BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

v.

INLAND REGIONAL CENTER

Service Agency

OAH No. 2019070682

DECISION

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on November 21, 2019, in San Bernardino, California.

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

Joseph Cavanaugh, Deputy Public Defender, Riverside County, represented claimant, who was present.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on November 21, 2019.

ISSUE

Is claimant eligible for regional center services under the Lanterman Act Developmental Disabilities Services Act (Lanterman Act) based on an intellectual disability?

FACTUAL FINDINGS

Background

1. Claimant is a 26-year-old male who has been an IRC consumer since 1995 based on a diagnosis of cerebral palsy. Claimant lives in the family home of his parents and receives Social Security benefits, 219 hours of In-Home Supportive Services, and 35 hours of agency provided respite.

2. Respondent was charged in the Superior Court of California, County of Riverside, for a felony violation of Penal Code section 311.11, subdivision (a), possession of child pornography. On December 5, 2018, the court ordered IRC to evaluate claimant for diversion pursuant to Penal Code section 1001.20 et seq. Under this provision, claimant may be eligible for diversion if "determined to be a person with a cognitive developmental disability[1] by the regional center, and who therefore is eligible for its services." (Pen. Code, § 1001.21, subd. (a).)

[1]Under Penal Code section 1001.20, subdivision (a), the term "cognitive developmental disability" means any of the following:

3. On May 29 2019, IRC served claimant with a Notice of Proposed Action and attached letter indicating that IRC determined no intake services could be provided because records provided did not show that claimant had a substantial disability resulting from epilepsy, intellectual disability, autism, or a condition closely related to an intellectual disability or that requires treatment similar to a person with an intellectual disability. However, IRC stated that claimant would continue to be eligible for IRC services under the diagnosis of cerebral palsy.

> (1) "Intellectual disability" means a condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.
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> (2) "Autism" means a diagnosed condition of markedly abnormal or impaired development in social interaction, in communication, or in both, with a markedly restricted repertoire of activity and interests.
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> (3) Disabling conditions found to be closely related to intellectual disability or autism, or that require treatment similar to that required for individuals with intellectual disability or autism, and that would qualify an individual for services provided under the Lanterman Developmental Disabilities Services Act.

4. On June 18, 2019, IRC submitted a report to the court stating that IRC determined that claimant was not eligible for IRC services under the category of intellectual disability.

5. On July 15, 2019, claimant's attorney filed a fair hearing request on claimant's behalf, seeking review of IRC's determination. This hearing followed.

6. The issue in this hearing is whether respondent is eligible for regional center services under the Lanterman Act based on an intellectual disability.[2]

Diagnostic Criteria for Intellectual Disability

7. The *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5) contains the diagnostic criteria used for intellectual disability. The essential features of intellectual disability are deficits in general mental abilities and impairment

[2] Claimant did not contend that he was eligible for regional center services based on a disabling condition closely related to an intellectual disability or that requires similar treatment as an individual with an intellectual disability, also known as the "fifth category." Under Penal Code section 1001.21, subdivision (c), diversion is available for individuals qualifying under this category "only if that person was a client of a regional center at the time of the offense for which he or she is charged." While claimant was a client of IRC at the time the offense was charged, his eligibility was based on a diagnosis of cerebral palsy. Thus, to be eligible for diversion under the fifth category, claimant would have to have been receiving IRC services under this category at the time the offense was charged. In contrast, an individual qualifying under the category of intellectual disability is not required to have been receiving regional center services.

in everyday adaptive functioning, as compared to an individual's age, gender, and socio-culturally matched peers. In order to have a DSM-5 diagnosis of intellectual disability, three diagnostic criteria must be met.

First, deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, academic learning, and learning from experience), confirmed by both clinical assessment and individualized, standardized intelligence testing must be present. Intellectual functioning is typically measured using intelligence tests. Individuals with intellectual disability typically have intelligent quotient (IQ) scores in the 65-75 range.

Second, deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility, must be present. 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.

Third, the onset of the cognitive and adaptive deficits must occur during the developmental period.

Claimant's Medical, Psychological, and Educational Records

8. In 1995, when claimant was three years old, Kenneth Garrett, Ph.D. conducted a psychological evaluation and determined claimant was eligible for regional center services based on a diagnosis of cerebral palsy. Dr. Garrett believed claimant's intellectual capacity was well within the low average to borderline range, but that it was possible that his intellectual functioning was normal, and his learning delays were primarily caused by motor limitations.

9. Claimant's school district completed a triennial psychoeducational assessment in February 2001, when claimant was eight years old. The evaluator noted claimant reported hating school and appeared to lack motivation and interest in school several ability tests were administered including the Kaufman Assessment Battery for Children (K-ABC) and the Woodcock Johnson – Revised (WJ-R). The evaluation indicated borderline to mildly delayed nonverbal processing ability. Sequential process was within the average range and simultaneous processing was within the borderline range. With regards to his academic performance, achievement in the area of reading was in the borderline range and mathematics was in the intellectually disabled range.

10. When claimant was nine years old, he received special education services, according to his Individualized Education Program (IEP), under the category "Multiple Impairment."

11. An IEP from April 2009, when claimant was 16 years old, indicated that claimant was being served for "Orthopedic Impairment." The IEP listed some of claimant's strengths, including reading at grade level and the ability to write short sentences and paragraphs. Claimant passed the California High School Exit Exam (CAHSEE) in English-Language Arts. Claimant was able to add and subtract single digit numbers but had difficulty with more complex tasks such as multiplication and division. The IEP noted claimant had good receptive and expressive communication skills and was very articulate. Claimant indicated an interest in becoming a video game developer and was working one day per week at his family's electric supply company learning various accounting activities.

12. An IEP in April 2010, when claimant was 17 years old, indicated that claimant was on-track to graduate from high school and passed his exit exams in

language arts. At the time, claimant participated in a general education environment 98 percent of the time.

13. Several Individualized Service Plans (ISPs) were completed by Pathways Inc., an IRC vendor providing claimant with 10 hours per week of personal assistance. In October 2011, when claimant was 19 years old,[3] he was enrolled in a weight-training course and job placement course at a community college. Claimant indicated an interest in pursuing a career in graphic design. The ISP also indicated that claimant was employed at an electrical contracting company performing clerical work for two hours, twice per week. An ISP by Pathways in May 2012 stated that claimant continued to be enrolled in community college and was taking classes in business management and gym. He also continued to work one day per week. An ISP in December 2012 stated that claimant was enrolled in a theater class.

14. Claimant underwent two separate court-ordered psychological evaluations to determine his competency to stand trial. Michael Kania, Ph.D., evaluated claimant on January 10, 2018, and authored a report dated February 2, 2018. William Jones, Ph.D., evaluated claimant on April 9, 2018. Dr. Kania noted that claimant was initially a "reluctant historian" but also evidenced symptoms suggestive of learning problems. For example, he initially was reluctant to answer questions by responding "I don't know," but later would reference the requested information. As the interview progressed, he expressed concern about being sent to prison. Based on claimant's

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[3] The ISP indicated that claimant was eligible for IRC services under the categories of cerebral palsy and mental retardation. Dr. Miller testified that IRC had never determined claimant to be eligible for services based on a diagnosis of intellectual disability, thus the reference to mental retardation was in error.

vocabulary, Dr. Kania estimated that claimant intellectually functioned in the borderline range. However, based on information provided by claimant's mother, and the apparent difficulty claimant had in answering other information such as his address, there was a suggestion that claimant was functioning in the "mild mental retardation" range. Dr. Kania concluded that claimant was competent to stand trial. Claimant provided information about the circumstances surrounding the criminal charges and told Dr. Kania that he was hoping to be found incompetent so he would not have to stand trial.

In contrast, Dr. Jones opined that claimant was incompetent to stand trial. Claimant was very anxious, unable to answer simple questions, appeared not able to remember questions long enough to answer them, and could not complete simple tasks such as counting backwards. Where claimant had expressed to Dr. Kania basic knowledge of the court process, he claimed to Dr. Jones no knowledge of criminal charges or the court process he did not answer or said he did not know. Dr. Jones noted a "rigid, obsessive, and repetitive quality" in claimant's answers, similar to that of an autistic person and typical of some cerebral palsy patients.

15. A letter from neurologist Indermohan S. Luthra, M.D., dated April 10, 2019, stated claimant is under Dr. Luthra's care for cerebral atrophy due to a brain hemorrhage at birth. Dr. Luthra noted claimant has "an intellectual disability and altered perceptions in judgment," and requires assistance with his activities of daily

living.[4] Dr. Luthra did not indicate how he diagnosed claimant with intellectual disability or if it was even a diagnosis pursuant to the DSM-5.

16. A letter dated February 6, 2018, from Catherine Warne, RN, MSN, FNP, stated that claimant has been her patient for several years and has cerebral palsy, mild mental retardation and major depressive disorder. She wrote that claimant can read but cannot write and can only tell time from a digital clock.

17. A January 24, 2018, letter from Hozair Syed, M.D., stated that claimant was under his care since December 2017, with diagnoses of cerebral palsy, "mild retardation," anxiety depression, and major depression.

18. A January 14, 2019, letter by John Griffiths L.C.S.W., stated that claimant has been his patient since October 2017. He has seen claimant as part of family sessions and diagnosed claimant with major depression and generalized anxiety disorder.

Testimony of Holly Miller, Psy.D.

19. Holly Miller, Psy.D, is a California licensed clinical psychologist. She received her Doctor of Psychology in 2009 and has worked as a staff psychologist at IRC since 2016. In that position, she assists in the assessment and diagnosis of persons

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[4] Dr. Luthra also submitted a letter dated December 12, 2017. In that letter, Dr. Luthra stated that claimant was under his care since January 2014. Dr. Luthra referenced that claimant suffered from cerebral palsy and seizures and required assistance with most activities of daily living. Dr. Luthra did not reference intellectual disability or claimant's intellectual functioning.

for the purpose of determining eligibility for regional center services under the Lanterman Act. Dr. Miller testified regarding IRC's determination that claimant was not eligible for IRC services under the category of intellectual disability. Dr. Miller identified and discussed the above records that were reviewed by IRC's interdisciplinary team.[5]

20. Dr. Miller testified that IRC reviewed the records provided by claimant and determined that there was insufficient evidence to justify performing any further intake evaluation, i.e. psychological assessment. IRC will conduct its own psychological assessment if there is evidence that there is a disability in one or more areas, which cannot be determined based on records alone. Eligibility for IRC services under the category of intellectual disability requires a DSM-5 diagnosis under this category. Thus, intellectual disability involves global cognitive and adaptive deficits, with sub-deficits in many areas of cognition. This is differentiated from a learning disability, where there is weakness in learning the material in a specific area. Learning disabilities, or difficulties in learning generally because of a secondary condition, do not qualify an individual for regional center services.

21. In this case, the records from the entirety of claimant's developmental period do not reference intellectual disability. Claimant's school records indicated he received special education services solely for his physical disability. None of the records indicated that the school district (or claimant's parents) had a concern about claimant's intellectual functioning. The two intelligence tests that were administered, the K-ABC and WJ-R, indicated varied results, which is not typical of a person with an

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[5] IRC's interdisciplinary team is comprised of a medical doctor, a psychologist, and a case manager.

intellectual disability. Although claimant had some deficits in academic achievement, academic achievement scores are not used to determine a DSM-5 diagnosis of intellectual disability. Poor performance in school could relate to other factors that influence success in an educational setting, such as a learning disability. Instead, intelligence scores relate to innate ability and the potential to learn information. Dr. Miller noted that most individuals with intellectual disability are not able to pass exit exams and receive a diploma, as claimant did. In addition, claimant was in a general education setting throughout his school career, which is not typical of someone with intellectual disability. Finally, claimant attended several course at community college, which again, is atypical of someone with intellectual disability.

22. Dr. Miller addressed the two court-ordered psychological evaluations. She noted that the purpose of each evaluation was to establish competency for trial,[6] and they were not evaluations performed to diagnose claimant's intellectual functioning under the DSM-5. Both Drs. Kania and Jones based their evaluation on interviews and record reviews; neither conducted individualized standardized testing. Likewise, Dr. Miller noted that claimant's neurologist, psychiatrist, and primary care nurse practitioner did not provide any indication of how (or when) claimant was diagnosed with intellectual disability. In addition, neurologists, psychiatrists, and nurse practitioners are not trained to, and do not typically, conduct standardized testing to determine intellectual functioning. Such testing is required for a DSM-5 diagnosis of intellectual disability.

23. In conclusion, Dr. Miller believed that none of the records from claimant's developmental period showed evidence or even a suspicion of intellectual disability.

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[6] The court found claimant competent to stand trial.

Although several health care practitioners referenced an intellectual disability or "mental retardation" diagnosis, there was no evidence supporting either diagnosis and nothing indicated how either diagnosis was obtained. While claimant might have some cognitive impairment, intellectual disability is a clearly defined condition in the DSM-5 that requires very specific criteria. This condition is characterized by global deficits in all areas that are consistent over a period of time, throughout the developmental years. Moreover, the adaptive deficits must be secondary to global cognitive impairment. Here, the evidence established that claimant's adaptive deficits were secondary to his cerebral palsy, rather than global cognitive impairment.

Testimony of Young-Min Kim, M.D.

24. Young-Min Kim, M.D., is board certified in neurology, child neurology, epilepsy, and board-eligible in pediatrics. He is an assistant professor in the Division of Pediatric Neurology at Loma Linda University, where he is also the director of the Cerebral Palsy and Movement Disorders Center. He is also co-director of the Neonatal Neurology Intensive Care Unit and Cerebral Palsy Clinic. In his day-to-day practice, he sees children with neurological disabilities such as cerebral palsy. Dr. Kim has been a neurological consultant to IRC for the past three years, where he assists in determining eligibility for IRC services.

Dr. Kim testified that cerebral palsy is a disorder of motor development, with the core feature being motor impairment. Approximately one-half of those with cerebral palsy are also intellectually disabled.[7] Individuals can have neurological

[7] Dr. Kim did not reference whether the term "intellectual disability" referred to the DSM-5 diagnosis.

deficits and poor judgment, but this does not necessarily constitute intellectual disability. Dr. Kim reviewed an article submitted by claimant titled "Intellectual disability in cerebral palsy: a population-based retrospective study."[8] He located the original article, which was published in the *American Academy of Cerebral Palsy and Developmental Medicine*. This is a reputable peer-reviewed journal. The article reviewed a population-based observational study that determined that intellectual disability was present in 45 percent of those with cerebral palsy. The findings in the article were consistent with other epidemiological studies that have found intellectual disability to be present in 30 to 60 percent of those with cerebral palsy. However, a population study cannot be generalized to specific individuals.

Dr. Kim also reviewed information claimant submitted from the "cerebralpalsy.org.au" website. Dr. Kim agreed that someone with cerebral palsy could have limitations in cognition, including comprehension, decision-making, difficulty processing emotions, language skills, learning, memory, problem-solving, recognition, and speech proficiency. However, these conditions do not define cerebral palsy – not all individuals with cerebral palsy have cognitive impairment. It is possible that an individual with cerebral palsy or brain damage could have these types of cognitive impairments. The determination of cognitive impairment is generally made following psychological testing administered by psychologists.

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[8] The article claimant submitted was pasted into a Microsoft Word document copied from cerebralpalsy.org.au.

Testimony of Claimant's Mother

25. Claimant's mother testified at hearing and wrote a supplemental letter. The following is a summary of her testimony and letter. Claimant was born premature at 26 weeks, 14 weeks early. The doctors did not think he would live. Ten days after he was born he suffered cardiac arrest. It was determined claimant had grade-4 (the most severe) ventricular hemorrhage. Claimant spent three months in the intensive care unit. Claimant was her third child. Claimant did not talk, had frequent seizures, could not be toilet trained and did not interact like other children. He has a history of seizures and apnea. He cannot see out of one eye. He is documented as quadriplegic because he only has use of one hand.

Claimant cannot do math or tell time. He is not safe to be left home alone. The brain damage resulted in a shrunken right frontal lobe that impairs his judgment and reasoning. He also has impaired short-term memory. Claimant enjoys watching television and mimics what he sees. He receives vocational nursing respite care from IRC.

Claimant's mother disputed the statements in the IEPs that claimant could read and do math. She signed the IEPs because she did not want to hear anything negative about claimant. For so long, she had heard what was wrong with claimant and she was desperate for positive feedback about him. She wanted him to pass the high school exit test and get a high school diploma. In this vain, she testified that claimant had help passing the test and did not answer all of the questions himself. Likewise, his job at the family store was not real work. However, nominally having a job gave claimant great satisfaction and purpose. She wanted claimant to go to college. He was provided with a one-to-one aide, but claimant got in trouble because the aide was doing all the work.

Claimant's mother wanted to believe that claimant could learn. She refused to hear anything negative about claimant and the school told her what she wanted to hear. Because of this, she believes the district did not offer any IQ testing or suggest that he should receive special education for his intellectual functioning. Claimant cannot manage money, he has no social functioning, and he cannot push his own wheelchair.

Testimony of Claimant's Brother

26. Claimant's brother testified at the hearing and wrote three letters. The following is a summary of his testimony and letters. Claimant's brother received a Doctor of Osteopathic Medicine in 2017 and is currently in a neurology residency program at Desert Regional Medical Center. Although cerebral palsy is primarily a motor disability, it can also affect the brain in a variety of ways resulting in a variety of abnormalities, including altered sensations, altered perceptions, intellectual disability, communication problems, behavioral disabilities, and physical disabilities such as seizures. Intellectual disability is no less than 50 percent prevalent in every cerebral palsy case.

Claimant's brother testified that claimant was born premature and suffered intraventricular and intracerebral hemorrhage as well as bronchopulmonary dysplasia causing cerebral hypoxia. As a result, he has a very severe form of cerebral palsy. He has problems with understanding things, limited complex thinking, and lack of awareness of risk. Claimant's condition is static and will not improve. Claimant's brother believed that he was able to render a diagnosis of intellectual disability, and that claimant suffers from such condition. However, he could not testify from memory what the exact DSM-5 criteria is and believed a neurologist could make such a

diagnosis. He was also unaware that a DSM-5 diagnosis of intellectual disability was required for a determination of regional center eligibility.

Testimony of Claimant's Father

27. Claimant's father testified at hearing and wrote a supplemental letter. He echoed the testimony and statements of claimant's mother and brother, namely that claimant is unable to perform self-care needs and lacks self-control/judgment.

Additional Letters by Family Members

28. Claimant submitted letters from his grandmother, sister, and aunt. All three described the challenges that claimant has faced and that he is physically, mentally, and emotionally delayed.

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.)

Relevant Law and Regulations

2. The Legislature enacted a comprehensive statutory scheme known as the Lanterman Act (Welf. & Inst. Code, § 4500 et seq.) to provide a pattern of facilities and services sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life. The

purpose of the statutory scheme is twofold: To prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community, and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community. (*Assn. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 388.) Welfare and Institutions Code section 4501 outlines the state's responsibility for persons with developmental disabilities and the state's duty to establish services for those individuals.

3. The department is the public agency in California responsible for carrying out the laws related to the care, custody and treatment of individuals with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4416.)

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 includes "disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability." (*Ibid.*) Handicapping conditions that are "solely physical in nature" do not qualify as developmental disabilities under the Lanterman Act. (*Ibid.*)

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

(a) "Developmental Disability" means a disability that is attributable to mental retardation[9], 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 psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual

[9] 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.

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 intellectual disability, 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 intellectual disability."

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.

7. Upon an application for services, the regional center is charged with determining if an individual meets the definition of developmental disability contained in Welfare and Institutions Code section 4512. In this assessment, "the regional center may consider evaluations and tests, including, but not limited to, intelligence tests, adaptive functioning tests, neurological and neuropsychological tests, diagnostic tests performed by a physician, psychiatric tests, and other tests or evaluations that have been performed by, and are available from, other sources." (Welf. § Inst. Code, § 4643, subd .(b); Cal.Code Regs., tit. 17, § 54010.)

8. Welfare and Institutions Code section 4642 requires a regional center to perform "initial intake and assessment services" for "any person believed to have a developmental disability." Intake shall also include a decision to provide assessment but does not require an assessment. (*Id.* at subd. (a)(2).)

Conclusion

9. In order for him to seek diversion in his criminal case, claimant seeks a determination from IRC that he has a "cognitive developmental disability" that renders him eligible for its services. The Penal Code provision defines "cognitive developmental disability" to include "intellectual disability," which is defined as "a condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." (Pen. Code, § 1001.20, subd. (a).) Although this definition

generally mirrors the diagnostic criteria contained in DSM-5, Penal Code section 1001.21, subdivision (a), requires that the intellectual disability render claimant eligible for regional center services. Thus, the determination of regional center eligibility rests solely under the provisions of the Lanterman Act and its regulations. Neither the Lanterman Act nor title 17 of the California Code of Regulations further defines intellectual disability. However, the established authority for this purpose is the DSM-5, "a standard reference work containing a comprehensive classification and terminology of mental disorders." (*Money v. Krall* (1982) 128 Cal.App.3d 378, 384, fn. 2.)

The burden is on claimant to establish his eligibility for regional center services based on an intellectual disability. Claimant did not meet his burden. Claimant established that he suffered traumatic brain injury at birth resulting in cerebral palsy. It was also established that he has cognitive impairments and limitations in adaptive functioning; however, he did not establish that these impairments satisfy the DSM-5 criteria for intellectual disability.

Claimant received special education services throughout his childhood, but these services were related to his physical disabilities associated with cerebral palsy. There was no indication throughout the entirety of his schooling that claimant's intellectual functioning was within the intellectually disabled range. The limited cognitive testing conducted in 2001 indicated borderline to mildly delayed nonverbal processing ability, and average to borderline range for sequential and simultaneous processing, receptively. Someone with true DSM-5 intellectual disability typically has consistent cognitive impairments across all areas; in other words, their abilities are not scattered. Claimant performed less well in academic achievement measures, but as Dr. Miller testified, poor academic performance can be caused by multiple factors other than intellectual disability. Dr. Miller testified that intelligence scores in the borderline

range are not representative of someone with an intellectual disability. Several IEPs also indicated claimant was reading at grade level, could write short sentences and paragraphs, and had good receptive and expressive communication skills. These are not features associated with an intellectual disability. Likewise, claimant passed his high school exit exams, graduated with a high school diploma, and enrolled in community college. Dr. Miller testified that these achievements are not consistent with someone with intellectual disability. Finally, although there was some testimonial and documentary evidence that approximately half of those persons with cerebral palsy may also have intellectual disability, that does not change the fact that a person must still meet the DSM-5 criteria for intellectual disability; here, claimant does not.

Claimant's mother attempted to minimize the significance of these milestones, essentially claiming that others did the work for him. She also noted her reluctance to receive any negative information about claimant, and thus did not want to recognize that claimant had intellectual deficiencies. However, even if this were the case, claimant had the burden to produce sufficient evidence to establish that the multiple records from his developmental period did not accurately reflect his cognitive abilities. While he produced letters from medical professionals such as his neurologist, psychiatrist, nurse practitioner, and counselor stating claimant was diagnosed with intellectual disability, these statements were conclusory without any objective information to establish the basis for the diagnosis – or if the diagnosis was under the DSM-5. In particular, deficits in intellectual functioning, the first criterion for a DSM-5 diagnosis, were not established through clinical assessment and individualized, standardized, intelligence testing.

Dr. Miller's expert testimony that claimant did not qualify for regional center services under intellectual disability was credible and unrebutted. It is also well-

established that "Lanterman Act and implementing regulations clearly defer to the expertise of the [department] and [regional center] professionals and their determination as to whether an individual is developmentally disabled." (*Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1129.) While claimant's family certainly wants the best for claimant, which presumably would include diversion from the criminal justice system, their personal opinions cannot overcome either the professionally sound clinical judgement provided by Dr. Miller or the multitude of records from claimant's developmental period that do not show any hint of intellectual disability.

Accordingly, claimant failed to establish that he meets the diagnostic criteria for intellectual disability under the DSM-5 and is not eligible for regional services under this category.

ORDER

Claimant's appeal from Inland Regional Center's determination that he is not eligible for regional center services based on intellectual disability is denied.

DATE: December 6, 2019

ADAM L. BERG
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.