BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

and

INLAND REGIONAL CENTER,

Service Agency OAH No. 2020030611

DECISION

Marion J. Vomhof, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter telephonically on April 21, 2020, pursuant to an April 9, 2020, Order of Exemption from the March 19, 2020, OAH General Order in connection with the COVID-19 pandemic.

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

Danielle Steward, Agency Social Worker with Building Bridges Family Foster Agency, represented minor claimant, who was not present for the hearing.

Oral and documentary evidence was received. The record was closed and the matter submitted for decision on April 21, 2020.

ISSUE

Is claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) based on a substantial handicap as a result of autism or intellectual disability or a substantial handicap resulting from a condition closely related to autism or intellectual disability or requiring treatment similar to that required by individuals with autism or intellectual disability (fifth category)?

CASE SUMMARY

The evidence established that claimant is not eligible for regional center services based on a substantial handicap as a result of autism or intellectual disability or a condition closely related to autism or intellectual disability or requiring treatment similar to that required by individuals with autism or intellectual disability.

FACTUAL FINDINGS

Jurisdictional Matters

1. On February 20, 2020, IRC notified claimant that she was not eligible for regional center services because she did not have a "substantial handicap" as a result of autism, cerebral palsy, epilepsy, or intellectual disability, nor did she appear to have a handicapping condition closely related to autism, cerebral palsy, epilepsy, or intellectual disability or that required treatment similar to that provided to individuals with autism, cerebral palsy, epilepsy, or intellectual disability.

2. On March 3, 2020, Jennifer Le, claimant's social worker, filed a Fair Hearing Request on claimant's behalf and stated the following as reasons for requesting a hearing:

> There is belief that child qualifies for services. Child tantrums and will "flap" her wings when upset and child struggles with transitioning. Would benefit from behavior therapy.

In the Request, Ms. Le described what was needed to resolve the complaint as: "That [claimant] receives behavior therapy, speech therapy."

Background Information

3. Claimant is five years old and currently resides in a foster home along with her three sisters, ages four, three, and one and one-half. Claimant was placed in foster care due to neglect and failure to protect. She has been in her current foster home since June 2019, but previously had four different foster placements. Claimant is in pre-school and began attending Head Start in August 2019, although her school is currently closed due to the COVID-19 pandemic. Claimant was referred to IRC by her DCFS social worker for possible Autism Spectrum Disorder (ASD); her four-year-old sister is also being evaluated at IRC for ASD.

Applicable Diagnostic Criteria

INTELLECTUAL DISABILITY

4. 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

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

Intellectual functioning is typically measured using intelligence tests. Individuals with intellectual disability typically have intelligent quotient (IQ) scores in the 65-75 range.

AUTISM SPECTRUM DISORDER

5. The DSM-5 also contains the following diagnostic criteria to be used for ASD:

> A. Persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history (examples are illustrative not exhaustive, see text):
>
> 1. Deficits in social-emotional reciprocity, ranging, for example, from abnormal social approach and failure of normal back-and-forth conversation; to reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions.

2. Deficits in nonverbal communicative behaviors used for social interaction, ranging, for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication.

3. Deficits in developing, maintaining, and understanding relationships, ranging for example, from difficulties adjusting behavior to suit various social contexts; to difficulties in sharing imaginative play or in making friends; to absence of interests in peers.

B. Restrictive, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following, currently or by history (examples are illustrative, not exhaustive, see text):

1. Stereotyped or repetitive motor movements, use of objects, or speech (*e.g.*, simple motor stereotypies, lining up toys or flipping objects, echolalia, idiosyncratic phrases).

2. Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior (*e.g.*, extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, need to take same routine or eat same food every day).

3. Highly restricted, fixated interests that are abnormal in intensity or focus (*e.g.*, strong attachment to or preoccupation with unusual objects, excessively circumscribed or perseverative interests).

4. Hyper- or hyporeactivity to sensory input or unusual interest in sensory aspects of the environment (e.g., apparent indifference to pain/temperature, adverse response to specific sounds or textures, excessive smelling or touching of objects, visual fascination with lights or movement).

C. Symptoms must be present in the early developmental period (but may not become fully manifest until social demands exceed limited capacities, or may be masked by learned strategies in early life).

D. Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning.

The "Fifth Category"

6. Under the "fifth category" the Lanterman Act provides assistance to individuals with "disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability" but does "not include other handicapping conditions that are

solely physical in nature."[1] Along with the other four qualifying conditions (cerebral palsy, epilepsy, autism spectrum disorder, and intellectual disability), a disability involving the fifth category must originate before an individual attains 18 years of age, must continue or be expected to continue indefinitely, and must constitute a substantial disability. The fifth category is not defined in the DSM-5.

In *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1129, the California Court of Appeal held that the fifth category was not unconstitutionally vague and set down a general standard: "The fifth category condition must be very similar to mental retardation, 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."

In response to the *Mason* case, in 2002 the Association of Regional Center Agencies (ARCA) approved the *Guidelines for Determining 5th Category Eligibility for the California Regional Centers* (Guidelines).[2] In those Guidelines, ARCA noted that eligibility for Regional Center services under the fifth category required a "determination as to whether an individual functions in a manner that is similar to that of a person with mental retardation **OR** requires treatment similar to that required by individuals with mental retardation." (Emphasis in original.) The Guidelines stated that *Mason* clarified that the Legislative intent was to defer to the professionals of the

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[1] Welfare and Institutions Code section 4512, subdivision (a).

[2] The ARCA guidelines have not gone through the formal scrutiny required to become a regulation and were written before the *DSM-5* was in effect.

Regional Center Eligibility Team to make the decision on eligibility after considering information obtained through the assessment process. The Guidelines listed the factors to be considered when determining eligibility under the fifth category.

Substantial Handicap

7. In order to determine whether a diagnosis of a developmental disability is substantially handicapping so as to qualify for regional center services, there must be significant functional limitations in at least three of the seven life activities listed in California Code of Regulations, section 54001, which are "self-care," "receptive and expressive language," "learning," "mobility," "self-direction," "capacity for independent living," and "economic self-sufficiency." Because claimant is only five years old, the life activities "capacity for independent living" and "economic self-sufficiency" do not apply.

Evidence Introduced at Hearing

8. Dr. Sandra Brooks testified at the hearing. She received her Ph.D. in Clinical Psychology from Loma Linda University in 2006 and has worked as a staff psychologist at IRC for 13 years. Her duties include reviewing records and conducting evaluations to assist IRC's multidisciplinary Eligibility Team to determine if potential clients are eligible for services.

In preparation for the hearing, Dr. Brooks reviewed a medical examination report, which included a developmental screening for autism, and reports of social assessment and psychological assessments conducted by IRC. All three reports were received into evidence.

9. The May 29, 2019 medical examination report listed as a "mental health concern" that claimant would sit and stare, did not respond when caregiver felt claimant should be responding, and would cry and throw tantrums. While the examiner gave claimant a score of "fail" in developmental areas such as communication, gross motor, fine motor, problem solving, and personal social, the report indicated that claimant was "meeting growth and developmental milestones." As a result of the screening, claimant was referred to IRC for possible ASD.

Dr. Brooks pointed out that the report provided no results of the screeners utilized, and she opined that because claimant was meeting developmental milestones at that time, there was insufficient information in the report to make an autism diagnosis.

10. On September 23, 2019, a social assessment was completed by Joyce Kim, Senior Intake Counselor for IRC. Ms. Kim met with claimant and her foster mother, and reviewed claimant's daily living skills, such as mobility, eating, toileting, self-care tasks, focus, communication and social interaction. As a result of her assessment, Ms. Kim recommended, and claimant's foster mother agreed, that claimant should undergo further testing as necessary, including a psychological evaluation for ASD.

Dr. Brooks noted that the social assessment stated that claimant was being monitored for trauma every three months by a psychologist. This was significant and must be considered when making a diagnosis, because trauma can result in an individual exhibiting behaviors that may seem like autism.

11. On January 22, 2020, Dr. Ruth Stacy, an IRC staff psychologist, conducted a psychological assessment, which included the administration of four tests.

The Kaufman Brief Intelligence Test Second Edition (KBIT2) was administered to obtain an estimate of claimant's current level of cognitive functioning. Results indicated her verbal communication score was at the upper limit of the below average range and her nonverbal communication and intelligence quotient (IQ) were both average. Dr. Brooks stated that overall, claimant's cognitive skills were within the average range of intellectual functioning.

The Autism Diagnostic Observation, Second Edition (ADOS-2), Model 3 is a comprehensive assessment used to elicit social interactions and communication behaviors crucial for diagnosing ASD. An overall total score of 7 or above is suggestive of ASD; claimant's overall total score of 3 was within the non-spectrum range.

The Childhood Autism Rating Scale, Second Edition, Standard Version (CARS2-ST) is a behavioral rating scale which distinguishes behaviors associated with ASD from behaviors associated with developmental delays, and uses information provided by caregivers as well as direct observation of the examiner. A score of 30 or above is suggestive of ASD; claimant attained a score of 25.5, which Dr. Brooks stated is within the range of Minimal to No Symptoms of Autism Spectrum Disorder.

The Adaptive Behavior Assessment System, Third Edition (ABAS-3), Parent/Caregiver Form was used to obtain the caregiver's perception and estimates of claimant's current developmental levels in various areas of adaptive functioning. The Conceptual and Practical composite scores were within the low range, the Social composite score was within the extremely low range, and the General Adaptive Composite score was near the upper limit of the extremely low range. Claimant's cognitive skills were within the average range, and no deficits were found in intellectual or adaptive functioning, therefore Dr. Brooks advised that claimant does not meet the criteria for a diagnosis of intellectual disability.

In reviewing the DSM-5 criteria for autism, Dr. Brooks stated that an individual must meet the criteria under section A, and must meet at least two of the four criteria in section B. Dr. Brooks reviewed the following from Dr. Stacy's report:

Under Section A.1, deficits in social-emotional reciprocity, claimant was able to go back and forth, recognized her emotions, and demonstrated appropriate affect. Regarding Section A.2, deficits in nonverbal communicative behaviors, claimant was able to integrate eye contact and gestures into her communication. Regarding Section A.3, deficits as to relationships, claimant plays with other children and likes to be in charge. While she may have some social difficulties, her overall social interests are not those as seen in other children with ASD.

Section B discusses restricted, repetitive patterns of behavior, interests or activities. Under Section B.1, stereotyped or repetitive movements or speech, some of these movements were reported by the caregiver but were not observed by Dr. Stacy. Dr. Stacy wrote that claimant did like to line up her toys, but no other stereotyped or repetitive movements were observed. As to Section B.2, insistence on sameness or inflexibility, claimant played with a variety of toys during the assessment and also at home according to her foster mother. Under Section B.3, highly restricted, fixated interests, claimant did get upset when her toys were moved but she also displayed imaginative creativity by making up a story with various characters. This behavior is not characteristic of individuals with autism. Regarding Section B.4, hyper- or hyporeactivity to sensory input, claimant appeared quite busy, "perhaps a little hyper," but Dr. Stacy observed no sensory issues.

Claimant does not meet criteria for "fifth category eligibility," as her cognitive skills are within the average range, and claimant does not have a disabling condition that requires treatment similar to what individuals with intellectual disability require.

Dr. Brooks concluded that claimant does not meet criteria for regional center services under intellectual disability, ASD, or a disabling condition closed related to or requiring treatment similar to what individuals with an intellectual disability require.

Dr. Brooks advised that information gathered from claimant's foster mother suggests that claimant may have Attention Deficit/Hyperactivity Disorder (ADHD), which can impact claimant's social and adaptive skills, and her ability to function successfully in new situations or situations that require flexibility. Claimant's family history plus her four different foster placements could have an effect on her mental health and development. Dr. Brooks noted that claimant's current trauma-related counseling is important, and since September 2019, claimant has been receiving what Dr. Brooks referred to as "play therapy" in her foster home each week through Tessie Cleveland Community Services Corp. Claimant is scheduled to begin speech therapy soon. Claimant has a history of behavioral outbursts and tantrums, and smearing feces, and mental health/behavioral health services could address those behavioral concerns and rule out ADHD. However, Dr. Brooks pointed out that this condition would not qualify claimant for regional center services. Dr. Stacy also recommended claimant be evaluated for special education services as well as speech therapy and occupational therapy, that she receive those services or therapies as warranted.

Claimant's foster mother testified that she has been claimant's foster mother for eleven months. At the time she arrived, claimant was fully toilet trained, but has since regressed and has daily "accidents." She has defecated in the car and played in her feces "a couple of times." Claimant is "easily distracted" and when asked a question, she will at times stare and not respond. Since she arrived at this foster home, claimant has frequent temper tantrums, where she will "slide on her back in the middle of the floor for hours." These tantrums seem to begin when something changes, such as the

need to go to the store. When claimant is told to stop, she will sit up and at times has spit. Claimant will "bang her head" until it hurts her but will stop before she is physically injured.

LEGAL CONCLUSION

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 eligibility criteria. The standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

Applicable Statutes

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

3. Welfare and Institutions Code section 4501 states:

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

> An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community. To the maximum extent feasible, services and supports should be available throughout the state to prevent the dislocation of persons with developmental disabilities from their home communities.

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

> "Developmental disability" means a disability which originates before an individual attains age 18, continues, or can be expected to continue indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

5. Welfare and Institutions Code section 4512 (l)(1) 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.

(D) Mobility.

(E) Self-direction.

(F) Capacity for independent living.

(G) Economic self-sufficiency."

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

(a) 'Developmental Disability' means a disability that is attributable to mental retardation, 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 functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or 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 mental retardation.

Appellate Authority

7. The purpose of the Lanterman Act is 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." (Welfare and Institutions Code section 4501; *Association of Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

8. The Lanterman Act enumerates legal rights of persons with developmental disabilities. A network of 21 regional centers is responsible for determining eligibility, assessing needs and coordinating and delivering direct services to individuals with developmental disabilities and their families within a defined geographical area. Designed on a service coordination model, the purpose of the regional centers is to "assist persons with developmental disabilities and their families in securing those services and supports which maximize opportunities and choices for living, working, learning, and recreating in the community." The Department of Developmental Services allocates funds to the centers for operations and the purchasing of services, including funding to purchase community-based services and supports. (*Capitol People First v. Department of Developmental Services* (2007) 155 Cal.App.4th 676, 682-683.)

Evaluation

9. The Lanterman Act and the applicable regulations set forth criteria that claimant must meet in order to qualify for regional center services. Claimant failed to meet her burden to establish her eligibility for regional center services. Claimant's foster mother justifiably wants to make sure claimant receives all services for which she is eligible. However, a preponderance of the evidence did not show that claimant

suffers from autism spectrum disorder or intellectual disability. And a preponderance of the evidence does not show that claimant meets the criteria for eligibility under the fifth category.

ORDER

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

DATE: May 4, 2020

MARION J. VOMHOF
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.