

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

In the Matter of:

CLAIMANT

v.

INLAND REGIONAL CENTER, Service Agency

OAH No. 2020110427

DECISION

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter telephonically on December 23, 2020.

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

Claimant was represented by her authorized representative.

The record was closed and the matter submitted for decision on December 23, 2020.

ISSUE

Should IRC conduct further assessment to determine whether claimant is eligible for regional center services under the categories of 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) pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act)?

FACTUAL FINDINGS

Background

1. Claimant is a 21-year-old female who lives with her maternal aunt. On October 19, 2020, IRC sent claimant a Notice of Proposed Action and attached letter stating that after a review of claimant's records, IRC decided that no "intake" services can be provided because the records indicate claimant does not have a "substantial disability" as a result of intellectual disability, autism, cerebral palsy, epilepsy, or the fifth category.

2. On November 6, 2020, claimant's authorized representative filed a Fair Hearing Request requesting that IRC "retest" claimant. The request was construed to mean that claimant was contesting IRC's eligibility determination.

Diagnostic Criteria for Autism

3. The *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5) identifies criteria for the diagnosis of autism spectrum disorder. The diagnostic criteria include 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 spectrum disorder to qualify for regional center services under the category of autism.

Diagnostic Criteria for Intellectual Disability

4. The DSM-5 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 65-75 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.

Evidence Presented at Hearing

5. Ruth Stacy, Psy.D., is a staff psychologist at IRC. She has also held positions at IRC such as Senior Intake Counselor and Senior Consumer Services Coordinator. She has been involved in assessing individuals who desire to obtain IRC services for over 27 years. In addition to her doctorate degree in psychology, she also holds a Master of Arts in Counseling Psychology, a Master of Arts in Sociology, and a Bachelor of Arts in Psychology and Sociology. Dr. Stacy qualifies as an expert in the diagnosis of autism spectrum disorder, intellectual disability, and in the determination of eligibility for IRC services. Dr. Stacy testified about the following records the IRC eligibility team reviewed before determining that claimant did not qualify for regional center services.

6. A psychoeducational evaluation was conducted by claimant's school district in February 2010, when claimant was 10 years old, to address eligibility for special education services. Claimant was assessed with the Childhood Autism Rating Scale (CARS), which is based on reporting by her teachers. Her overall score was in the severely autistic range. Claimant was also assessed under the Gilliam Asperger's Disorder Scale (GADS), which suggested that Asperger's Syndrome was highly probable. Claimant also had a "very elevated" score for the Devereux Scales of Mental Disorders autism scale. Because claimant is African American, she could not be administered standardized intelligence tests. However, an estimate of her cognitive abilities were scattered between significantly below average to borderline below average. As a result, the evaluation found that claimant was eligible for special education services under the category of autism.

Dr. Stacy testified that a person can qualify for special education services under the category of autism if the person displays autism characteristics, and a DSM-5

diagnosis of autism spectrum disorder is not required. Thus, the criteria for receiving special education is far less stringent than under the Lanterman Act.

7. An Individualized Education Plan (IEP) completed by claimant's school district in February 2011, when claimant was 12 years old and in 8th grade, indicated that claimant qualified for special education services under the categories of speech/language impairment and autism. The IEP noted that claimant becomes upset and angry when she does not get what she wants, she will throw objects at peers and teacher 100 percent of the time, and she cries easily and becomes very loud and vocal when angry. In the summary of claimant's strengths, the IEP notes claimant participates in reading activities in class and communicates well orally, she reads at a fourth grade level, she has increased her positive peer/staff interaction, she helps others having a difficult time, she appreciates recognition for her school work and appropriate behavior, she is gaining confidence in her ability to behave appropriately, she is involved in social activities with her mother, and she is increasing her interest in general teenage social norms.

Dr. Stacy does not believe that the descriptions of claimant describe a person with substantial deficits. None of the descriptions of claimant suggest she suffered from a handicapping condition as a result of autism.

8. A psychological evaluation was conducted in April 2012 by Edward Frey, Ph.D., as part of an earlier request for IRC eligibility. Dr. Frey administered the Wechsler Intelligence Scale for Children – IV, in which claimant scored in the borderline range for all areas. However, she was considerably strong in the areas of vocabulary and non-verbal abstract reasoning. Dr. Frey did not believe that the results were suggestive of intellectual disability. Dr. Frey believed that borderline functioning was likely a slight underestimation because claimant was neglected for many years

when she lived with her mother who was deaf and schizophrenic. Dr. Frey also reviewed the Gilliam Autism Rating Scale (GARS) with claimant's aunt. Based on the aunt's report, Dr. Frey believed that the probability for claimant having autism was "unlikely." Finally, Dr. Frey administered the Vineland – II Adaptive Behavior Scale. Claimant's adaptive functioning was assessed in the borderline range in all domains. She was almost low average in both communication and daily living skills. Dr. Frey concluded that claimant was not eligible for IRC services. He noted that claimant was showing growth socially, and he suspected some of the autistic-like features were more related to environmental factors.

Dr. Stacy agreed with Dr. Frey's conclusions that the testing did not show claimant was eligible for IRC services.

9. An IEP completed in February 2013, when claimant was 14 years old, indicated claimant was being served under the category of autism. In listing claimant's strengths, the IEP noted claimant has been eager to share her areas of interest with adults and peers, enjoys demonstrating her use of sign language, enjoys using technology, and participates actively in class. The IEP also noted claimant has shown improvement in reading fluency and math operations. There were no noted concerns in the areas of adaptive living skills. She no longer received speech and language services.

Dr. Stacy testified that individuals with autism spectrum disorder typically would receive speech and language services, but the school district determined claimant no longer met the criteria. Additionally, there were no noted concerns in adaptive/daily living skills. Again, the IEP did not reflect that claimant suffered a handicapping condition.

10. A psychoeducational evaluation was performed in February 2016, which included teacher and classroom evaluations. The Woodcock-Johnson III Tests of Achievement contained 22 tests measuring five curricular areas. Claimant had a total score of 81, which was in the low average range. Claimant was also administered the GARS, which was completed by claimant's aunt and a teacher. The aunt placed claimant in the "possible" category for autism and the teacher's rating placed claimant in the "very likely" category for autism. The GADS was also administered and showed a high probability of Asperger's based on the aunt's evaluation and borderline probability based on the teacher's assessment. The Adaptive Behavior Assessment System 2 (ABAS-2) was administered to assess claimant's adaptive skills. Based on reporting by claimant's aunt and teacher, claimant had very low adaptive living skills in all areas – within the first percentile.

11. A transitional IEP was completed in February 2016, when claimant was 17 years old. The IEP indicated claimant was being served under the category of autism. The IEP indicated that claimant presented with strong vocabulary and reading skills compared to classroom peers. She participated in several extracurricular activities with considerable recognition. Claimant continued to have outbursts and some aggressive responses to her peers. She met all of her annual goals. Although she raises her voice in frustration or wanting to be heard, she responds to visual cues to self-edit and adjust her tone. She has shown mature behavior in class, does better when told to calm down, explain herself, and help to solve her problem. It was noted she needs to continue working to control her impulsive behavior.

Dr. Stacy testified that the IEP does not support claimant having a handicapping condition. Claimant had good receptive communication, good vocabulary, no

indication of stereotypical behavior or restricted interests, and in general, nothing to indicate autism in any of the descriptions.

12. Based on these documents, Dr. Stacy agreed with the multidisciplinary team's conclusion that claimant is not eligible for regional center services. Dr. Stacy believes that claimant's history of neglect and abuse is the source of claimant's deficits. Claimant consistently has scored in the low average range on cognitive functioning, which precludes a finding of intellectual disability. Dr. Stacy testified that if claimant had autism or a substantial handicap, her scores would be significantly lower. The testing showed scores not indicative of autism spectrum disorder.

13. Claimant's aunt testified as follows: She is a credentialed preschool teacher who took custody of claimant when claimant was 13 years old. Claimant's mother had neglected claimant, and claimant's aunt felt a lot of claimant's behaviors stemmed from this neglect. She did not know anything about claimant's background, so she was referred to IRC. She spoke to Dr. Frey, but she underreported some of the behaviors because she did not want to deal with it at the time. As time went by, claimant had speech problems. Claimant's aunt helped claimant with most of her school work; which explained why her scores were high. However, claimant cannot maintain a conversation, cannot understand simple questions or directions, and has to be directed over and over again to do things. Claimant cannot express emotions and is not aware of others' emotions. She is not aware of temperature and will wear a jacket out when it is 100 degrees outside. Claimant has routines and rituals; she does not like change. She exhibits odd movements, is clumsy, has stiff body language, is sensitive to sounds, fixates on objects intensely, and prefers only soft food. Claimant has obtained behavioral support from the Otay Center. However, claimant's aunt does not envision claimant living on her own ever. Claimant has attended community college for a

couple of years. However, she is now on academic probation. She does not have a job. Claimant travels to school by bus, but claimant's aunt has to put her on the bus, which goes directly to the college. She has to ensure that claimant dresses appropriately. Claimant is unable to make a budget or live independently.

14. Lexi Fryman is an associate marriage and family counselor who works at the Otay Center and testified at the hearing. She has worked with claimant for the past two years on mental health issues. Her formal diagnosis is conduct disorder. However, the facility does not treat autism, and a lot of things claimant needs help with Ms. Fryman cannot provide. Claimant presents with anxiety, but Ms. Fryman believes it is based on claimant's limited ability to express herself. Claimant speaks in a monotone voice, has no facial expressions, and lacks the emotional intelligence to work through her behavior issues.

15. Mona Acayturri is a case manager at the Otay Center who testified at the hearing. She has worked with claimant over the past year, working on building skills with claimant. Claimant struggles with connecting. Ms. Acayturri has worked in behavioral health for the past 21 years. Claimant presents differently than someone with anxiety. Claimant had a past diagnosis of intermittent explosive disorder, which the center's psychiatrist recently changed to conduct disorder and autism spectrum disorder. Claimant did not undergo any formal testing for the assessment of autism.

LEGAL CONCLUSIONS

Burden of Proof

1. In a proceeding to determine eligibility, the burden of proof is on the claimant to establish he or she meets the proper criteria. The standard is a preponderance of the evidence. (Evid. Code, §§ 115; 500.)

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 retardation¹, 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;

¹ 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. "Any person believed to have a developmental disability . . . shall be eligible for initial intake and assessment services in the regional centers." (Welf. & Inst. Code, § 4642, subd. (a)(1).) Intake shall include but need not be limited to, "information and advice about the nature and availability of services provided by the regional center and by other agencies in the community, including guardianship, conservatorship, income maintenance, mental health, housing, education, work activity and vocational training, medical, dental, recreational, and other services or programs that may be useful to persons with developmental disabilities or their families. Intake shall also include a decision to provide assessment." (*Id.* at subd. (a)(2).)

8. If assessment is needed, the assessment shall be performed within 120 days following initial intake. (Welf. & Inst. Code, § 4643, subd. (a).) "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" (*Ibid.*) In determining if an individual meets the definition of developmental disability, 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. (*Id.* at subd. (b).)

9. Any individual found ineligible for regional center services may appeal the decision in accordance with Welfare and Institutions Code sections 4700 through 4716. (Cal. Code Regs., tit. 17, § 54010, subd. (c).)

Evaluation

10. 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 also includes a decision to provide assessment but does not require an assessment. (*Id.* at subd. (a)(2).) Based on a review of claimant's records, IRC determined that claimant is ineligible for regional center services under any category and no further assessment is required. With regards to intellectual disability and the fifth category, based on the documentary evidence, there is not a reasonable belief that claimant qualifies under either category. IRC's decision not to conduct any further assessment is supported by the evidence, namely that claimant's cognitive abilities were most recently assessed in the low average range. Moreover, claimant graduated from high school and attended community college, which is not consistent with an individual with an intellectual disability or a similar disabling condition.

11. With regards to autism, claimant's records are less clear. Although claimant received special education services under the category of autism, the criteria are far less stringent than under the Lanterman Act. Claimant was assessed for IRC eligibility in 2012, and the evaluator concluded that autism was not probable. However, in 2016, a GARS assessment by claimant's school district showed autism was possible based answers from claimant's aunt, and very likely based on her teacher's response. The GADS also showed Asperger's was highly probable based on the aunt's responses and borderline based on the teacher's responses. Claimant has been receiving mental health treatment, and claimant's witnesses, although not experts in the field of autism, both testified that claimant displays behavior consistent with autism. Claimant's aunt testified credibly about claimant's behavior and limitations in functioning. Based on the evidence, there is an indicia that claimant has significant functional limitations in three or more areas of major life activities to constitute a "substantial disability" based on autism spectrum disorder. (Cal. Code Regs., tit. 17, § 54001.) Therefore, a preponderance of the evidence established that an assessment under Section 4643 is warranted. It should be highlighted, however, this decision makes no determination whether claimant qualifies for regional center services under the category of autism – only that IRC must undertake further assessment.

ORDER

Claimant's appeal from IRC's determination that she is not eligible for regional center services and supports is denied in part and granted in part. Claimant is not eligible for under the categories of epilepsy, cerebral palsy, intellectual disability, or a disabling condition closely related to an intellectual disability or that requires similar treatment as an individual with an intellectual disability. IRC shall conduct further

assessment to determine claimant's eligibility based on autism within the time frame specified under Welfare and Institutions Code section 4643.

DATE: January 6, 2021

ADAM L. BERG

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.