

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

In the Matter of:

CLAIMANT,

vs.

WESTSIDE REGIONAL CENTER

Service Agency

OAH No. 2019120376

DECISION

Eileen Cohn, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on January 29, 2020, in Culver City, CA.

Candace Hein, Fair Hearings Legal Compliance Coordinator, represented Westside Regional Center (WRC or Service Agency).

Claimant's grandparent and legal guardian (grandparent) represented claimant¹, who was not present.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on January 29, 2020.

ISSUE

Is claimant eligible for WRC services under the eligibility categories of Intellectual Disability (ID) or Fifth Category?²

SUMMARY

Claimant requested eligibility for WRC services under the categories of intellectual disability or fifth category based upon the results of assessments and claimant's deficits. The WRC maintained claimant did not qualify under either category based upon its assessment and the review of the data by the WRC psychologist-expert. Based upon a review of the evidence, the WRC's assessment, which was focused primarily on an evaluation of claimant under the eligibility category

¹ In an effort to protect the privacy of claimant and claimant's family, their names, as well as any pronouns identifying the gender of claimant, have been omitted.

² The parties are in agreement that claimant does not qualify under the categories of Autism, Epilepsy or Cerebral Palsy. Assessments were performed in the area of autism and the RC concluded claimant did not qualify under this eligibility category.

of autism, did not fully assess claimant's eligibility for ID or the fifth category. However, complaint has the burden of proof and based upon the evidence, at this time, claimant failed to show claimant has a substantial disability under the Lanterman Act.

EVIDENCE RELIED UPON

Documentary: WRC's exhibits 1-10; claimant's exhibits A-C.

Testimonial: For WRC, Kaely Shilakes, Psy.D., WRC Psychologist. For claimant, Mother.

Background and Jurisdictional Matters

1. Claimant was born in July 2009 and is 11 years old. Claimant lives with grandparent and claimant's father in grandparent's home. Claimant's mother is not present. Claimant is currently in the fifth grade in the Inglewood Unified School District (school district). When claimant was in the second grade, the school district made claimant eligible for special education under the eligibility category of specific learning disability (SLD). The school district is guided by the definition of SLD set forth in the California Education Code, which is not identical to the definition of SLD set forth in the Diagnostic Statistical Manual, fifth edition (DSM-5) and relied upon by the WRC to determine whether claimant has a learning disorder. From second grade on, claimant's education has been guided by an individual education program (IEP). Claimant's current IEP provides for placement in a special day class (SDC), with some mainstreaming with general education students, for one-hour daily.

2. In 2019, grandparent requested services for claimant from the WRC. On April 26, 2019 the WRC's staff and assigned intake coordinator, Rebecca Choice, M.A.,

clinical psychologist, conducted a telephonic interview with grandparent and on May 7, 2019, conducted an office interview with claimant and grandparent which was memorialized in a memorandum. (Ex. 4.) Ms. Choice referred claimant for an eligibility evaluation with Naz Bagherzadeh, Psy.D. Dr. Bagherzadeh evaluated claimant in August 2019 and prepared a written report. (Ex. 5.)

3. On October 23, 2019, the multidisciplinary team, which included Ms. Choice, an autism specialist, Soryl Maskowitz, LCSW, a physician, Ari Zeldin, M.D., and staff psychologist Kaely Shilakes, Psy D., determined claimant was not eligible for WRC services. The details of the decision-making process were not memorialized in any writing. (Ex. 6.)

4. In early November, the WRC served grandparent with a Notice of Proposed Action (NOPA), effective October 23, 2019, where it confirmed it had not found claimant eligible because claimant did not meet the criteria set forth in the Lanterman Act. In a letter attached to the NOPA, Ms. Choice mentioned the multi-disciplinary team's meeting and decision and referred grandmother to Dr. Bagherzadeh's psychological evaluation.³ (Ex. 2.)

³ Ms. Choice referenced "mental retardation" instead of "intellectual disability." Under California law, the term "mental retardation" has been replaced with the term "intellectual disability," including but not exclusive to, Welfare and Institutions Code section 4512. (*See* Senate Bill No. 1382, chaptered by the Secretary of State, Chapter 452, Statutes of 2012.) The term intellectual disability, not mental retardation, is expressly identified as one of the eligibility categories under Welfare and Institutions Code, section 4512.

5. On November 20, 2019, grandparent timely filed a fair hearing request, on claimant's behalf, to appeal WRC's decision. In claimant's appeal and the attachments to the appeal, grandparent acknowledged Dr. Bagherzadeh's rejection of eligibility under the criteria of autism. Instead, grandparent requested WRC to consider claimant's eligibility based upon Dr. Bagherzadeh's assessment of claimant's borderline intellectual functioning. (Ex. 2, p.5 of 5.)

6. On December 12, 2019, in an effort to resolve the dispute WRC representative Mary E. Rollins communicated with grandparent. After reviewing the grandparent's response to the Dr. Bagherzadeh's assessment and reviewing existing documentation, Ms. Rollins informed grandparent that without new documentation the WRC's conclusion is unchanged. Ms. Rollins, whose background and expertise is unknown, advised grandparent that claimant does not meet the eligibility requirements under any category, but rather has a learning disability.⁴

7. Jurisdiction has been established for the fair hearing.

WRC's Intake and Evaluation

8. After claimant's grandparent requested WRC eligibility and services for claimant, Ms. Choice prepared an intake report based upon her telephone interview with claimant's grandparent and office interviews and observation of claimant. Grandparent self-referred claimant for WRC eligibility due to grandparent's concerns

⁴ Grandparent also testified that an informal meeting was conducted, but there is no documentation confirming the meeting, and even if the meeting occurred, based upon the evidence submitted, it would not have resulted in anything substantively different than what was communicated by Ms. Rollins in her letter.

about claimant's cognitive delays and academic performance. Ms. Choice identified the referral as an "initial assessment for intellectual development." (Ex. 4.)

9. Claimant's developmental milestones were typical and by history claimant's physical health has been good, other than mild asthma. Claimant had no history of trauma, seizures, sleeping, eating, hearing or vision problems. Consistent with grandparent's testimony at hearing, grandparent reported to Ms. Choice concerns about claimant's poor response to "unfamiliar individuals"; otherwise grandparent did not observe claimant to be aggressive or hyperactive, to tantrum, or have angry outbursts. During the intake meeting, Ms. Choice observed claimant's receptive and expressive communication to be "age appropriate." (Ex. 5.)

10. During August 2019, Dr. Bagherzadeh conducted a psychological eligibility evaluation of claimant with a focus on assessing claimant for eligibility under the category of autism. (Ex. 5.). Dr. Bagherzadeh also acknowledged grandparent's concerns with claimant's cognitive ability and academic functioning, as well as grandparent's concerns with claimant's social discomfort, "even around familiar people." (Ex. 5.) In addition to conducting assessments, Dr. Bagherzadeh reviewed the school district's triennial psychoeducational assessment report dated February 27, 2019, the IEP dated February 27, 2019, and Ms. Choice's report. Dr. Bagherzadeh noted family psychiatric history of bipolar disorder, psychosis, depression and learning disability.

11. Dr. Bagherzadeh reported the results of several standard cognitive assessments administered by the school district and reported in its February 2019 report. (Ex. 5; Ex. 8.)

(A) On the Cognitive Assessment System, Second Edition (CAS-2) claimant obtained a poor standard score of 79 in the domain of planning (problem solving), a below average standard score of 80 in the domain of simultaneous processing (integrating separate stimuli); an average score in the domain of attention (selectively attend to one stimuli), and an average score in the domain of success processing (ordering of things).

(B) On other measures of claimant's cognitive processing ability administered by the school district claimant performed in the average range overall on the Test of Auditory Processing, Fourth Edition (TAPS-4). TAPS-4 is a measure of language comprehension and processing skills which impact effective listening and communication skills necessary for language and literacy development. Claimant scored within the below-average score on the sub-index score of the listening comprehension index, which assesses processing oral directions, and demonstrated deficits in the ability to process and recall oral information in a quiet setting. (Ex. 8.)

(C) In the area of visual processing claimant performed in the below average and low range on measurements used in the Test of Visual Perception Skills, Fourth Edition (TVPS-4), demonstrating weaknesses in perception and interpretation of forms by category. In the area of visual-motor processing using the Beery-Buktenica Development Test of Visual-Motor Integration, Sixth Edition (VMI-6), claimant performed in the average range.

12. Not reported by Dr. Bagherzadeh but pertinent to claimant's cognitive ability and diagnosis were claimant's supplemental CAS-2 scores including: a below average score on the executive function composite score which measures thinking, behavior and attention; a "within or close to average range" on the working memory composite score which measures short-term memory for information used to evaluate

verbal-spatial relations and sentence questions; a “lower than average score” on the composite measure of executive function with working memory which measures performance on tests requiring control of thinking, behavior and attention when working with the application of short term memory of information. The school district assessor considered claimant’s executive functioning area worthy of further consideration, exploration and assessment due to “educational and therapeutic implications.” (Ex. 8, p. 6-7.)

13. Dr. Bagherzadhi reported on the results of the school district’s assessment of claimant’s academic achievement. On the Kaufman Test of Educational Achievement, Third Edition (KTEA-3), claimant performed, when measured against his same-aged peers, in the below average range on the reading composite (three percent), which measures letter and word recognition and reading comprehension, on the math composite (five percent), which measures math concepts and applications and math computation, and in the low range (one percent) on the written language composite, which measures written expression and spelling.

14. (A) Dr. Bagherzadeh, without any specific analysis of ID, accepted the school district’s determination for claimant’s eligibility for special education services as a pupil with an SLD, which under the Education Code and related regulations, requires a finding of a severe discrepancy between intellectual ability and achievement in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical reasoning. (Ex. 8, pp. 15-1; Ed. Code § 5632; Cal. Code Regs., § 3030, subd. (b)(10).)

(B) The school district may find a severe discrepancy by a mathematical formula which requires converting the cognitive ability and achievement scores into a common standard score with a mean of 100, and then calculating

whether the difference between the scores of same-aged peers, is equivalent to a mathematical differential of 1.5 multiplied by the standard deviation, adjusted by a one standard error of measurement. Alternatively, the IEP team can make a determination according to the Education Code without performing a mathematical calculation, by documenting in a written report that there is a severe discrepancy between ability and achievement as a result of a disorder of one or more basic psychological processes. (Ex. 8.) The school district's assessor determined claimant met the eligibility requirement for special education under the eligibility criteria of SLD, based upon one area of cognitive ability, claimant's visual processing deficit, and concluded that claimant suffered a severe discrepancy between claimant's cognitive ability and achievement. It appears from the assessor's analysis that the alternative method of determining an SLD was used.

15. It is unknown from the school district's assessment whether in fact claimant meets the criteria of SLD under the DSM-5 because the DSM-5 was not referenced. (See DSM-5, pp. 66-74.)⁵

16. Dr. Bagherzadeh performed one standardized measure of cognitive ability, the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V). Dr.

⁵ **"Intellectual disability (intellectual developmental disorder).** Specific learning disorder differs from general learning difficulties associated with intellectual disability, because the learning difficulties occur in the presence of normal levels of intellectual functioning (i.e., IQ score of at least 70 +/- 5). If intellectual disability is present, specific learning disorder can be diagnosed only when the learning difficulties are in excess of those usually associated with the intellectual disability." (emphasis in the original.) (DSM-5, p. 73.)

Beghazadi considered the full-scale score of the WISC-V “the most representative of general intellectual functioning.” (Ex. 5.) Claimant’s full scale score was 76, which he referred to as a very low borderline range of cognitive ability. Dr. Bagherzadeh found “no major discrepancies among subtest scores. [Claimant’s] score on Verbal Comprehension, Visual Spatial, and Processing Speed Scales fell within the Low Average range. Further his score on the Fluid Reasoning and Working Memory scales fell in the Very Low Range. It must be noted that his Visual Spatial (Composite Score: 89) and Processing Speed scores (Composite Score: 89) fell within the higher end of the Low Average range. That being said, [Claimant’s] scores reflect somewhat below average cognitive functioning in most areas of intellectual functioning.” Respondent’s full scale cognitive score was 76, a very low-borderline score (Ex. 5.) ⁶

17. At hearing, Dr. Shilakes corrected some of the labels used by Dr. Baghezadeh in her chart of the assessment results. However, Dr. Bagherzadeh’s description of claimant’s cognitive ability remains unaffected by the categorization of particular scores because claimant’s full scale score remains the same, and at 76 is very low and as Dr. Shilake, clarified very low/borderline.

18. Dr. Bagherzadeh also administered the Vineland Adaptive Behavior Scales, Third Edition – Comprehensive Interview Form (Vineland-3) to assess claimant’s adaptive functioning in the domains of communication, daily living skills, socialization and motor skills. Claimant’s scores in the communication and social domains fell within

⁶ At hearing, Dr. Shilakes corrected some of the labels used by Dr. Bagherzadeh in her chart of the assessment results. However, Dr. Bagherzadeh’s description of claimant’s cognitive ability remains unaffected by the categorization of particular scores accurately.

the moderately low range, and his scores in the daily living skills domain fell in the adequate range.

19. Grandparent was the principal source of information regarding claimant's adaptive functioning. In grandparent's office interview with Dr. Bagherzadeh, grandparent reported claimant's difficulty in social interactions. Grandparent noted claimant's solitary play at the park, and absence of friends out of school. On the Vineland-3 report grandparent expressed concern with claimant's social challenges.

20. Dr. Bagherzadeh's assessment was focused on assessing claimant for the eligibility category of autism, referred to in the DSM-5, as Autism Spectrum Disorder (ASD). As such, much of the focus of Dr. Bagherzadeh's assessment of claimant's adaptive abilities in the area of communication and socialization. Based upon her assessment, which included a school observation, office interviews, the administration of the WISC-V and the Vineland-3, Dr. Bagherzadeh concluded claimant did not meet the diagnostic criteria for ASD; more particularly, claimant did not present with qualitative impairments in reciprocal social communication and restricted behaviors.

21. Dr. Bagherzadeh opined that at a future time, with increased social demands, claimant might meet the DSM-5 diagnostic criteria of Social Communication Disorder. (Ex. 5, p. 7.)

22. Dr. Bagherzadeh considered claimant's "borderline intellectual functioning" only in the context of a determining whether claimant met the criteria for autism. She opined that "some" of claimant's social difficulties "may" be attributed to his "borderline intellectual functioning." (Ex. 5, p. 7.)

23. Claimant's adaptive behaviors are not clinically significant at this time. According to grandparent's report on the Vineland-3, interview and testimony,

claimant's adaptive behaviors, were mostly age-appropriate. Grandparent reported that claimant was able to do many daily living skills. Claimant can pay attention, clarify words claimant did not understand, write 20 words from memory, plan for changes in the weather, take claimant's own temperature, clean floors thoroughly, put away leftover food, use a clock and keep track of when to do things, use technology, move easily between topics in a conversation, understand verbal cues when entering a group which indicates that claimant is not welcome, take turns while playing sports, control anger when given constructive criticism. Grandparent reported deficits in writing simple notes, letters or emails, using the toilet before going out if uncertain about the availability of a restroom, cleaning bathroom, and doing laundry.

24. Dr. Bagherzadeh concluded from the results of the Vineland-3 that claimant's adaptive skills in the communication and socialization domains were within the moderately low range, and claimant's daily living skills as measured by that domain was in the average range.

25. Dr. Bagherzadeh diagnosed claimant with borderline intellectual functioning based upon the WISC-5 full scale score of cognitive ability of 76 and Vineland-3 functioning in the communication and social domains of moderately low.

Claimant's Academic Status and Learning Deficits

26. Dr. Bagherzadeh's report did not go into any detail about claimant's academic and learning struggles. During the hearing, claimant's historical struggle in the area of academic achievement was explored in more detail by grandparent. The February 2019 IEPs and academic achievement records, it is clear that claimant has persistently struggled in all areas and measures of academic achievement, i.e., math, reading and written expression., when standard measures of achievement are applied.

(Exs. 7, 8, A, and C.)⁷ On the California Assessment of Student Performance and Progress administered during the 2018-2019 school year, when claimant was in fourth grade, claimant performed below standard in all areas assessed: English Language Arts, inclusive of reading, writing, listening and research/inquiry; Mathematics, inclusive of concepts and procedures, problem solving, modeling and analysis, and communicating reasoning. (Ex. B.). Claimant's fourth grade scores were consistent with his below average grades on the same assessment administered the previous year. (Ex. C.)

27. Based upon Dr. Bagherzadeh's assessment there is insufficient support for the school district's determination of SLD. As such, there is an insufficient basis from which to preclude claimant from WRC services on the basis that claimant's deficits arise solely from a learning disorder.

Other Evidence

28. Dr. Shilakes testified on behalf of the WRC and responded to questions about the WRC's ultimate determination that claimant did not meet the eligibility criteria for WRC services. Dr. Shilakes is a licensed clinical psychologist who, for three years, was a vendored psychologist for the WRC. She has been employed by the WRC as a staff psychologist-intake manager, since August 2019.

⁷ Claimant's "standards-based" report card for the fifth grade states he is working in many areas in the English-language arts at a level of "consistent achievement in within the standard" but not in mathematics; however, these measures appear to be determined by the teacher and directly conflict with the statewide assessment. (Ex. A.)

29. Dr. Shilakes articulated the two aspects of eligibility criteria for Lanterman Act services: diagnosis of a qualifying disability, and a substantial disability in three or more "life areas" by the eligibility team of which she was a part. She capably explained the intake process which was supported by the documentation.

30. (A) Dr. Shilakes testimony lacked clarity and was less persuasive when explaining the WRC's position that claimant did not qualify as ID or under the fifth category. There was insufficient documentary evidence to support Dr. Shilakes's testimony or the WRC's position. Dr. Shilakes stated that Dr. Bagherzadeh's report, which clearly was prepared to determine whether claimant met the eligibility criteria for autism, was also sufficient to rule out claimant's eligibility under the categories of ID or fifth category. In her report, Dr. Bagherzadeh only set forth the diagnostic criteria of autism, not intellectual disability, and addressed intellectual disability only in passing, only to explain the deficits in claimant's social communication. A more comprehensive assessment is required to rule out intellectual disability and fifth category eligibility.

(B) Dr. Shilakes stated that the one measure, using the WISC-5, was sufficient. Dr. Beherzadeh referred to claimant's full scale score of 76 as "borderline." Dr. Shilakes confirmed that although the DSM-5 no longer uses this term, it is still appropriated by psychologists to refer to individuals who are close to, but not precisely within the scores of 70, with a deviation of plus or minus 5 points, which would place claimant one point above the upper end of the range for ID. With a borderline score of 76, it is uncertain whether this one assessment is sufficient to determine ID under DSM-5 or the fifth category, particularly in view of Dr. Bagherzadeh's statement (made with regard to her analysis of autism), "that no single test is used to make a diagnosis." (Ex. 5.)

(C) Dr. Bagherzadeh did conduct interviews and observations; however, her use of these measures was focused on whether claimant met the eligibility criteria for autism.

(D) Although Dr. Shilakes insisted the WRC's team, of which she was a participant, discussed all areas of eligibility, there is no writing supporting her statement, and Dr. Bagherzadeh's assessment which was available to the team was not prepared for any purpose other than a determination of autism.

(E) Dr. Shilakes did not dispute the results of the WISC-5. At a minimum more evidence of an analysis of Dr. Bagherzadeh's borderline intellectual disability determination was needed with reference to the DSM-5 criteria.

(F) Dr. Shilakes offered little insight into whether any treatment for ID or fifth category-eligible individuals would be similar to that required for claimant. After discussing treatment for adults, Dr. Shilakes offered that school-aged children require the breakdown of tasks into small steps, and constant repetition.

(G) Overall, there was insufficient support from Dr. Behrzadeh's assessment for the WRC's determination that claimant did not meet the diagnostic criteria for ID or the ID-related fifth category.

31. Grandparent is a tireless advocate on behalf of claimant. Based upon grandparent's testimony and the documentary evidence the WRC and grandparent supplied, it is clear that grandparent has pursued assistance to address and improve claimant's deficits. Grandparent has provided interventions at home, illustrated by the provision of guidance to claimant to ensure success in self-care by insisting upon toileting routines and independence in the community, by guiding claimant in the purchase of goods. Grandparent's home and community interventions are laudable.

32. Grandparent's observations of claimant's needs are consistent with claimant's reported deficits in adaptive behavior, primarily in the areas of communication and learning. During the hearing, grandparent reported claimant's inability to engage with strangers and to make transitions to new people. Grandparent observed claimant's hesitance when told to engage with a store clerk, at grandparent's insistence, to purchase an item. Grandparent spoke of claimant's difficulty in making the transition to a general education environment during the school day because claimant had to leave the group of familiar special education students, and join claimant's special education peers. Grandparent was a credible, and an honest and astute witness. Grandparent is highly educated and with a bachelor of arts in human services a master of arts in organizational leadership and credits toward a doctorate in human services, is a case manager with the Salvation Army.

33. Understandably grandparent wants claimant to obtain the proper help, strategies and tools, in social skills and learning. Grandparent understands claimant's communication skills to be directly related to any social skills deficits grandparent has observed, including claimant's challenges with unfamiliar people. Grandparent has met with resistance from the school district in the area of social skills training.

34. In a Lanterman Act case, where the claimant is requesting eligibility, claimant has the burden of proof. There were deficiencies with the WRC's evaluation and determination that claimant was not eligible for regional center services under the categories of ID or fifth category, and at some later time another intake and evaluation might be appropriate. Dr. Bagherzadeh's report suggests that ID or the fifth category might be appropriate.

35. Claimant did not offer any competing evaluation or evidence that would substantiate claimant's diagnosis as ID or evidence that would support the fifth

category, including treatment similar to that of an individual with ID. Significantly, at this time, claimant failed to provide sufficient evidence that claimant has a “substantial disability” in three or more areas identified in the Lanterman Act. By history, claimant’s adaptive deficits are restricted to the area of receptive and expressive language, and learning. During the hearing, grandparent reported claimant needed to be reminded to shower, but conceded that this was a pattern common to children. Aside from tasks involving learning, there is insufficient evidence that the deficits noted by grandparent, which generally require reminders, are not age appropriate.

LEGAL CONCLUSIONS

JURISDICTION AND BURDEN OF PROOF

1. Jurisdiction exists to conduct a fair hearing in the above-captioned matter, pursuant to Welfare and Institutions Code, section 4710 et seq..

2. Because claimant is the party asserting a claim, claimant bears the burden of proving, by a preponderance of the evidence, that claimant is eligible for government benefits or services. (See Evid. Code, §§ 115 and 500.) Claimant has not met claimant’s burden of proving eligibility for regional center services in this case.

GOVERNING LAW

3. The Lanterman Act is a comprehensive statutory scheme to provide treatment, services, and supports for persons with developmental disabilities. (Welf. &

Inst. Code⁸ §§ 4500, 4500.5, 4502, 4511.) The term “[s]ervices and supports for persons with developmental disabilities” is broadly defined in section 4512, subdivision (b), to include diagnosis, evaluation, treatment, care, special living arrangements, physical, occupational, and speech therapy, training, education, employment, and mental health services.

4. To be eligible for services and treatment under the Lanterman Act, a person must have a “developmental disability,” defined in section 4512 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.” (§ 4512, subd. (a).) The statute identifies five categories of disabling conditions that are potentially eligible for services: (1) intellectual disability, (2) cerebral palsy, (3) epilepsy, (4) autism, and (5) “disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability, but shall not include other handicapping conditions that are solely physical in nature.” (*Ibid.*)

5. To be eligible for services under section 4512, subdivision (a), a person must not only have a qualifying “developmental disability,” but that disability must also constitute a “substantial disability for that individual.” (§ 4512, subd. (a).) Subdivision (l) of section 4512 defines “substantial disability” as “the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person: [¶] (A) Self care. [¶] (B) Receptive and expressive language. [¶] (C) Learning. [¶]

⁸ All statutory references are to the Welfare and Institutions Code unless otherwise stated.

(D) Mobility. [¶] (E) Self-direction. [¶] (F) Capacity for independent living. [¶] (G) Economic self-sufficiency.” Claimant failed to demonstrate that claimant currently suffers from a substantial disability in three of the seven categories. Claimant is deficient in receptive and expressive language due to claimant’s social communication deficits and learning. Claimant has challenges with transitions and dealing with unfamiliar people, e.g., unfamiliar students and store clerks. Grandparent has to urge claimant to perform self-care, but otherwise there is no evidence claimant’s self-care or self-direction is not age appropriate. The remaining categories are not applicable to an 11-year-old child.

6. In addition to having a condition that meets the foregoing statutory requirements, a claimant seeking fifth category eligibility under section 4512, cannot have a “handicapping condition” that is “solely physical in nature” (§ 4512, subd. (a)) or solely constitutes a psychiatric disorder or a learning disability. (Cal. Code. Regs., tit. 17 (CCR), § 54000, subd. (c).) The excluded conditions are defined in CCR section 54000, subdivision (c):

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy

between estimated cognitive potential and actual level of educational performance and which is not a result of generalized [intellectual disability], 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 [intellectual disability].

7. There is no evidence that claimant's deficits are solely psychiatric and solely physical, and insufficient evidence that claimant's deficits are solely due to a learning disability and not ID or, if not ID, the fifth category, assuming claimant could meet the threshold requirement of having a substantial disability.

8. The determination of eligibility under the category of ID is guided by the DSM-5, which states in pertinent part as follows:

Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following three criteria must be met:

A. Deficits in intellectual functions, 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 sociocultural 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 intellectual and adaptive deficits during the developmental period.

[1] . . . [1]

...[1] Intellectual functioning is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence. Individuals 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.

...[11] IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks. For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score. Thus, clinical judgment is needed in interpreting the results of IQ tests.

Deficits in adaptive functioning (Criterion B) refer to how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and socio-cultural background. Adaptive functioning involves adaptive reasoning in three domains: conceptual, social, and practical. The conceptual (academic) domain involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations, among others. The social domain involves awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment, among others. The practical domain involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior and

school and work tasks organization, among others.
Intellectual capacity, education, motivation, socialization,
personality features, vocational opportunity, cultural
experience, and coexisting general medical conditions or
mental disorders influence adaptive functioning. . .

[¶] . . . [¶]

Criterion B is met when at least one domain of adaptive
functioning – conceptual, social, or practical – is sufficiently
impaired that ongoing support is needed in order for the
person to perform adequately in one or more life settings at
school, at work, at home, or in the community. To meet the
diagnostic criteria for intellectual disability, the deficits in
adaptive functioning must be directly related to the
intellectual impairments described in Criterion A.

(DSM-5, pp. 37-38).

9. The assessment of whether claimant suffers from a fifth category condition requires consideration of both prongs of potential fifth category eligibility, i.e., whether claimant suffers from a disabling condition found to be closely related to intellectual disability or whether claimant requires treatment similar to that required for individuals with intellectual disability. (Welf. & Inst. Code § 4512, subd. (a).)

10. In *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, the appellate court held that “the fifth category condition must be very similar to [intellectual disability], with many of the same, or close to the same, factors required in classifying a person as [intellectually disabled]. Furthermore, the various additional

factors required in designating an individual developmentally disabled and substantially handicapped must apply as well.” (Id., at p. 1129.) It is therefore important to track factors required for a diagnosis of intellectual disability when considering fifth category eligibility.

11. The presence of adaptive deficits alone is not sufficient to establish intellectual disability or fifth category eligibility. (*Samantha C. v. Department of Developmental Services* (2010) 185 Cal.App.4th 1462, 1486 [intellectual disability “includes both a cognitive element and an adaptive functioning element” and to “interpret fifth category eligibility as including only an adaptive functioning element” misconstrues section 4512, subdivision (a)].)

12. Determining whether a claimant’s condition “requires treatment similar to that required” for persons with intellectual disability is not a simple exercise of enumerating the services provided and finding that a claimant would benefit from them. Many people, including those who do not suffer from intellectual disability, or any developmental disability, could benefit from the types of services offered by regional centers (e.g., counseling, vocational training, living skills training, or supervision). The criterion therefore is not whether someone would benefit from the provision of services, but whether that person’s condition requires treatment similar to that required for persons with intellectual disability, which has a narrower meaning under the Lanterman Act than services. (*Ronald F. v. Dept. of Developmental Services*), (2017) 8 Cal.App.5th 84, 98.)

That the Legislature intended the term “treatment” to have a different and narrower meaning than “services” is evident in the statutory scheme as a whole. The term “services and supports for persons with developmental disabilities” is

broadly defined in subdivision (b) of section 4512 to include those services cited by the court in *Samantha C.*, e.g., cooking, public transportation, money management, and rehabilitative and vocational training, and many others as well. (§ 4512, subd. (b); *Samantha C.*, *supra*, 185 Cal.App.4th at p. 1493, 112 Cal.Rptr.3d 415.) “Treatment” is listed as one of the services available under section 4512, subdivision (b), indicating that it is narrower in meaning and scope than “services and supports for persons with developmental disabilities.”

13. The term “treatment,” as distinct from “services” also appears in section 4502, which accords persons with developmental disabilities “[a] right to treatment and habilitation services and supports in the least restrictive environment. Treatment and habilitation services and supports should foster the developmental potential of the person and be directed toward the achievement of the most independent, productive, and normal lives possible. Such services shall protect the personal liberty of the individual and shall be provided with the least restrictive conditions necessary to achieve the purposes of the treatment, services, or supports.” (§ 4502, subd. (b)(1).) The Lanterman Act thus distinguishes between “treatment” and “services” as two different types of benefits available under the statute.

DISPOSITION

14. Dr. Bagherzadeh found from the administration of the WISC-5, little difference in the various domains of claimant’s cognitive abilities, diagnosed claimant with a borderline intellectual disorder, and attributed claimant’s deficits in the social-communication area to claimant’s borderline intellectual disability. Otherwise

the WRC failed to provide a thorough foundation for its determination that claimant did not meet the criteria for ID under the DSM-5, or the fifth category.

15. Despite the weaknesses in the foundation for WRC's determination, it was claimant's burden to establish proof of a substantial disability and a qualifying eligibility, which claimant failed to do. The evidence, from the assessments administered by the school district and Dr. Bagherzadeh, established that claimant's deficits could not be solely attributed to a learning disorder. Nevertheless, claimant failed to show a substantial disability in three or more areas as required by the Lanterman Act, or provide any expert testimony to establish a diagnosis of ID, or alternatively, that claimant met fifth category eligibility criteria, i.e., a disability closely related to ID or requirement treatment similar to ID.

ORDER

WRC'S determination that claimant is not eligible for regional center services is sustained. Claimant's appeal of that determination is denied.

DATE:

EILEEN COHN

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.