

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

In the Matter of:

CLAIMANT

v.

INLAND REGIONAL CENTER, Service Agency

OAH No. 2020030102

DECISION

Jami A. Teagle-Burgos, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 31, 2020.¹

¹ In light of the President's declaration of a national emergency over the COVID-19 pandemic; the Governor's proclamation of a State of Emergency and Executive Orders N-25-20, N-33-20, and N-63-20 pertaining to the pandemic; the declarations of county and city public health emergencies throughout the State; the directives from state and local officials to ensure social distancing and sheltering-in place; and in order to protect the health and safety of all public and OAH personnel, this matter was conducted by telephone.

Jennifer Cummings, Program Manager, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

Claimant represented himself with the assistance of his mother.²

The record was closed, and the matter submitted for decision on August 31, 2020.

ISSUES

Is claimant eligible for regional center services under the category of autism spectrum disorder (autism), intellectual disability, or a disabling condition closely related to an intellectual disability or that requires treatment similar to that required for individuals with an intellectual disability pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act)?

FACTUAL FINDINGS

Background

1. On January 15, 2020, IRC's eligibility team, which is comprised of a psychologist, program manager, and medical doctor, made an eligibility determination based on documents provided by claimant, a 10-year-old male, that he was not eligible for regional center services.

² Claimant's mother testified with the assistance of a Spanish interpreter.

2. On January 16, 2020, IRC sent claimant a Notice of Proposed Action stating that its eligibility team found that claimant did not have a “substantial disability” as a result of intellectual disability, autism, cerebral palsy, epilepsy, or a disabling condition that is closely related to an intellectual disability or requires treatment similar to a person with an intellectual disability (fifth category).

3. On February 10, 2020, claimant filed a Fair Hearing Request challenging IRC’s eligibility determination. Specifically, claimant contends he is eligible for regional center services. This hearing followed.

Developmental Disability

4. In order to be eligible for regional center services one must have a developmental disability. 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 the individual. Four diagnoses qualify as grounds for finding a developmental disability – intellectual disability, cerebral palsy, epilepsy, and autism. There is a fifth qualifying category, which generally is referred to as the fifth category. It is a disabling condition found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability.

Diagnostic Criteria for Autism Spectrum Disorder

5. The *Diagnostic and Statistical Manual for Mental Disorders* (DSM-5) identifies criteria for the diagnosis of autism. The diagnostic criteria includes persistent deficits in social communication and social interaction across multiple contexts; restricted repetitive and stereotyped patterns of behavior, interests, or activities;

symptoms that are present in the early developmental period; symptoms that cause clinically significant impairment in social, occupational, or other important areas of function; and disturbances that are not better explained by intellectual disability or global developmental delay. An individual must have a DSM-5 diagnosis of autism to qualify for regional center services based on autism.

Diagnostic Criteria for Intellectual Disability

6. The DSM-5 also identifies criteria for the diagnosis of intellectual disability. Intellectual disability is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. Three diagnostic criteria must be met in order to receive a diagnosis of intellectual disability: deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience; deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility; and, the onset of these deficits must have occurred during the developmental period. Intellectual functioning is typically measured using intelligence tests. Individuals with an intellectual disability typically have intelligent quotient (IQ) scores at or below the 65 to 75 range. The essential features of intellectual disability are deficits in general mental abilities and impairment in everyday adaptive functioning, as compared to an individual's age, gender, and socio-culturally matched peers.

Eligibility Under the Fifth Category

7. Under the fifth category, the Lanterman Act provides assistance to individuals with a disabling condition closely related to intellectual disability or that

requires treatment similar to that required by an individual with an intellectual disability. The fifth category does not include other handicapping conditions that are "solely physical in nature." (Welf. & Instit. Code, § 4512, subd. (a).)

Evidence Presented at Hearing

CLAIMANT'S MOTHER'S TESTIMONY

8. The following is a summary of the testimony of claimant's mother. Claimant behaves well at school because she gives him his medications before he goes to school. He is completely different when he comes home. He is 10 years old and behaves like his sister who is six years old. He is one of her four children. Claimant does not act like a normal child because he is sometimes very hyperactive. He is not able to speak well or dress himself. He does not play like other children, and she has to make sure that he does not touch anyone inappropriately. Her neighbor asked if claimant has special needs, and other people have noticed that something is wrong with him. Her husband has to help her with claimant because claimant just runs outside to the ice cream truck without asking. Claimant began receiving Supplemental Security Income (SSI) when he was about four or five years old, due to his learning disability and a speech impairment. When he speaks, he does not say a complete sentence, instead he will say phrases like "give sandwich," He also receives SSI for a congenital foot condition for which he has undergone eight surgeries. She knows that claimant is different from other children, and would like extra support for him.

**INDIVIDUALIZED EDUCATION PROGRAM (IEP) SUMMARIES ON MAY 3,
2016, SEPTEMBER 20, 2016, JANUARY 10, 2017, AND APRIL 23, 2019**

9. The following are summaries of claimant's IEPs that were prepared by Colton Joint Unified School District (CJUSD).

10. An IEP on May 3, 2016, reported that claimant was six years old and attending Smith Elementary School. Claimant's primary disability was listed as "specific learning disability," and not autism, emotional disturbance, and/or intellectual disability. He had discrepancies in attention, auditory processing, cognitive abilities, oral expression, and listening comprehension. He attended class in a general education setting with supplemental aids and services. The summary of claimant's levels of performance were as followed: reading was an area of concern; he was able to count to 10 but not yet learned to write numbers from memory; he could write his first name but not yet learned to give the letters in order; he was able to communicate his needs while at school; he was very social and well-liked by his peers; he could be physical with students in class but not in an aggressive way; he was respectful to adults; he was able to run, bounce and catch a ball, and use the playground equipment; he had improvement in fine motor skills and was able to copy and cut letters; and he was able to use the restroom and wash his hands independently.

11. An IEP on September 20, 2016, reported that claimant was in first grade and his primary disability continued to be "specific learning disability." The purpose of the IEP was to review the results of claimant's speech testing. A speech therapist assessed that he was below average in receptive and expressive language skills in English and Spanish, and slightly below average in articulation skills. Claimant met the requirements for speech services.

12. An IEP on January 10, 2017, reported that claimant was still in first grade and his primary disability continued to be "specific learning disability." Claimant had been out of school from mid-September 2016 through December 2016 because he was recovering from foot surgery. He had returned to his class in January 2017, and his teacher reported that he was adjusting well. He continued to be in a general education setting and was receiving in-class specialized academic instruction for 120 minutes each week and pull-out of class speech services for 120 minutes each month.

13. An IEP on April 12, 2019, reported that claimant was in third grade and his primary disability continued to be "specific learning disability." He could identify the names and sounds of most letters; he could add and subtract single and double digits without regrouping; he could write alphabet letters but often confused "b", "d", and "p"; he spoke in a combination of complete and incomplete sentences due to word-finding difficulties and poor working/language memory as well as processing; he had reduced phonemic skills and difficulty with multimodality learning as his reading and writing were limited; he was considered by his teacher to be a very sweet boy who participated well in whole/small group settings, and was cooperative most of the time; he was respectful to adults and his peers; he had poor short-term memory and needed repeated directions and re-teaching; he was able to run and access playground equipment; he was able to use scissors correctly and write neatly; he could take care of his personal needs, and seek help when he needed; he did not often complete classwork or homework; he lacked organizational skills and was disorganized with his work, time, and materials; and he was able to write his first name but not last name.

PSYCHOEDUCATIONAL REPORT ON MAY 2, 2016

14. The following is a summary of a psychoeducational report on May 2, 2016, submitted by Amanda Contreras-Porto, M.S., a school psychologist at CJUSD, who evaluated claimant when he was in kindergarten.

15. On the Kaufman Assessment Battery for Children 2nd Edition (KABC-II), claimant had a standard score of 78 on the Mental Processing Index (MPI) that was in the below average range; standard score of 82 on the Nonverbal Index (NVI) that was in the below average range; standard score of 87 on the Facilitating Cognitive Composite (FCC) that was in the below average range; standard score of 66 in Gc-Crystallized Intelligence that was in the extremely below average range; standard score of 91 in Gsm-Short Term Memory that was in the average range; standard score of 85 in Gv-Visual Processing that was in the below average range; standard score of 91 in the Glr-Lng Term Retrieval that was in the average range; and a standard score of 91 in the Gf-Fluid Reasoning that was in the average range.

16. On the Comprehension Test of Phonological Processing Second Edition (CTOPP-2), claimant had a standard score of 67 in the Ga-Auditory Processing that was in the extremely below average range.

17. On the Woodcock-Johnson III Test of Cognitive Abilities, claimant had an overall cluster standard score of 63 that was in the extremely below average range, and a standard score of 96 in his ability to coordinate visual perception with finger/hand movements that was in the average range. On the Woodcock Johnson IV Tests of Oral Language in English and Spanish, claimant was limited in English oral language ability and extremely limited in Spanish oral language ability.

18. On the Young Children's Achievement Test (YCAT), claimant had a composite score of 73 that was in the well below average range.

19. On the Adaptive Behavior Assessment System Third Edition (ABAS-III), claimant had standard scores of 65 in general adaptive composite, 60 in conceptual 70 in social, and 69 in practical, which all fell in the extremely low range.

20. On the Bateria-III Woodcock-Munoz (Bateria), claimant had a standard score of 55 in his ability to communicate his acquired knowledge that was in the very low range; a standard score of 65 in phonetic coding that was in the very low range; a standard score of 47 in his ability to communicate his acquired knowledge that was in the very low range; and a standard score of 54 in his ability to apprehend and hold information in immediate awareness that was in the very low range.

21. Based on the scores above, Ms. Contreras-Porto assessed that claimant's area of suspected disability was a "specific learning disability." His overall cognitive ability was in the average range, and his processing deficits were in attention, auditory, and cognitive ability area of expression. He had a severe discrepancy between intellectual ability and achievement for which he met the criteria for a student with a "specific learning disability." In addition, he was referred to a speech and language pathologist for a possible speech and/or language impairment.

TRIENNIAL HEALTH ASSESSMENT ON APRIL 11, 2019

22. A Triennial Health Assessment by CJUSD on April 11, 2019, reported that claimant continued to qualify for services as a student with a "specific learning disability." He had a significant discrepancy between his overall nonverbal ability that was in the average range and his academic abilities in reading, math, and writing. However, claimant's social emotional behavior and adaptive functioning were not

determined to be areas of significant concern, and he had regular school attendance. He did continue to receive speech therapy with a speech pathologist. His parents shared that he was aggressive and had other behavioral problems at home. His IEP team expressed that claimant did not exhibit the same behavioral problems at school. His mother mentioned that claimant was taking medication to calm him down in the morning before school and also at night time.

MEDICAL RECORD ON OCTOBER 21, 2019

23. A medical record on October 21, 2019, by Shurouk Ismail, M.D., a primary care physician, indicated that claimant was seen for having pneumonia in both lungs. Claimant had a normal physical examination aside from having a fever, cough, and ear drainage. He was able to cooperate with family, friends, and teachers; he had enough friends; his family had no concerns about relations with family, friends, or others; he played sports for one hour each day; he used the television and/or computer for two hours each day; he was in second grade and performed below grade level; he liked school; he had a learning disability that was a "writing disorder"; and he had special needs involving speech. His current medications included guanfacine 1mg tablet at night for attention deficit hyperactivity disorder (ADHD), and sertraline 25mg half tablet every morning for anxiety.

IRC'S ELIGIBILITY DETERMINATIONS ON MAY 9, 2017, AND JANUARY 15, 2020

24. On May 9, 2017, IRC's staff psychologist and program manager conducted an Eligibility Determination/Team Review by reviewing claimant's Psychoeducational Assessment from May 2016 and his IEPs from January 2017, September 2016, and May 2016. They found that claimant was being served at school

under a “specific learning disability,” and his testing scores were variable as they ranged from mildly delayed to average. Their final assessment was that claimant was not eligible for regional center services, as he did not have an intellectual disability, autism spectrum disorder, cerebral palsy, epilepsy, and/or a condition in the fifth category.

25. On January 15, 2020, IRC’s staff psychologist, medical doctor, and program manager conducted an Eligibility Determination/Team Review by reviewing claimant’s Psychoeducational Assessment from May 2016 and his IEPs from April 2019, January 2017, September 2016, and May 2016. They found that claimant continued to be served at school under a “specific learning disability” and for speech language impairments. They determined that claimant continued to not be eligible for regional center services, as he did not have an intellectual disability, autism spectrum disorder, cerebral palsy, epilepsy, and/or a condition in the fifth category.

DR. DIAZ’S TESTIMONY

26. The following is a summary of the testimony of Alejandra Diaz, Psy.D., a staff psychologist at IRC. Dr. Diaz has been a licensed clinical psychologist since 2017. She conducts psychological evaluations to determine eligibility for regional center services. She explained a client of regional center services must have a developmental disability that originated prior to the age of 18 and is likely to continue indefinitely, and constitutes a substantial disability that is contributable to an intellectual disability, autism spectrum disorder, cerebral palsy, epilepsy, or a condition in the fifth category.

27. Upon review of the records, Dr. Diaz reported that claimant was respectful; he was able to do self-help skills like use the restroom and wash his hands independently; and he was able to communicate in the classroom with his teacher and

peers. Claimant had average cognitive ability although his academic achievements were lower. He had scattered scores across the battery of testing in his psychoeducational assessment that showed below average range for mental processing and cognitive ability. The observations of his teacher and mother indicated that he had an extremely low range of adaptive behavior. Dr. Diaz reported that claimant's overall test scores were in the below average range for cognitive ability, but not low enough for him to be considered intellectually disabled. Claimant's test scores were also varied, and this was different from persons with a developmental disability who had test scores that were similar. Moreover, claimant's school has provided IEP services to claimant for several years for his "specific learning disability," and the school never had a concern that he had an intellectual disability. As such, Dr. Diaz assessed that claimant did not have an intellectual disability.

28. In addition, Dr. Diaz testified there was no indication that claimant had autism. He had appropriate social behavior, and he was liked by his peers and respectful to adults. While it was noted that he grabbed things at school, he was not aggressive in any way. His school never identified that autism was ever a concern.

29. Finally, Dr. Diaz testified that claimant was being treated by his medical doctor for ADHD and anxiety, and prescribed medications for these conditions. Dr. Diaz remarked these medications could impact claimant's overall functioning including his cognition.

LEGAL CONCLUSIONS

Burden and Standard 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 of Developmental Services 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 retardation³, 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 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.

(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 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).)

Applicable Case Law

9. In *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1127, the Fourth District Court of Appeal discussed the language in the Lanterman Act regarding the fifth category and determined the language was not impermissibly vague. The appellate court explained that finding as follows (*Id.* at pp. 1128-1130.):

In the instant case, the terms “closely related to” and “similar treatment” are general, somewhat imprecise terms. However, section 4512(a) does not exist, and we do not apply it, in isolation. “[W]here the language of a statute fails to provide an objective standard by which conduct can be judged, the required specificity may nonetheless be provided by the common knowledge and understanding of members of the particular vocation or profession to which the statute applies.” [Footnote omitted.] Here, the Lanterman Act and implementing regulations clearly defer to the expertise of the DDS and RC professionals and their determination as to whether an individual is developmentally disabled. General, as well as specific guidelines are provided in the Lanterman Act and regulations to assist such RC professionals in making this difficult, complex determination. Some degree of generality and, hence, vagueness is thus tolerable.

The language defining the fifth category does not allow such subjectivity and unbridled discretion as to render section 4512 impermissibly vague. The fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded. Furthermore, the various additional factors required in designating an individual developmentally disabled and substantially handicapped must apply as well.

While there is some subjectivity involved in determining whether the condition is substantially similar to mental retardation and requires similar treatment, it is not enough to render the statute unconstitutionally vague, particularly when developmentally [sic] disabilities are widely differing and difficult to define with precision. Section 4512 and the implementing regulations prescribe an adequate standard or policy directive for the guidance of the RCs in their determinations of eligibility for services.

Evaluation

10. The burden of establishing that claimant is eligible for regional center services was on claimant. Claimant did not meet that burden.

11. The only expert who testified in this matter was Dr. Diaz. Following a review of all records provided, Dr. Diaz's uncontroverted expert opinion was that claimant's records did not show he qualified for regional center services under autism,

intellectual disability, or the fifth category. The eligibility team at IRC concluded the same.

12. The Lanterman Act and the applicable regulations set forth criteria that a claimant must meet to qualify for regional center services. Claimant has been receiving IEP services for a "specific learning disability" and a speech and language impairment, and he has been diagnosed with ADHD and anxiety. However, none of these conditions entitles one to regional center services. Claimant's mother justifiably wants to make sure her son receives all services for which he is eligible. And it certainly is understandable that claimant's mother is worried about claimant. However, a preponderance of the evidence does not show that meets the diagnostic criteria under the DSM-5 for autism or intellectual disability. The evidence also did not show claimant suffers from a condition closely related to an intellectual disability or that requires treatment similar to a person with an intellectual disability. Accordingly, claimant is not eligible for regional center services under the fifth category.

ORDER

Claimant's appeal from Inland Regional Center's determination that he is not eligible for regional center services is DENIED.

DATE: September 14, 2020

JAMI A. TEAGLE-BURGOS
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.