

**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. 2022020357

DECISION

Marion J. Vomhof, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter telephonically on October 25, 2022.

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

Claimant's mother represented claimant and was assisted by a court-certified Spanish-language interpreter.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on October 25, 2022.

ISSUE

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

SUMMARY

Claimant failed to establish that he is eligible for regional center services as a result of an intellectual disability, autism, cerebral palsy, epilepsy, or under the fifth category. Claimant's appeal of IRC's determination that she is not eligible for services is denied.

Jurisdictional Matters

1. On December 15, 2021, IRC sent claimant a Notice of Proposed Action stating that a review of the records indicated that claimant did not have a "substantial disability" as a result of intellectual disability, autism, cerebral palsy, epilepsy, or a disabling condition that is closely related to an intellectual disability or requires treatment similar to a person with an intellectual disability (fifth category).

2. On February 1, 2022, claimant's mother filed a fair hearing request. Under reasons for the request, she wrote in part: ". . . California Code of Regulations title 5 section 3030 under the primary category of specific learning disability . . ." and that claimant also meets "the secondary eligibility under other health impairments due to a

medical diagnosis of epilepsy, attention-deficit hyperactivity disorder (ADHD), and high functioning autism” This hearing followed.

3. Claimant’s mother was present at the start of the hearing on October 25, 2022. She gave an opening statement and cross-examined IRC’s consulting physician, Dr. Nycholat. Near the end of Dr. Brooks’s testimony, claimant’s mother said she did not wish to continue the hearing. The administrative law judge advised that she was free to leave if that was her choice, but that the hearing would continue without her. At that time, claimant’s mother left the hearing. As a result, she did not testify or present any witnesses on claimant’s behalf.

Diagnostic Criteria for Intellectual Disability

4. The *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*, (DSM-5) contains the three diagnostic criteria that must be met in order to make a diagnosis of intellectual disability. Criterion A: deficits in intellectual functions; Criterion B: deficits in adaptive functioning; and Criterion C: the onset of these deficits during the developmental period. An individual must have a DSM-5 diagnosis of intellectual disability to qualify for regional center services. Intellectual functioning is typically measured using intelligence tests. Individuals with intellectual disability typically have IQ scores in the 65-75 range.

Diagnostic Criteria for Autism

5. The DSM-5 identifies criteria for the diagnosis of autism spectrum disorder (ASD). 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 ASD to qualify for regional center services based on autism.

Evidence Presented at Hearing

TESTIMONY OF DESIREE NYCHOLAT, M.D. – IRC CONSULTING PHYSICIAN

6. Desiree Nycholat, M.D., has been a consulting physician for IRC for six years. She is a general pediatrician specializing in care for children 0 to 18 years of age. Dr. Nycholat reviews medical records for individuals being evaluated and performs medical evaluations if there are concerns for signs of epilepsy, cerebral palsy, or any other specific medical condition. The following is a summary of Dr. Nycholat's testimony and her review of claimant's records.

7. The regional center's medical eligibility criteria for epilepsy is a diagnosis of a seizure disorder that occurred before the age of 18 years, and that, despite adequate medical treatment, epilepsy significantly affects multiple areas of functioning such as self-care, receptive and expressive language, learning, mobility, and self-direction. Epilepsy is typically an ongoing increased seizure activity over time, rather than a one-time occurrence or a convulsion or seizure-like activity. An individual with epilepsy that is not causing a significant disability, or with seizure activity and no epilepsy diagnosis, may not be eligible for regional center services.

8. Medical records dated June 21, 2017, from Children's Health of Orange County (CHOC) contained a list of claimant's then-current home medications. None of the medications listed are used to control seizure activity.

9. CHOC check-out instructions from claimant's visits on November 10, 2019, and December 9, 2019, did not support an eligible claim of epilepsy.

10. A collection of CHOC medical records from May 4, 2011, through May 8, 2012, which included claimant's visits with a neurologist, included no mention of seizures or epilepsy.

11. A collection of CHOC medical records from 2013 through 2016 included claimant's visits to primary care physicians and consultations with the orthopedic and urology departments. There was no mention of seizures or epilepsy in any of these records.

12. A collection of CHOC records from 2021 through 2022, included claimant's May 2022, hospital admission for headaches and back pain. The records stated that his mother reported numerous seizures starting in May 2021. A neurology consultation noted that claimant had a history of convulsions that had been investigated in the past and were found not to be true electrographic seizures, and he had a normal electroencephalogram (EEG) in 2018. It was also noted that a March 2022 magnetic resonance imaging (MRI) of the brain showed non-enhancing hyperintensities, but it was unclear what significance those findings had and there was no suggestion that these were related to seizures or epilepsy. During his hospital stay, claimant experienced no seizures nor was he diagnosed with epilepsy. It was recommended that claimant follow up with a neurologist as an outpatient.

13. There was no documentation of medication to treat seizures in these medical records. Based on her review of claimant's records, Dr. Nicholat concluded that he does not meet regional center eligibility for epilepsy because he has not been

diagnosed with epilepsy that is causing an ongoing disability or significant impairment, and he has not been on medications to manage seizures.

TESTIMONY OF SANDRA BROOKS, PH.D. – IRC STAFF PSYCHOLOGIST

14. Sandra Brooks, Ph.D., is a licensed clinical psychologist and has worked as an IRC staff psychologist since 2007. She conducts psychological evaluations or reviews pertinent records for the purpose of assisting IRC's eligibility team to determine eligibility for regional center services. IRC's eligibility team consists of a physician, a psychologist, a program manager, and a consumer services coordinator. The following is a summary of Dr. Brooks's testimony, which included eligibility criteria and her review of claimant's records.

15. Eligibility criteria for regional center services requires a diagnosis of ASD, intellectual disability, cerebral palsy, epilepsy, or a condition that is closely related to intellectual disability or that requires similar treatment. In addition, the individual must demonstrate that they have at least three substantial handicaps in the areas of receptive and expressive language, learning, self-care, self-direction, capacity for economic self-sufficiency, capacity for independent living, or motor skills. Conditions precluded from qualifying conditions are conditions that are solely psychological, solely physical, psychiatric, or specific learning disabilities. IRC is not required to complete an evaluation to determine eligibility.

16. If a child is categorized in special education under autism or autistic-like behaviors, the child does not automatically meet the regional center's criteria for eligibility. The school district only requires that a student demonstrates autistic-like behaviors but does not require a DSM-5 diagnosis of ASD. The school district also

does not require that the individual demonstrate substantial handicaps in adaptive functioning.

17. Claimant's initial Individualized Education Program (IEP), dated September 23, 2010, when he was three years old, documented that he was eligible for special education services on the basis of speech or language impairment. This is not a qualifying diagnosis for regional center services.

18. Claimant's October 24, 2014, IEP documented that he was eligible for special education services on the basis of autism and specific learning disability. The IEP documented that claimant likes to play with his peers and wants to help his teacher, and that he likes to please his teachers and his friends. A desire to please is suggestive of social interest and social awareness. This is not typical of most children on the autism spectrum.

19. Claimant's September 13, 2021, IEP documented that claimant's parent had been concerned about depression and claimant had medication for depression. Dr. Brooks stated that individuals with depression can be more socially withdrawn and may lack the desire to interact with others.

20. Dr. Brooks reviewed a September 23, 2010, Preschool Psychoeducational Evaluation, completed when claimant was three and a half years old. Adaptive behavior skills were measured by administering the Vineland Adaptive Behavior Scales-II Survey Interview Form. Claimant's communication skills were found to be in the moderately low or borderline range, with a standard score of 78; his daily living skills were adequate with a standard score of 100; his socialization skills were moderately low, with a standard score of 75; his motor skills were adequate with a standard score of 88; and his overall adaptive skills were in the moderately low or low

average range, with an adaptive behavior composite of 82. Scores below 70 would be considered substantially handicapping; claimant's scores ranged from 75 to 100.

21. On June 22, 2015, when claimant was eight and a half years old, a Psychological Assessment was conducted by Michelle Molina, Ph.D. Relevant assessment procedures were the Autism Diagnostic Observation Schedule (ADOS) and the Vineland Adaptive Behavioral Scales. Regarding communication, claimant was able to give a reasonable account of routine events and to engage in some conversation with the evaluator. His eye contact and facial expressions were considered typical. His response and the amount of reciprocal social communication was typical. The overall quality of his rapport with the evaluator was typical. There were some repetitive behaviors in terms of his conversation and possible sensory interests. There were no unusual body movements. His overall score on the ADOS indicated a low number of autism-related symptoms.

Dr. Brooks pointed out that even though no significant deficits were noted in social communication, the evaluator made claimant eligible under autism, explaining that while claimant's social communication was almost within the average range it was felt that when he was faced with new circumstances he has a low frustration tolerance, and would show difficulties in that area.

22. A Psychological-Educational Multidisciplinary Assessment dated October 17, 2016, was conducted when claimant was nine years old. The assessment demonstrated that claimant got along with his peers; he responded well to teacher correction and feedback; and he participated well in the testing and was able to follow directions.

Dr. Brooks found it significant that claimant continues to exhibit behaviors at home that are associated with autism, but these behaviors are not evident in school. The expectation would be that autism spectrum behaviors would be present across various settings. The Autism Spectrum Rating Scales (ASRS) were administered to claimant's teachers and to his parents. The teacher report indicated that there were few behavioral characteristics similar to those with autism, whereas the parent report showed many associated features of ASD. His behaviors at school seemed to be more typical of other children his age.

23. Dr. Brooks reviewed check-out instructions from a June 21, 2021, visit by claimant to a CHOC primary care facility. The instructions documented that the reason for the visit as "dizziness, tired per mom, chest pain" and "problems" listed included aggressive behavior, speech delay, ADHD and oppositional defiant behavior. Dr. Brooks stated that individuals with these conditions can demonstrate difficulty with social interaction but typically not due to lack of social interest. Typically with ADHD, the social difficulties often have to do with poor boundaries and poor impulse control rather than a lack of social interest or a complete lack of social awareness.

24. On January 13, 2012, claimant was evaluated by a CHOC neurologist for possible autism. In an outpatient report following the examination, the evaluator noted that although claimant's mother reported autistic-like behaviors, claimant did not exhibit autistic features during the examination. The evaluator wrote in part:

It appeared that [claimant] was unable to effectively communicate with his mother as she speaks Spanish, and he speaks predominantly English and [claimant] really does not understand commands given to him in Spanish or questions asked to him in Spanish by the mother and so

she proceeds [*sic*] him as being unable to do certain things such as understands tasks that are asked of him including multi-step commands. However, when I asked the exact same command in English, he was able to perform multi-step commands.

Dr. Brooks stated this is significant because a large part of assessing ASD has to do with assessing a person's language skills. The evaluator also observed that claimant maintained very good eye contact and did not demonstrate any stereotypical or repetitive behavior.

25. In October 2017, the Regional Center of Orange County (RCOC) determined that claimant was ineligible for Lanterman services. RCOC's eligibility team stated that claimant had not been diagnosed with epilepsy or placed on anticonvulsant treatment, and despite having a diagnosis of autism, he did not have substantial disability in at least three areas of life activity.

26. On December 9, 2021, IRC's Eligibility Team noted that claimant did have a diagnosis of autism in 2015, but he had been found ineligible for Lanterman services by RCOC in 2017 because he did not have three areas of substantial disability. The new information provided was insufficient to warrant an additional evaluation.

27. On September 22, 2022, IRC's Eligibility Team reviewed additional records provided by claimant, as well as records previously submitted. They noted that claimant had been determined ineligible for RCOC services in 2017 and ineligible for IRC services in December 2021. IRC's Eligibility Team determined that claimant was not eligible for regional center services based on intellectual disability, ASD, cerebral palsy,

epilepsy, or fifth category, and that new information provided was insufficient to warrant an additional evaluation.

LEGAL CONCLUSIONS

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 of proof is a preponderance of the evidence. (Evid. Code, §§ 115; 500.)

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 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.

5. 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. (Note: The

regulations still use the term "mental retardation," instead of the term "Intellectual Disability.")

(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.

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.

Evaluation

7. Claimant failed to establish that he qualifies for regional center services. Based on the records provided, the opinions of Dr. Brooks and Dr. Nycholat that claimant does not meet the DSM-5 diagnostic criteria for intellectual disability or ASD were uncontested. Despite having the diagnosis of autism, claimant did not provide

evidence of a substantial disability in at least three areas of life activity. It is understandable that claimant's mother only wants the best for her child and to help him with his challenges. However, based on the records provided, a preponderance of the evidence did not establish that claimant is eligible for regional center services under any qualifying category, including further intake.

ORDER

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

DATE: November 8, 2022

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.