

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

In the Matter of the Eligibility of:

CLAIMANT

and

INLAND REGIONAL CENTER, Service Agency

OAH No. 2021070018

DECISION

Marion J. Vomhof, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by video and teleconference on August 12, 2021, and October 26, 2021, due to the ongoing COVID-19 pandemic.

Keri Neal, Fair Hearing Representative, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

Claimant was represented by his mother, who was assisted by three Spanish-language interpreters.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on October 26, 2021.

ISSUE

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

CASE SUMMARY

The evidence established that claimant is not eligible for regional center services based on a diagnosis of autism spectrum disorder, intellectual disability, or a condition closely related to an intellectual disability or that requires treatment similar to that required for individuals with an intellectual disability which constitutes a substantial disability (fifth category).

FACTUAL FINDINGS

Jurisdictional Matters

1. On May 27, 2021, IRC notified claimant that he was not eligible for regional center services because he did not have a developmental disability. IRC's letter stated that claimant does not currently have a "substantial disability" as a result of intellectual disability, autism, cerebral palsy, epilepsy, and he also does not appear to have a disabling condition related to intellectual disability, or need treatment similar to what individuals with an intellectual disability need.

2. On June 18, 2021, claimant's mother filed a Fair Hearing Request on claimant's behalf and stated the following reason for requesting a hearing:

I [mother] totally disagree that my son [claimant] of regional center [s/c] is denied services without even made an evaluation.

In the Request, claimant's mother described what was needed to resolve the complaint as:

I, [mother], formally request a thorough review of my son's case for a reconsideration of eligibility so that he can be an IRC client and benefit from their [s/c] services, therapies, and get help as soon as possible to help with his needs and disabilities.

Background Information

3. Claimant is 10 years old and in the 4th grade. He currently resides in the family home with his parents and siblings. Regarding school services, claimant was initially assessed for special education services in April 2019 and subsequently had an Independent Educational Evaluation (IEE) conducted in September 2019. He was found ineligible for special education services. However, claimant has a 504 plan through his school district while he participates in the general education setting. Claimant has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) combined type, enuresis, and autism. He currently takes medication for sleep and hyperactivity. Claimant receives psychological therapy, occupational therapy, and speech therapy through Easy Speech. These services are funded through his Medi-Cal insurance. He

receives Applied Behavior Analysis (ABA) services from California Psych Care, also funded through Medi-Cal. Claimant also receives In-Home Supportive Services (IHSS).

Applicable Diagnostic Criteria

AUTISM SPECTRUM DISORDER

4. The *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5) contains the diagnostic criteria used for Autism Spectrum Disorder (ASD), as follows: 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 functioning; and disturbances that are not better explained by intellectual disability or global developmental delay.

INTELLECTUAL DISABILITY

5. The 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.

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,² 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.”

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

² Although the Lanterman Act and the DSM-5 have been amended to eliminate the term “mental retardation” and replace it with “intellectual disability,” California Code of Regulations has not been amended to reflect the currently used terms.

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).³ 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 Regional Center Eligibility Team to make the decision on eligibility after considering information obtained through the assessment process. The Guidelines listed factors to be considered when determining eligibility under the fifth category.

Another appellate decision, *Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462, has suggested that 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 mental retardation, notwithstanding an individual’s relatively high level of intellectual functioning. In *Samantha C.*, the individual applying for regional center services did not meet the criteria for mental retardation. Her cognitive test results scored her above average in the areas of abstract reasoning and conceptual development and she had good scores in vocabulary and comprehension. She did perform poorly on subtests involving working memory and processing speed, but her scores were still higher than persons with mental retardation. The court

³ 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.

understood and noted that the ARCA Guidelines 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 70-74).” (*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 mental retardation.

Treatment Similar to an Individual with an Intellectual Disability

7. In determining whether a person requires treatment similar to a person with an intellectual disability, a regional center will consider the nature of training and intervention that is most appropriate for the individual who has global cognitive deficits. This includes consideration of the following: individuals demonstrating performance-based deficits often need treatment to increase motivation rather than training to develop skills; individuals with skill deficits secondary to socio-cultural deprivation but not secondary to intellectual limitations need short-term, remedial training, which is not similar to that required by persons with an intellectual disability; persons requiring habilitation may be eligible, but persons primarily requiring rehabilitation are not typically eligible as the term rehabilitation implies recovery; individuals who require long-term training with steps broken down into small, discrete units taught through repetition may be eligible; and the type of educational supports needed to assist children with learning.

Substantial Disability

8. In order to determine whether a diagnosis of a developmental disability is a substantial disability 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, title 17, 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 10 years old, the life activities "capacity for independent living" and "economic self-sufficiency," do not apply.

IRC's Evidence

9. Paul Greenwald, Ph.D., is employed by IRC as a staff psychologist and has held that position since October 2008. Dr. Greenwald received his doctorate degree in Psychology from California School of Professional Psychology in 1987. His responsibilities at IRC include performing psychological assessments of individuals to determine whether those individuals are eligible for services at IRC on the basis of a diagnosis of Intellectual Disability and/or ASD. Dr. Greenwald's assessments consist of reviewing available records and interpreting test data, as well as drafting reports of his psychological assessments. Dr. Greenwald submits recommendations regarding his diagnostic conclusions and whether those conclusions conform to the requirements of the Lanterman Act regarding eligibility for services at IRC. Dr. Greenwald is a member of IRC's eligibility team, which consists of a medical doctor, an intake coordinator, a program manager, and a staff psychologist. The team makes the decision as to an individual's eligibility for IRC services.

Dr. Greenwald reviewed all of the documents received into evidence and testified at the hearing. The following factual findings are based upon Dr. Greenwald's testimony and documents received into evidence, which were part of IRC's record review in this matter. Dr. Greenwald did not perform any psychological testing on claimant for IRC's evaluation. Instead, IRC relied upon documents submitted

by claimant for a record review to determine claimant's eligibility and whether further testing was needed. IRC concluded no further testing was needed.

MEDICAL RECORDS

10. A November 13, 2018, medical record of claimant's evaluation at Indio Mental Health Services reflected a primary diagnosis of ADHD, a secondary diagnosis of enuresis, and a tertiary diagnosis of ASD. The "estimated onset date" for ASD was listed as November 13, 2018, the day of the evaluation. Claimant was then seven years old. Dr. Greenwald stated that ADHD is a developmental condition and enuresis is a medical condition, and both are not qualifying diagnoses. The records did not state how the diagnosis of ASD was made. No cognitive or adaptive testing was shown to support this diagnosis.

11. A March 12, 2019, record of a neurological assessment at Loma Linda University Child Neurology Clinic stated that claimant's diagnoses were behavior problems, ADHD, and autism. The reason for the visit was "autistic disorder." Claimant's "attention span and concentration were appropriate" for his age, and his speech was "articulate." He had significant behavioral problems and exhibited hyperactivity, but he was "able to be redirected." He was able to "interact with examiners and his surroundings appropriately." He maintained "good eye contact." His "symptoms of autism" had improved. Dr. Greenwald stated that autism does not improve. Articulate speech, good eye contact, and the ability to be redirected do not support a diagnosis of ASD. None of the characteristics described were consistent with an ASD diagnosis. Dr. Greenwald said that instead, this report indicated that a psychological or medical evaluation was not necessary to determine eligibility and that claimant is not eligible for IRC services.

OCCUPATIONAL THERAPY

12. An occupational therapy evaluation of claimant, conducted by Easy Speech Therapy Center on March 6, 2019, determined that claimant would benefit from occupational therapy services to address sensory concerns, self-help skills, and handwriting skills.

13. On December 14, 2020, claimant's school district prepared an occupational initial assessment report. The assessment found that all of claimant's "foundational skills" such as fine motor, visual motor, sensory, coordination, and handwriting skills were functional, and therefore occupational therapy did not appear to be needed for him to access his educational program.

14. An independent occupational therapy educational evaluation was conducted on May 10 and 28, 2021, by Susanne Smith Roley, Licensed Occupational Therapist. Claimant was nine years and seven months of age. The evaluation indicated he had poor receptive and expressive language skills, and recommended individual treatment of speech, language, voice, communication, and/or auditory processing.

SPEECH AND LANGUAGE EVALUATIONS

15. A speech and language evaluation conducted by Easy Speech Therapy Center on March 26, 2019, when claimant was seven years and five months old, showed poor receptive and expressive language skills. A recommendation was made for therapy to include treatment of speech, language, voice, communication, and/or auditory processing.

16. A February 6, 2020, report from Easy Speech Therapy Center stated that claimant has consistently attended weekly therapy since April 2019. Claimant has

engaged in play therapy with two different therapists and has demonstrated the ability to label emotions, take deep breaths to calm himself, wait his turn, and use words to express his feelings and ideas. Dr. Greenwald stated that this is not characteristic of persons with ASD.

17. On December 7, 2020, claimant's school district facilitated a speech and language evaluation to address claimant's special needs based a suspected communication related disability. Claimant's mother believed that he had difficulty communicating with his teacher, while his teacher reported that claimant was able to express himself clearly to both her and his peers. Claimant's teacher said that he worked well in small groups and "he engages with his peers and with adults in a meaningful and productive manner." He "was easily redirected to the task at hand." A Comprehensive Assessment of Spoken Language (CASL-2) test showed that claimant's expressive and receptive vocabulary skills were in the average range for his age. No articulation errors were noted in his conversational speech for either Spanish or English. A Clinical Evaluation of Language Fundamental-5 Edition (CELF-5) test reflected that his expressive and receptive language skills were in the low average to average range for his age. The report stated that claimant "has many strengths in the area of social use of language." He has a "friendly and charming demeanor." He is "developing a powerful communication style which includes negotiation and persuasion." Claimant was "animated and engaged" throughout various activities.

Dr. Greenwald stated these results were inconsistent with an ASD diagnosis. The evaluation concluded that claimant did not meet the state eligibility criteria for a speech/language disorder in the areas of articulation, receptive language, expressive language, or pragmatic language.

APPLIED BEHAVIOR ANALYSIS SERVICES

18. Claimant receives ABA services from California Psychcare Centers for Behavioral Health Treatment (CPC). Claimant's health conditions were listed as Attention Hyperactivity Disorder (AHD) and enuresis. A six-month progress report dated July 22, 2019, reported that in social skills group, claimant has made improvements in all goals in place, including making eye contact when speaking to someone and following the rules of the game. An Adaptive Behavior Assessment System, Third Edition (ABAS-3) test was administered. Results showed that since claimant's initial assessment, which was completed by his mother, claimant had made improvement in communication, functional academics, home living, self-care, and social skills. Dr. Greenwald stated that improvements in these areas are not consistent with an ASD diagnosis.

SECTION 504⁴ EVALUATION

19. Claimant's school district conducted an initial section 504 evaluation on January 28, 2020. The purpose of this evaluation was to determine whether claimant had a physical or mental impairment that substantially limited a major life function, and, if so, to provide accommodations to allow him to continue to attend school and learn in a regular classroom. The evaluators determined that claimant met the eligibility requirements for section 504 accommodations based on enuresis, but he did not qualify for an Individualized Education Program (IEP).

⁴ This refers to Section 504 of the Rehabilitation Act of 1973.

INDIVIDUALIZED EDUCATION PROGRAM (IEP)

20. An initial IEP meeting was held on December 15, 2020,⁵ when claimant was 9 years old and in the third grade. The team did not feel that claimant required special education services and that claimant's needs could best be met through his 504 plan. The report stated that claimant "is making progress consistent with state standards and teacher expectations and with what the other kids in his class are doing."

PSYCHOEDUCATIONAL ASSESSMENTS

21. In April 2019, when claimant was seven years and five months old, his school district conducted an initial psychoeducational assessment. The evaluation concluded that claimant "did not meet eligibility for special education services under Other Health Impairment or Autism."

22. In July through August 2019, Pedro Olvera, Psy.D., administered various tests, including the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V) test. The WISC-V measures cognitive ability and intelligence IQ. Claimant was seven years and nine months old. On the Autism Spectrum Rating Scales (ASRS), the mother's responses were elevated across all domains while the teacher's ratings were in the average range. Dr. Olvera recommended that claimant met special education eligibility criteria under Specific Learning Disability and Other Health Impairment due to ADHD.

⁵ The IEP team meeting began on December 15, 2020. The meeting reconvened on January 21, 2021, and reconvened a second time on February 25, 2021.

However, the school-based IEP team recommended claimant's educational needs could be addressed through his 504 plan.

23. In December 2020, claimant's school district conducted a comprehensive multidisciplinary assessment to determine claimant's current educational needs and eligibility for special education services. On the Autism Spectrum Rating Scales (ASRS), there were significant differences between the mother's and teacher's ratings. The mother's overall ratings suggested that claimant exhibited many behavioral characteristics of children diagnosed with ASD, but these were not consistent with the examiner's observations of claimant's social communication during testing. The examiner observed no repetitive or restricted behaviors, and the teacher's overall ratings suggested little to no behavioral characteristics of ASD. In general, 2019 score ranges were average to low average compared to his 2020 scores. However, neither the 2019 nor the 2020 psychoeducational assessments showed intellectual disability.

IRC ELIGIBILITY DETERMINATIONS

24. IRC's Eligibility Team reviewed claimant's records and discussed his eligibility for services at IRC on four occasions. On May 22, 2019, the team determined that claimant was not eligible for IRC services. Psychoeducational assessments reported appropriate language and articulation in his speech, and no test results supported a "history of autism" as reported in medical evaluations. A second review on March 25, 2020, determined that claimant was again not eligible for IRC services. The evaluation reported that "no objective autism psychodiagnostics tests (e.g. ADOS) or screenings served as basis for California Psychcare's autism determination (7-22-19)." On August 5, 2021, the team again determined that claimant was not eligible for IRC services.

Testimony of Claimant's Mother

25. Claimant's sister has been found eligible for regional center services at IRC, so his mother thought IRC could help claimant, as well. She understands IRC's requirements but she had hoped IRC could help claimant with a job in the future.

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 Code Sections

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 . . .

[¶] . . . [¶]

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 that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. . . . [T]his 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.

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’s mother justifiably wants to ensure that claimant receives all services for which he is eligible. However, claimant failed to meet his burden and a preponderance of the evidence did not establish that claimant is eligible for regional center services, based on a diagnosis of autism, intellectual disability, or a condition closely related to intellectual disability

or requiring treatment similar to that required by individuals with intellectual disability, that constitutes a substantial disability.

Claimant's mother was sincere. She is clearly motivated by her desire to help her son obtain services that she believes are necessary to allow him to get a job when he gets older and to function independently in the world. However, claimant has the burden of proving that he is eligible for regional center services. The weight of the evidence presented at hearing did not establish that claimant is substantially disabled because of a qualifying condition. As such, claimant failed to satisfy his burden of demonstrating eligibility for regional center services under the Lanterman Act.

ORDER

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

DATE: November 9, 2021

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.