

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

In the Matter of:

CLAIMANT

VS

INLAND REGIONAL CENTER, Service Agency.

OAH No. 2020060511

DECISION

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on August 17, 2020, by telephonic conference pursuant to OAH's July 22, 2020 Order that converted this matter from an in-person hearing to a telephonic hearing due to the social restrictions in place as a result of the COVID-19 pandemic.

Stephanie Zermeño, Fair Hearing Representative, represented Inland Regional Center (IRC).

No appearance was made by or on behalf of the claimant, despite notice of the hearing being served upon claimant with the date, time and manner the hearing would take place identified. Despite claimant's failure to appear, this matter proceeded on the merits, at IRC's request, as required pursuant to Welfare and Institutions Code

section 4712, subdivision (a). That subdivision requires that a hearing be held within 50 days of the date a claimant's fair hearing request is filed unless good cause is found to continue the matter. In this matter, a continuance was previously granted at claimant's request. However, claimant did not seek a continuance of the August 17, 2020, hearing.

After IRC presented documentary and testimonial evidence the record was closed and the matter was submitted for decision on August 17, 2020.

ISSUE

Is claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) based on a diagnosis of autism spectrum disorder (autism), intellectual disability, or a disabling condition closely related to an intellectual disability or that requires similar treatment as an individual with an intellectual disability (fifth category) that is substantially disabling?

FACTUAL FINDINGS

IRC'S Denial of Claimant's Application for Services

1. Claimant is a 17-year-old boy who has been receiving special education services through his school. Claimant lives with his grandmother and attends high school. According to claimant's January 31, 2019, Individualized Education Program (IEP), claimant is on home instruction due to mental health problems. Claimant qualifies for special education services under the Emotional Disturbance, Special Learning Disability, and Speech and Language Impairment categories.

2. In a Notice of Proposed Action dated April 14, 2020, IRC denied claimant's application for regional center services because the records it reviewed did not show that claimant has a disability that qualifies him for services under any of the categories set forth in Welfare and Institutions Code section 4212.

3. On May 13, 2020, claimant requested a fair hearing to challenge IRC's proposed action. As the reason of his request, claimant disputed that he does not have a developmental disability. In response to the question in the request concerning what is needed to resolve claimant's concerns, claimant stated that he wanted to know what documents IRC reviewed to take its proposed action and inquired whether IRC had reviewed all of claimant's medical records.

Diagnostic Criteria for Autism Spectrum Disorder

4. Official notice was taken of excerpts from the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5) as applicable to the assessment of claimant for eligibility under the Autism and Intellectual Disability categories. The DSM-5 provides the diagnostic criteria used by psychologists and medical doctors to diagnose autism spectrum disorder, which is one of the qualifying conditions for regional center services. To be eligible for regional center services based on autism spectrum disorder, a claimant must meet the diagnostic criteria for that disorder that are set forth in the DSM-5.

5. Under the DSM-5, the criteria necessary to support a diagnosis of autism spectrum disorder include: persistent deficits in social communication and social interaction across multiple contexts; restricted, repetitive 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 current functioning; and disturbances that are not better explained by intellectual disability or global developmental delay.

Diagnostic Criteria for Intellectual Disability

6. Official notice is also taken of diagnostic criteria in the DSM-5 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, confirmed by both clinical assessment and individualized, standardized intelligence testing must be present. Intellectual functioning is typically measured using intelligence tests. Individuals with intellectual disability typically have intelligent quotient (IQ) scores in the 65 to 75 range.

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

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

Diagnostic Criteria for Fifth Category

9. Under the fifth category, the Lanterman Act provides assistance to individuals with disabling conditions closely related to an intellectual disability or that requires similar treatment as an individual with an intellectual disability but does not include other handicapping conditions that are “solely physical in nature.” (Welf. & Inst. Code, § 4512, subd. (a).) A disability involving the fifth category must also have originated before an individual attained 18 years of age, must continue or be expected to continue indefinitely, and must constitute a substantial disability.

In *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, the court of appeal 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. Another appellate decision has also suggested, when considering whether an individual is eligible for regional center services under the fifth category, that eligibility may be based largely on the established need for treatment similar to that provided for individuals with an intellectual disability, notwithstanding an individual’s relatively high level of intellectual functioning. (*Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462.) In *Samantha C.*, the individual applying for regional center services did not meet the criteria for intellectual disability. The court understood and noted that the Association of Regional Center Agencies had guidelines (ARCA Guidelines) which recommended consideration of fifth category for those individuals whose “general intellectual functioning is in the low borderline range of intelligence (I.Q. scores ranging from 70 to 74).” (*Id.* at p. 1477.) However, the court confirmed that individuals may qualify for regional center services under the fifth category on either

of two independent bases, with one basis requiring only that an individual require treatment similar to that required for individuals with intellectual disability.

IRC Determination and the Records It Reviewed

7. IRC obtained the following medical records, reports, and psychological assessments:

IEP dated September 7, 2017

IEP dated October 13, 2017

IEP dated January 12, 2018

IEP dated May 7, 2018

IEP dated January 31, 2019

Psychoeducational Triennial Assessment Psychoeducational
by School District dated October 28, 2013

Educationally Related Mental Health Services Assessment
by Andrea Choudhury dated January 26, 2015

Psychoeducational Triennial Assessment by School District
dated September 23, 2016

Psychoeducational Report Update by School District dated
December 20, 2017

Educationally Related Mental Health Services Assessment
by Tracy Schroeder dated January 15, 2018

Psychological Assessment Report by Loma Linda University
Medical Center dated January 21, 2019

Psychoeducational Triennial Assessment by School District
dated September 19, 2019

Health Assessment by School District dated September 11,
2019

Speech-Language Assessment Report by School District
dated September 19, 2019

8. Based on the records it reviewed, IRC's multidisciplinary team determined that claimant did not qualify for regional center services. This team included Paul Greenwald, Ph.D., a licensed staff psychologist at IRC. Dr. Greenwald testified in this matter and his testimony is summarized below. In a document dated February 24, 2020, captioned "Eligibility Determination/Team Review," Dr. Greenwald cited several medical and psychological reports dated September 13, 2019, May 1, 2017, and January 10, 2018, as the records he reviewed. He also reviewed an IEP dated September 19, 2019.¹

9. Citing the September 19, 2019, psychological assessment that was performed through claimant's school district, Dr. Greenwald wrote the following based

¹ The document appeared to be in Dr. Greenwald's handwriting. The dates of these reports appear to be incorrect: The school psychological assessment is dated January 19, 2019, an IEP is dated May 7, 2018, and a mental health assessment is dated January 15, 2018.

on his review of this report: "Estimated cognitive functioning appears to be in the low average ranges". He further noted that claimant was assessed with "special learning disabilities in reading and written expression, math calculation/reasoning due to auditory processing not developmental (Aut/ID)".

10. Pryschilla Lopez, School Psychologist, prepared the School District's September 19, 2019, psychological assessment report, entitled Psychoeducational Triennial Assessment, which Dr. Greenwald referenced in the multi-disciplinary team determination. (Exhibit 19.) Dr. Lopez's report was detailed and comprehensive.

11. In her summary of claimant's overall medical health, Dr. Lopez stated that claimant is in general good health and he participates in a "residential program." He is diagnosed with Bipolar Disorder with Psychotic features (auditory and visual hallucinations), Attention Deficit Hyperactivity Disorder (ADHD) (combined presentation), chronic Post Traumatic Stress Disorder (PTSD), Psychogenic non-epileptic seizures (pseudo seizure) and heart valve prolapse. She further stated that claimant has a history of self-injurious behaviors with numerous psychiatric hospitalizations before he entered a residential program for suicidal attempts, suicidal and homicidal ideations, and auditory hallucinations telling him to hurt himself or others.

12. In her assessment of claimant, Dr. Lopez had claimant undergo a series of psychological assessments on August 23, 2019, September 11, 2019, and September 13, 2019. She also observed claimant at school on September 13, 2019. In addition, Dr. Lopez reviewed claimant's "cumulative file."

Dr. Lopez administered the following psychological tests to claimant:
Developmental Test of Visual-Motor Integration-Sixth Edition (Beery VMI), Woodcock

Johnson IV Tests of Achievement, Fourth Edition (WI IV), Behavior Assessment System for Children, Third Edition (BASC-3), Comprehensive Test of Phonological Processing (CTOPP-2), Woodcock-Muñoz Language Survey, Third Edition (WMLS-III).

13. In her summary of the results of the assessments she administered, Dr. Lopez stated the following:

As a result of the administered measures of this triennial evaluation, [claimant's] overall scores were found to be within the well below average to average ranges. He demonstrated areas of strength in psychological processing, in visual processing and auditory processing (based on his performance on the Phonological Awareness composite of the CTOPP-2). He obtained a below average score on the WMLS-III (standard score 82). His estimated cognitive functioning appears to be in the low average to average ranges of functioning.

14. Based on the results of the Beery VMI test specifically, which is designed to measure the integration of visual and motor abilities, Dr. Lopez found claimant's scores suggested an average score in visual-motor integration with a standard score 76. On the Visual Perception subtest, claimant obtained a standard score of 93, which placed him in the average range of functioning. On the Motor Coordination test, claimant obtained a below average standard score of 78.

15. Dr. Lopez concluded from these scores that a "severe discrepancy exists" between claimant's intellectual ability and achievements in written expression, reading,

and mathematical reasoning, due to “[a]uditory” and “[s]ensory motor” psychological processes.

16. Based on the WI-IV test scores results, Dr. Lopez stated that claimant scored in the “well below average range” in Broad Reading and Broad Math, and below average in Written Expression, it appears from the scores, because a page discussing this test result is missing.

17. Regarding claimant’s performance on the CTOPP-2, which measures phonological awareness, phonological memory, and rapid naming. According to the CTOPP-2 manual Dr. Lopez referenced, a deficit in one or more of these kinds of phonological processing abilities is viewed as the most common cause of learning disabilities in general, and of reading disabilities in particular.

According to the results of this test, claimant scored average in the Phonological Awareness of Words, he obtained a score of 88 on the Phonological Memory Composite Score, which indicated that he is “successful with storing and retrieving information from short-term memory.” Under the Rapid Naming Composite, claimant scored in the very poor range, indicating that he “struggles when required to store and fluently retrieve information from long-term memory.” But, Dr. Lopez also noted that claimant was able to correctly identify all numbers and letters during the administration of the Rapid Digit Naming and Rapid Letter Naming subtests.

18. Regarding claimant’s behaviors, as measured by the BASC, Dr. Lopez found him to be in the “average” range in the parent scale with no concern, notably, in adaptability social skills, leadership and functional communication. He was rated “at risk” indicating “some concern regarding somatization and activities of daily living.” He was not rated as “clinically significant” based on claimant’s grandmother’s rating.

Claimant was additionally described in the report as being “helpful and empathetic” towards others, with a strong and open mind and a desire to succeed.

19. Dr. Lopez described claimant as polite and cooperative based on her interaction with him during the testing. Dr. Lopez noted claimant asked her questions, was “very talkative,” frequently smiled, and appeared to have a good sense of humor. He shared information about himself and his mental health struggles and reported that he tends to experience visual and auditory hallucinations. Claimant, Dr. Lopez noted, was able to maintain adequate eye contact and initiated conversation throughout the testing session. She also described him as “very social” from her September 13, 2019, observation of him when he was at school.

Testimony of Paul Greenwald, Ph.D.

20. Dr. Greenwald is a licensed clinical psychologist and IRC staff psychologist at IRC. At IRC, Dr. Greenwald conducts psychological evaluations to determine eligibility for services.

21. Dr. Greenwald reviewed the reports and records IRC received and applied the criteria for determining whether claimant is eligible to receive Lanterman Act services. He also participated in IRC’s multi-disciplinary assessment of claimant’s eligibility as mentioned above. Based on his review of the records IRC obtained, Dr. Greenwald testified that claimant’s records showed that claimant does not have a developmental disability and is not eligible for regional center services under the intellectual disability or autism categories.²

² The records do not indicate that claimant has a basis to qualify for regional center services under any categories other than intellectual disability, autism, or the

22. Dr. Greenwald testified that claimant's records show that claimant has a learning disability that affects his ability to integrate and process visual information, as Dr. Lopez found in her September 19, 2019 report. This "processing" problem is recorded in the VMI test results and means that claimant has difficulties reproducing perceived information due to a learning disability. Dr. Greenwald's opinion is consistent with Dr. Lopez's opinion as summarized above.

23. Fundamentally, due to this visual motor processing problem, claimant's cognitive and intellectual patterns, as measured in tests administered to claimant over the years, are not consistent with an "intellectually deficient" profile where the scores are "consistently" low. To support his opinion here, Dr. Greenwald cited claimant's performance on the Woodcock-Muñoz Language Survey in 2013, Developmental Test of Visual-Motor Integration, and the Weschler Individual Achievement Test. (Exhibit 10, pp. 77 and 78.).

24. Dr. Greenwald testified that claimant's results from these tests were "splintered"; they showed a wide range of performances and skills underlying claimant's performances on these tests: The scores ranged from extremely low to low average, and are consistent with the profile typical of a child with a speech language learning disability, as opposed to a child with an intellectual disability.

25. Dr. Greenwald also addressed whether claimant may qualify for regional center services under the autism category. Dr. Greenwald stated that the records showed that claimant is sociable, presents as polite and cooperative, he likes to read,

fifth category. With this noted, Dr. Lopez noted in her assessment that claimant was assessed with "Psychogenic non-epileptic seizures (pseudo seizures)".

and he is able to communicate effectively. These features are not typical for a person with autism.

Specific Findings

26. The evidence of record does not show that claimant has intellectual disability, cerebral palsy, epilepsy, or autism.

27. The evidence of record does not show that claimant has a disabling condition that is closely related to intellectual disability.

28. The evidence of record does not show that claimant has a disabling condition that requires treatment similar to that required for individuals with intellectual disability.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting. (Evid. Code, § 500.) "'Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." (Evid. Code, § 115.) Claimant has the burden of proving that he is eligible for Lanterman Act services.

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

The Law Regarding Eligibility

3. Welfare and Institutions Code section 4512, subdivision (a), defines developmental disability.

“Developmental disability” means 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. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include 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.

4. Welfare and Institutions Code section 4512, subdivision (b), concerns the determination of which services and supports are necessary for each consumer.

“Services and supports for persons with developmental disabilities” means specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and

maintenance of independent, productive, and normal lives.

The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option.

5. Welfare and Institutions Code section 4512, subdivision (b), lists examples of services and supports a consumer might need.

6. Welfare and Institutions Code section 4512, subdivision (l)(1), defines substantial disability as that term is used in Welfare and Institutions Code section 4512, subdivision (a).

"Substantial disability" means 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.

7. Welfare and Institutions Code section 4512, subdivision (l)(2) restricts a reassessment of a determination of substantial disability: "A reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible."

8. Welfare and Institutions Code section 4642, subdivision (a)(1), provides for eligibility for initial intake and assessment services.

Any person believed to have a developmental disability, and any person believed to have a high risk of parenting a developmentally disabled infant shall be eligible for initial intake and assessment services in the regional centers. In addition, any infant having a high risk of becoming developmentally disabled may be eligible for initial intake and assessment services in the regional centers. For purposes of this section, "high-risk infant" means a child less than 36 months of age whose genetic, medical, or environmental history is predictive of a substantially greater risk for developmental disability than that for the general population.

9. Welfare and Institutions Code section 4643, subdivision (a), provides that assessment may include collection and review of historical diagnostic data.

Assessment may include collection and review of available historical diagnostic data, provision or procurement of necessary tests and evaluations, and summarization of developmental levels and service needs and is conditional upon receipt of the release of information specified in subdivision (b).

10. Welfare and Institutions Code section 4643, subdivision (a), provides that a regional center may consider evaluations and tests from other sources.

In determining if an individual meets the definition of developmental disability contained in subdivision (a) of Section 4512, 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.

11. Claimant failed to prove by a preponderance of the evidence that he has a developmental disability to qualify for regional center services under any of the categories identified in Welfare and Institutions Code section 4512, subdivision (a). Based on a thorough review of numerous records and assessments, Dr. Greenwald testified that claimant does not have a developmental disability and he does not

qualify for regional center services under the intellectual disability, autism, and/or the fifth category. His opinion is well-supported in the record.

ORDER

Claimant's appeal from Inland Regional Center's determination that he is not eligible for regional center services is denied. The evidence did not establish claimant has a substantial disability as a result of autism, intellectual disability, cerebral palsy, epilepsy, or a condition that is closely related to an intellectual disability or requires treatment similar to a person with an intellectual disability (fifth category). Claimant's application for Lanterman Act services is denied.

DATE: August 28, 2020

ABRHAHAM M. LEVY

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.