

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

In the Matter of:

CLAIMANT,

vs.

SAN GABRIEL/POMONA REGIONAL CENTER,

Service Agency.

OAH Case No. 2021020149

DECISION

Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on March 30, 2021, by video and telephone conference.

Daniel Ibarra, Fair Hearing Specialist, represented San Gabriel/Pomona Regional Center (Service Agency or SGPRC). Claimant's mother and authorized representative represented Claimant.

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on March 30, 2021.

ISSUE PRESENTED

The issue in this case is whether Claimant is eligible for services from the Service Agency.

FACTUAL FINDINGS

The Parties and Jurisdiction

1. Claimant is a 21-year-old-woman who seeks services from the Service Agency under the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500 et seq.¹

2. On January 19, 2021, SGPRC issued a Notice of Proposed Action (NOPA) and an accompanying letter, which informed Claimant that she was not deemed eligible for services under the Lanterman Act. SGPRC asserted that Claimant did not have an eligible disability that was substantially handicapping within the meaning of the Lanterman Act. (Ex. 1.) Claimant previously applied for eligibility, in 2018, but she was found not eligible. (Ex's. 26-28.)

¹ All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

3. On or about January 26, 2021, Claimant filed a Fair Hearing Request (FHR), and this proceeding ensued. (Ex. 2.) All jurisdictional requirements have been met.

Claimant's General Background

4. Claimant was born in March 2000 after a 35-week pregnancy, her mother's first and only child. Aside from gestational diabetes, it appears the pregnancy was normal though shortened by three weeks. Claimant was six pounds, three ounces at birth. Her mother reported to a Service Agency social worker that Claimant lifted her head at three weeks and rolled over after one month. She sat alone at four months, crawled at five months, and walked at 13 months. At nine months she used single words, such as "mom," and she put words together at 19 months. (Ex. 25, p. 268.)²

5. Claimant lives with her mother. She graduated with a high school diploma, after receiving special education services since elementary school. She is not employed.

6. Claimant has been diagnosed with mental health issues by school psychologists and others. She has received services for mental health issues for most of her life.

Claimant's Educational Background

7. Claimant was provided special education services beginning at a young age. Over a period of years, she had several psychoeducational assessments. The first

² The Service Agency's exhibits are sequentially paginated with Bates stamp numbers.

such report in the record was generated in 2008, when Claimant was eight years old. (See ex. 5.) Other psychoeducational assessments were performed in 2008 (sixth grade); 2014 (ninth grade); and 2017 (12th grade). (See exhibits 8, 14, and 21, respectively.) In each instance, the school psychologist found that Claimant's cognitive abilities were, depending on the test and the domain within that test, in the low average to mildly delayed range. For example, the 2017 testing showed that Claimant was in the second percentile or less on two domains, but low average in two others, with an overall rating of low average. (Ex. 21, pp. 239-240.

8. Testing of academic achievement indicated that Claimant functioned in the low average to average range. In the 2017 psychoeducational assessment, Claimant was administered the Woodcock-Johnson IV—Tests of Academic Achievement, and her scores in various areas were low average to average. Her Broad Reading score was an 83, low average, while her Broad Math score was 101, right at average, giving her an age equivalent of 19. Broad Written Math was average, with a score of 91. (Ex. 21, pp. 247-248.) These scores were generally consistent with earlier testing of academic achievement. For example, Claimant's Broad Math score during the 2011 testing was an 83, as it was in 2017. (Ex. 8, p. 83.) The 2017 score in Broad Math was an increase from the 2011 testing, where a score of 90 was yielded. (*Id.*)

9. None of the psychoeducational assessments indicated mental retardation or intellectual disability, the latter diagnostic criteria having replaced mental retardation in approximately 2013. Instead, Claimant was consistently assessed as suffering from Emotional Disturbance.

10. The first Individual Education Plan (IEP) generated for Claimant in October 2008, noted that she was eligible due to Emotional Disturbance, described as Depressive Disorder and PTSD, Post-Traumatic Stress Disorder. (Ex. 4, p. 13.) She was

provided some accommodations for some tests and specialized teaching, but she was in a general education environment for over 90 percent of the time in school. (*Id.*, at p. 20.) Later IEPs put more accommodations in place, such as physical room arrangement and differential grading standards. (E.g., exhibit 7, p. 64.) The October 2010 IEP added counseling one time per week, for 30 minutes. (*Id.*, at p. 73.)

11. The thrust of the IEPs that were prepared for Claimant between 2008 and 2017 was that her needs for special education services did not derive from a lack of intellectual ability. Instead, she was eligible for special education services due to depression and post-traumatic stress disorder.

Claimant's Mental Health Issues

12. The record discloses a history of mental health problems on Claimant's part. For example, as early as May 2007, she was being treated by Tri-City Mental Health Center with medication and counseling for depressive symptoms and anxiety. She had, at some time in 2007, reported auditory hallucinations. (Ex. 3.)

13. During Claimant's first few years in school, she was receiving counseling from various facilities. She reportedly was diagnosed with psychotic disorder, but that diagnosis reportedly was changed later, apparently to Depressive Disorder. (Ex. 11, p. 108.)

14. In February 2012, Claimant was hospitalized on a 72-hour hold, due to her statements that she was suicidal. She was discharged with a diagnosis of Major Depression, and she was then prescribed Prozac and Abilify. (Ex. 11, p. 110.)³

³ Exhibit 10 appears to be discharge paperwork. It is not legible.

15. Allegedly, Claimant's father sexually abused her when she was a young child. Mother went to the police, and father was only allowed a short, supervised, visitation on one day of the weekend. That molestation is appears to be at the root of Claimant's diagnosis of Post-Traumatic Stress Disorder (PTSD).

Dr. Frey's Psychological Evaluation

16. On July 19, 2018, Edward G. Frey, Ph.D., a vendor of the Service Agency, performed a psychological evaluation of Claimant, who was then about four months past her 18th birthday. His report of his assessment is found at exhibit 23.

17. Dr. Frey reviewed the school district's October 2017 psychoeducational report (exhibit 21) as well as other records. He performed testing with the Wechsler Adult Intelligence Scale-IV (Wechsler) and the Vineland Adaptive Behavior Scales, Third Edition, Comprehensive Parent Form (Vineland). These are standard normed tests, regularly relied upon by psychologists and other mental health professionals.

18. The results of the Wechsler placed Claimant in the borderline range of intelligence, with a full-scale IQ of 78. Her verbal comprehension was average, with other composite scores being borderline. Her score on the digit span test, part of the working memory composite, was rather low: a three when the average is ten. (Ex. 23, pp. 256-257.)

19. The Vineland testing established that Claimant is significantly delayed in adaptive function. The test, which has three domains (communication, daily living skills, socialization) showed an adaptive behavior composite of 46, where average is 100. This is more than three standard deviations below the mean, and placed Claimant in less than the bottom one percent of people taking the test. (Ex. 23, p. 257.)

20. Dr. Frey was of the opinion that Claimant did not suffer from Intellectual Disability, noting that she suffers from Major Depression, by report.

Diagnostic Criteria

21. Official notice is taken of a standard text, the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, commonly known as the DSM-5. It is relied upon by mental health practitioners and others for diagnostic criteria.

22. (A) The DSM-5 defines intellectual disability as “a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains.” (DSM-5, p. 33.) The following three criteria must be met to establish that a person suffers from intellectual disability:

A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.

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

C. Onset of intellectual and adaptive deficits during the developmental period.

(B) Thus, the definitive characteristics of intellectual disability include deficits in general mental abilities (Criterion A) and impairment in everyday adaptive functioning, in comparison to an individual's age, gender, and socio-culturally matched peers (Criterion B). To meet the diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the intellectual impairments described in Criterion A. Onset is during the developmental period (Criterion C). A diagnosis of intellectual disability should not be assumed because of a particular genetic or medical condition. Any genetic or medical diagnosis is a concurrent diagnosis when Intellectual Disability is present. (DSM-5, pp. 39-40.)

23. The authors of the DSM-5 have indicated that "[i]ntellectual functioning is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence. Individuals with intellectual disability have scores of approximately two standard deviations or more below the general population mean, including a margin for measurement error (generally +5 points). On tests with a standard deviation of 15 and a mean of 100, such as the Wechsler, this involves a score of 65-75 (70 ± 5)."

(DSM-5,

p. 37.)⁴ At the same time, the authors of the DSM-5 recognize that “IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks.” Thus, “a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person’s actual functioning is comparable to that of individuals with a lower IQ score.” (*Id.*)

24. According to the DSM-5, “[a]daptive functioning is assessed using both clinical evaluation and individualized, culturally appropriate, psychometrically sound measures. Standardized measures are used with knowledgeable informants (e.g., parent or other family member; teacher; counselor; care provider) and the individual to the extent possible. Additional sources of information include educational, developmental, medical, and mental health evaluations.” (*Id.*) Whether it is intellectual functioning or adaptive functioning, clinical training and judgment are required to interpret standardized measures, test results and assessments, and interview sources.

25. Although not a DSM-5 diagnostic criteria, the Lanterman Act recognizes eligibility for people who have a condition similar to Intellectual Disability, or who can be treated in a manner similar to how a person with Intellectual Disability is treated, assuming the other legal eligibility criteria are met, i.e., the condition is substantially

⁴ The Vineland is scored in a similar manner, with a mean of 100, and a standard deviation of 15. A score of 70 on either test places the individual tested in the second percentile, meaning, essentially, that they are in the bottom two percent of the population.

disabling, etc. (See Legal Conclusions 2 through 4.) This eligibility category is often referred to as the fifth category.

Other Matters

26. In February 2020, just before Claimant turned 20, a neurologist administered the Montreal Cognitive Assessment (MOCA) to Claimant. The MOCA is often used as a screening device to find intellectual impairment. Claimant scored a 27 on the test, where normal is defined as a score of 26 to 30, the top possible score being 30. (Ex. 30.) It is noteworthy that part of the reporting for the MOCA states that “depression can cause or be confused with cognitive impairments.” (*Id.*, at p. 298.)

27. Mother testified that Claimant needs assistance with all aspect of daily life. Mother must make sure Claimant gets up, that she performs daily hygiene, and she must assist Claimant with money, which Claimant does not understand. The mental health professionals do not want to give Claimant anti-depressants but are exploring use of Adderall or other drugs used to treat attention deficit disorders. Mother also attested that Claimant has frontal lobe deficiencies, but medical reports that would support that claim and explain the effects of such condition were not adduced.

28. Claimant’s exhibit A was received in evidence, which is the report of results of chromosome testing. It indicates that Claimant has Microdeletion Syndrome, which the report provides has been reported in several autism studies. However, there is no evidence Claimant suffers from autism.

29. Claimant, now 21 years-old, lacks self-direction, economic self-sufficiency, and capacity for independent learning.

LEGAL CONCLUSIONS

Jurisdiction

1. Jurisdiction exists to conduct a fair hearing in the above-captioned matter, pursuant to section 4710 et seq., based on Factual Findings 1 through 3.

Legal Conclusions Pertaining to Eligibility Generally

2. The Lanterman Act, at section 4512, subdivision (a), defines developmental disabilities as follows:

“Developmental disability” means a disability which originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. . . . 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.

This latter category is commonly known as “the fifth category.”

3. (A) Regulations developed by the Department of Developmental Services, pertinent to this case, are found in title 17 of the California Code of

Regulations (CCR).⁵ At CCR section 54000 a further definition of “developmental disability” is found which mirrors section 4512, subdivision (a).

(B) Under CCR section 54000, subdivision (c), some conditions are excluded. The excluded conditions 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

⁵All references to the CCR are to title 17.

need for treatment similar to that required for intellectual disability.

4. Section 4512, subdivision (l), provides:

“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:

- (1) Self-care.
- (2) Receptive and expressive language.
- (3) Learning.
- (4) Mobility.
- (5) Self-direction.
- (6) Capacity for independent living.
- (7) Economic self-sufficiency.

5. To establish eligibility, Claimant must prove, by a preponderance of the evidence, that she suffers from an eligible condition, i.e., Autism, Intellectual Disability, Cerebral Palsy, Epilepsy, or disabling conditions found to be closely related to Intellectual Disability or to require treatment similar to that required for individuals with an Intellectual Disability. This Conclusion is based on section 4512, subdivision (a) and Evidence Code section 500. She must also prove that she has a substantial

disability as a result of his eligible condition, within the meaning of section 4512, subdivision (l).

6. There is no evidence that Claimant suffers from Cerebral Palsy, Epilepsy, or Autism. The issue in the case is whether she suffers from Intellectual Disability, or if she is eligible under the fifth category.

Dispositive Legal Conclusions

7. It was not established on this record that Claimant suffers from Intellectual Disability, based on Factual Findings 4 through 26. Historically, her cognitive abilities have been low average to borderline, but not placing her in the bottom two percent in terms of intellectual ability. Her academic achievement scores did not jibe with what would be expected from a student with Intellectual Disability. Certainly, her school district never entertained the idea that she suffered from that malady. While Claimant's poor adaptive functioning would augur for a diagnosis of Intellectual Disability, that alone is not sufficient to justify the diagnosis.

8. Claimant in some ways appears to be a person with a condition similar to that of Intellectual Disability, as she has borderline IQ, per Dr. Frey, and rather low adaptive function. However, it appears that her condition is a result of psychiatric issues, namely Major Depression and PTSD. CCR section 54000, subdivision (c)(1), prevents her from being eligible for services under the fifth category.

ORDER

Claimant's appeal is denied, and she shall not be eligible for services from the Service Agency pursuant to the Lanterman Act.

DATE:

JOSEPH D. MONTOYA

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.