peers. It was

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<sup>2</sup> A small tube inserted into the eardrum to ventilate the middle ear and prevent the accumulation of fluids.

reported that she is generally able to take care of her daily needs at school. It was noted that claimant had been absent from school 19 of the 99 days she had been enrolled.

16. On February 8, 2019, an Individualized Education Program (IEP) meeting was held with claimant's mother, claimant's teacher, a speech teacher, the principal of claimant's school, and Nichole Mahouski, a public health nurse, in attendance. The assessment team and claimant's mother agreed that claimant was eligible for special education services, based upon a finding of speech and/or language impairment. The goal of claimant's IEP is to improve her communication and articulation skills. She remained in a fully integrated classroom, but began receiving three 30-minute sessions per week of language and speech services. Claimant's mother plans to request additional speech therapy services for claimant from the school district.

## **RCRC Evaluation**

17. On February 13, 2019, RCRC intake specialist Alex Ostell met with claimant and her mother at their home. In addition to the facts set forth above, Claimant's mother reported having concerns about claimant's development since her birth. Claimant's mother reported that claimant dislikes school and she experiences anxiety when away from her siblings. Claimant's mother reported that claimant has poor safety awareness and the judgment of a two or three-year-old. She also reported that claimant exhibited some hyperactivity and aggression behaviors.

18. On May 16, 17 and 18, 2019, Robin E. Kissinger, Ph.D., a licensed clinical psychologist, evaluated claimant to determine her level of cognitive functioning. On the first two dates, claimant was evaluated at home and on the third date she was evaluated at her school. Dr. Kissinger issued a report dated May 23, 2019.

19. Dr. Kissinger observed that claimant initially appeared worried and anxious, but after 10 minutes appeared more comfortable and answered and asked questions, verbalized in play, and "engaged in social chit-chat." However, on occasion, claimant's anxiety returned. "This was most obvious when she was having difficulty performing a task."

[Claimant] displayed similar worry and cautiousness, when the examiner first arrived to her classroom. However, she soon forgot about the examiner presence and returned her focus to the class activity. [Claimant] was observed to follow direction and eagerly participate in the rug-time activity. When going to lunch, [claimant] independently followed the rules and routine. She was observed to engage in friendly conversations and back and forth play with peers. In fact, [claimant] and a peer became so engrossed in their conversation that at first, they did not notice that their line had been excused to leave the cafeteria for outdoor play.

20. Dr. Kissinger reported that claimant's "speech clarity was poor and her vocabulary was limited. Her speech was marked with errors in articulation, grammar, and syntax. On a couple of occasions, it was unintelligible."

21. Dr. Kissinger administered Wechsler's Preschool and Primary Scale of Intelligence-Fourth Edition (WPPSI-IV) to claimant. Claimant scored 71 in verbal comprehension (3rd percentile); 89 in visual-spatial (23rd percentile); 85 in working memory (14th percentile); and 77 in processing speed (6th percentile). Her full scale score on the WPPSI-IV was 74. Dr. Kissinger reports that claimant's full scale score of

74 is in the borderline range for ID, but “due to significant discrepancies across indices” that score “is less reliable and appears to underestimate her true ability.”

22. Dr. Kissinger also noted discrepancies in claimant’s verbal comprehension subtest scores, evidencing strengths in verbal reasoning, conceptualization, comprehension, expression, practical knowledge, judgment, and verbal concept formation and abstract reasoning. In contrast, claimant performed in the extremely low range on tests of verbal acquisition, retention, and retrieval of general facts. Dr. Kissinger opined that it is possible that claimant's chronic ear infections, mild hearing loss, and frequent illnesses “have impacted her ability to learn facts and concepts that contribute to her general fund of knowledge and information. Her responses reflect gaps in knowledge and suggest that she is experiencing difficulties processing auditory information.”

23. At Dr. Kissinger’s direction, claimant’s mother and claimant’s kindergarten teacher separately completed the Adaptive Behavior Assessment System, Third Edition (ABAS-3), regarding their observations of claimant. The ABAS-3 is an instrument designed to measure adaptive functioning. It measures three categories of adaptive functioning, conceptual domain, social domain, and practical domain, each with sub-scores. The ABAS-3 scores reported by claimant’s mother were markedly different than those reported by claimant’s teacher. The scores of the ABAS-3 completed by claimant’s teacher were: 7th percentile for conceptual functioning; 37th percentile for social functioning; 42nd percentile for practical functioning; yielding a composite score of 23rd percentile. The corresponding scores of the ABAS-3 completed by claimant’s mother were: 0.3 percentile; 1st percentile; and 0.3 percentile; yielding a composite score of 0.3 percentile. For example, claimant’s teacher reported that claimant “consistently reads her name when printed, writes her first and last



name” and that claimant’s “emerging skills include, stating the days of week in order, answering simple question[s] about a story read to her, and locating important dates on the calendar.” In contrast, claimant’s mother stated that claimant “never” writes or prints her first and last name or reads her name when printed and reported that claimant does not have the capacity to state the days of the week in order or answer simple questions about a story read to her. Dr. Kissinger concluded:

[Claimant's] adaptive behavior skills vary considerably in the home and school setting. For the most part, she demonstrates greater independence and ability in the school setting with the exception of significant delays in functional communication and moderate delays in learning and self-direction. Significant delays are reported across functional and general adaptive domains in the home and community settings. Real and perceived differences in [claimant's] adaptive behavior in the home vs. school setting may be related differences in expectations, demands, stressors, and relational dynamics.

24. Dr. Kissinger concluded that claimant:

presents with persistent difficulties in the acquisition and use of language across modalities due to deficits in comprehension and production including reduced vocabulary, limited sentence structure, and impairments in discourse. These deficits are sustainably and quantifiably below those expected for age, resulting in functional

limitations in effective communication, social participation, and academic achievement.

Dr. Kissinger diagnosed language disorder (DSM-5 code 315.39), without further discussion. One criterion for language disorder is that the symptoms are not better explained by ID. (DSM-5 at p. 42.)

25. Dr. Kissinger recommended an assessment by the school district to rule out a specific learning disability, services to address claimant's language delays and speech intelligibility, and psychotherapeutic intervention to address claimant's fears and worries related to early life stressors.

### **Further Evidence from Claimant**

26. On August 26, 2019, Julie Kelly, Au.D., tested claimant's hearing and concluded that claimant has slight conductive hearing loss, bilaterally. Dr. Kelly's test results reflect a greater high frequency loss in claimant's left ear, with a total hearing loss of 20 decibels (db) in the left ear and 15 db in the right ear.

### **Testimony of Claimant's Mother**

27. Claimant's mother disputes many of the statements in Dr. Kissinger's report and the overall validity of the report.

28. Claimant's mother submitted examples of claimant's schoolwork, including attempts to write her first name, many of which are not legible. She also submitted copies of a tracing outline of claimant's first and last name that claimant uses to help write her name. Claimant's mother does not believe claimant can write her first and last name as stated in Dr. Kissinger's report. Claimant mother also disputes the statement in Dr. Kissinger's report that claimant is able to state the days of the

week in order. However, in both cases Dr. Kissinger was reporting the ABAS-3 responses of claimant's teacher and contrasting them to the responses of claimant's mother. Further, the exemplars of claimant's writing appear to be written freehand as opposed to traced.

29. Claimant's mother testified that claimant "always" uses "him" and "he" to refers to persons, regardless of that person's gender. Dr. Kissinger reported claimant's overgeneralized use of male pronouns in a section of the report titled Qualitative Abnormalities of Communication.

30. Claimant's mother doubts the credibility of Dr. Kissinger's description of claimant becoming "engrossed" in a conversation with a classmate. Claimant's mother explained such behavior is inconsistent with her own observations of claimant's social and language skills.

31. Claimant's mother submitted a copy of claimant's most recent kindergarten report card, which in a section titled "Literacy Skills" reflects claimant's inability to recognize approximately 10 letters, 12 numbers less than "21" and her inability to connect most letters to the proper sounds or recognize 35 of 40 high frequency words. However, that data is consistent with the language deficits described by Dr. Kissinger, who diagnosed claimant with language disorder.

32. Claimant's mother advanced the theory that claimant performed better on the tests administered by Dr. Kissinger because claimant knew she was being tested. Claimant's mother explained that claimant's teacher inadvertently mentioned claimant's name when Dr. Kissinger arrived in the classroom, alerting claimant that she was being observed. However, Dr. Kissinger reported that claimant "soon forgot about the examiner presence and returned her focus to the classroom activity."

33. Claimant's mother stated that Dr. Kissinger accused her of falsifying her ABAS-3 responses in order to gain services. However, Mahouski testified that she was present when Dr. Kissinger spoke to claimant's mother about those responses and Dr. Kissinger did not accuse claimant's mother of falsifying responses. Rather, Dr. Kissinger informed claimant's mother that, given the disparity between the function reported by claimant's mother and claimant's teacher, the regional center might not find her responses credible. Dr. Kissinger suggested that claimant's mother rescore the responses. Claimant's mother declined.

34. Mahouski also testified that during the informal meeting with claimant's mother, Dr. Kissinger made a statement that an IQ test was not administered. However, Mahouski is unsure whether Dr. Kissinger was referring to an IQ test for claimant or perhaps a specific IQ test for one of claimant's older siblings.

35. Claimant's mother submitted evidence that RCRC had made multiple typographical and other errors—such as incorrect dates and incorrect names—in various documents, primarily correspondence with claimant's mother. Claimant's mother believes such errors cast doubt upon the validity of RCRC's evaluation of claimant's eligibility for regional center services.

36. Claimant's mother believes that claimant's difficulties in word recognition are due to one or more incidents where claimant's father threw claimant's mother while she was holding claimant. Claimant's mother testified that she hit her head against a wall but claimant's head did not hit the wall. Claimant's mother did not provide any further details as to how claimant was injured or describe any onset of symptoms near the time of the injury.

37. Claimant's mother contends that, considering all the potentially traumatic events claimant has endured—domestic abuse, the near drowning episode, severe asthma, ear infections, premature birth—that claimant must have enduring disabilities as a result and is therefore eligible for regional center services. In her words, "there has to be something going on."

## **Expert Testimony**

### **DR. DRUCKER**

38. Gerald Drucker, Ph.D., was part of the RCRC eligibility review team that evaluated claimant on behalf of the RCRC and he testified at hearing. Dr. Drucker is a licensed clinical psychologist and earned a Ph.D. in psychology from the University of California at Santa Barbara. Dr. Drucker has been working for the RCRC since 1987 and has also maintained a private practice since that time, treating children and adults and supervising multiple interns.

39. Dr. Drucker explained that when assessing a claimant for fifth category eligibility, if the claimant's IQ test score is near the borderline range, one must look closely to determine if the claimant has a condition similar to or requiring the same treatment as ID. He explained that eligibility requires an expectation that the deficits will continue indefinitely; that is that there is no potential cure. Dr. Drucker explained that in young children, pervasive delays are required. However, claimant's IQ sub-scores are varied, with very low scores in verbal functioning, but much higher scores in visual-spatial functioning. Moreover, claimant is not receiving special education services for a cognitive delay, but instead only for language and speech delays. Because of that, Dr. Drucker does not believe claimant has a condition like ID.

40. Dr. Drucker does not believe that conflicting ABAS-3 ratings of claimant's mother and claimant's teacher invalidate Dr. Kissinger's evaluation. Dr. Drucker cited multiple potential causes of the discrepancies, including different raters, and different settings. He explained that individuals often behave better in public and save their worst behavior for private settings. Also, the relationship with the person making the requests and the demand characteristics and expectations can influence the performance.

41. Dr. Drucker has known Dr. Kissinger for a year, has seen her resume, and is familiar with her current work. He is confident in Dr. Kissinger's evaluation that claimant does not have conditions closely related to ID or requiring treatment similar to that required for individuals with an ID.

#### **DR. SULLIVAN**

42. John Sullivan, M.D., was part of the RCRC eligibility review team that evaluated claimant on behalf of the RCRC and he testified at hearing. Dr. Sullivan is a board-certified pediatrician. He worked in general pediatrics from 1978 through 2007. For the last 10 years he has worked as a medical consultant for California Children's Services. Dr. Sullivan has also been a medical consultant for RCRC since 1985.

43. Dr. Sullivan explained that neurodevelopmental disorders such as language disorder and attention deficit hyperactivity disorder (ADHD) are distinct from ID and other developmental disorders treated by regional centers. Moreover, the treatment for neurodevelopmental disorders differs from the treatment for ID. For individuals with ID, lower functioning is expected and the treatment primarily consists of many repetitions over a long period of time. In contrast, language disorder may require less intensive services and specific treatment for the type of language disorder

they have. For example, if the individual has difficulty pronouncing words, he or she needs treatment specific to that problem, not just general repetition treatment.

44. Dr. Sullivan reviewed the August 26, 2019 audiology report of Dr. Kelly. He explained that, based upon that report, claimant's hearing loss is worse in a high frequency range that is not associated with speech recognition and she is not currently experiencing much learning impairment from that condition. He opined that it is not likely that claimant will need hearing aids and that preferential seating is probably a sufficient accommodation going forward. Dr. Sullivan explained that a "huge majority" of individuals with a history of middle ear infections such as claimant's get much better as they get older. Dr. Sullivan believes that claimant's past hearing problems may have contributed to her language delays, but her hearing loss is unlikely to be a permanent limitation.

45. Dr. Sullivan reports that it is very unusual for an individual to perform better on an IQ test than his or her actual ability, regardless of motivation.

46. Dr. Sullivan explained that the RCRC assessment team agrees that claimant has multiple problems, but risk factors and causation are secondary to claimant's actual strengths and weaknesses. Dr. Sullivan agrees with the other assessment team members that claimant needs language and speech therapy, a well-informed special education program, and preferential seating based upon claimant's hearing loss. However, Dr. Sullivan expressed full confidence in Dr. Kissinger's evaluation of claimant, citing her use of multiple observations, a standard IQ test, and review of medical records and the history provided by claimant's mother.

## Ultimate Findings

47. Claimant is not at this time substantially disabled by conditions found to be closely related to ID or to require treatment similar to that required for individuals with an ID. The opinions of Dr. Kissinger, Dr. Drucker, and Dr. Sullivan, that claimant's conditions are not closely related to ID because her deficits are specific to language and communication, were persuasive. Dr. Sullivan's opinion that claimant requires different treatments than the intensive repetition treatment required for individuals with an ID was also persuasive. Claimant offered no expert opinion to support eligibility under the fifth category and claimant's evidence did not impeach the credibility of Dr. Kissinger's evaluation of claimant, which was endorsed by Dr. Drucker and Dr. Sullivan.

## LEGAL CONCLUSIONS

1. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Act. The purpose of the Act is to rectify the problem of inadequate treatment and services for the developmentally disabled, and to enable developmentally disabled individuals to lead independent and productive lives in the least restrictive setting possible. (Welf. & Inst. Code, §§ 4501, 4502; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) The Act is a remedial statute; as such it must be interpreted broadly. (*California State Restaurant Association v. Whitlow* (1976) 58 Cal.App.3d 340, 347.)

2. As claimant is seeking to establish eligibility for government benefits or services, she has the burden of proving by a preponderance of the evidence that she



has met the criteria for eligibility. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits]; *Greatoroex v. Board of Admin.* (1979) 91 Cal.App.3d 54, 57 [retirement benefits]; Evid. Code, § 500.)

3. A developmental disability is 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.” (Welf. & Inst. Code, § 4512, subd. (a).) The term “developmental disability” includes ID, cerebral palsy, epilepsy, and autism. (*Ibid.*) Under the fifth category, an individual is also eligible for services if he or she has a disabling condition that is closely related to ID or that requires similar treatment as an individual with an ID. (*Ibid.*) Such condition must also have originated before the individual attained 18 years of age, must continue or be expected to continue indefinitely, and must constitute a substantial disability. (Cal. Code Regs., tit. 17, § 54000, subd. (b).) It is claimant’s burden to establish that she has a developmental disability and that the developmental disability is substantially disabling.

4. Claimant has not met her burden of establishing by a preponderance of the evidence that she is substantially disabled by a developmental disability as that term is defined in the Act. (Factual Finding 47.) Claimant also did not prove any basis to order RCRC to reassess her at this time. (*Ibid.*) Accordingly, her appeal must be denied.

## **ORDER**

Claimant's appeal from the denial of eligibility for regional center services is denied. Claimant is not eligible for regional center services at this time. Claimant is not entitled to reassessment at this time.

DATE: September 24, 2019

MICHAEL C. STARKEY  
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 90 days.