

**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. 2022060826

DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference and telephone on August 3, 2022.

Claimant's aunt represented claimant who was not present.

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

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on August 3, 2022.

ISSUES

Is claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) as a result of autism, an intellectual disability, 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?

Is IRC required to perform an evaluation of claimant to determine eligibility or is a records review sufficient?

SUMMARY

Claimant failed to establish that he is eligible for regional center services under a diagnosis of autism, intellectual disability, or under the fifth category. While claimant does have multiple psychiatric issues, the evidence did not establish they are due to a developmental disability that would qualify him for regional center services. The records provided to IRC did not show that claimant had an eligible developmental disability. IRC was not required to perform an evaluation of claimant to determine eligibility; the records review IRC performed was sufficient. Claimant's appeal of IRC's determination that he is not eligible for services is denied.

FACTUAL FINDINGS

Jurisdictional Matters

1. On May 16, 2022, IRC notified claimant that he was not eligible for regional center services. IRC made this decision based on records it reviewed and decided that no further intake services beyond the records review were warranted.

2. On May 24, 2022, claimant's aunt/legal guardian filed a fair hearing request appealing that decision and the matter was set for hearing.

Claimant's Assertion for Eligibility and Request for an Evaluation

3. Claimant is currently a 19-year-old male. He asserted he was eligible for services on the basis of autism, intellectual disability and/or under the fifth category. (Claimant's representative asserted the family is trying to get claimant evaluated for autism, but so far, they have not been successful. Thus, autism was considered in this decision.) Claimant also objected to IRC's eligibility determination being based on a records review only. Claimant requested that he be evaluated in order to determine a proper diagnosis.

Although the testimony offered by claimant's aunt and grandmother was heartfelt and sincere, they failed to understand that IRC's role in these matters is to determine eligibility, not to perform evaluations to determine diagnoses. If IRC concludes that the records reviewed are sufficient to make an eligibility determination, an evaluation is not necessary nor is it required by law. While the frustration that claimant's aunt and grandmother expressed about trying to obtain a proper diagnosis and treatment plan for claimant was understandable, especially in light of the history of claimant's mother's death and his father's refusal to seek appropriate treatment for

claimant, the evaluation claimant seeks is beyond the scope of IRC's duties and purpose as set forth in the Lanterman Act.

Diagnostic Criteria for Autism Spectrum Disorder

4. The *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*, (DSM-5) contains the diagnostic criteria that must be met in order to make a diagnosis of autism. To be eligible for regional center services based on autism spectrum disorder, a claimant must meet that diagnostic criteria. The criteria include: persistent deficits in social communication and social interaction across multiple contexts; restricted, repetitive patterns of behavior, interests, or activities; symptoms that are present in the early developmental period; symptoms that cause clinically significant impairment in social, occupational, or other important areas of current functioning; and disturbances that are not better explained by intellectual disability or global developmental delay. Nothing in the DSM-5 requires formal testing, rather the diagnostic criteria may be found "currently or by history."

Diagnostic Criteria for Intellectual Disability

5. The 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.

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 provide services for “other handicapping conditions that are solely physical in nature.” (Welf.& Inst. Code, § 4512, subd. (a).) 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 CalApp.4th 1119, 1129, the court 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, 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.” (Of note, the DSM-5 uses the term “intellectual disability,” the condition previously referred to as “mental retardation.” The cases were decided when the term mental retardation was in use and contain that term in their decisions. For clarity, that term will be used when citing to those holdings.)

On March 16, 2002, in response to the *Mason* case, the Association of Regional Center Agencies (ARCA) approved the *Guidelines for Determining 5th Category Eligibility for the California Regional Centers* (Guidelines). (Of note, 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 and are not entitled to be given the same weight as regulations.) 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 the 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, and 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 noted that the ARCA Guidelines recommended consideration of the 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.

Expert Witness Testimony

7. Holly Miller-Sabouhi, Psy.D. is a staff psychologist at IRC. Dr. Miller-Sabouhi received her Bachelor of Arts degree in Psychology from the University of California, Riverside. She received both her Master of Science in Psychology and her Doctor of Psychology from the University of La Verne. She has published articles and received the Student Diversity Award from the University of La Verne and the Educational Award for Clinical Psychologists from the County of Los Angeles Department of Mental Health. Her curriculum vitae set forth her training, post-doctoral and clinical experience.

Dr. Miller-Sabouhi testified in this hearing, explaining the eligibility determination process and why the records IRC reviewed did not establish that claimant had a qualifying developmental disability. Dr. Miller-Sabouhi further explained that IRC is not required to perform an evaluation of an individual; a records review is sufficient when the records do not suggest the presence of a qualifying developmental disability. In this case, IRC did not perform an evaluation of claimant because his records did not demonstrate that he had a qualifying developmental disability. No expert testimony refuted Dr. Miller-Sabouhi's opinions that claimant was not eligible, and she correctly stated the law that IRC is not required to perform an evaluation if the records reviewed demonstrate the individual does not have an eligible developmental disability.

Documents Introduced at Hearing

8. The records IRC reviewed to make its determination were introduced at hearing. Dr. Miller-Sabouhi testified about the documents, and claimant's aunt and grandmother offered testimony regarding his history and condition. That testimony is incorporated in the findings reached below.

9. A September 25, 2020, Individualized Education Program (IEP) from claimant's school district at the time, completed when claimant was 17 years old, identified his eligibility for special education services based on a primary disability of Specific Learning Disability and a secondary disability of Speech or Language Impairment. The IEP's Eligibility Statement noted: "processing disorders in the areas of phonological awareness and auditory memory impacts [claimant's] ability to access the general education curriculum without additional support." The IEP referenced the difficulties claimant had in classes, especially logging into class or turning in assignments, but noted he was a respectful young man, who socializes and appears to have friends. The Self-Help section noted that he was able to take care of his personal needs while at school. Claimant was in a regular physical education class. Given claimant's grade level, the IEP contained a Postsecondary Transition Plan, including goals and resources for services for after high school. Nothing in this document established eligibility for regional center services.

10. A March 30, 2022, IEP from claimant's school district at that time, when he was 18 years old, also identified his eligibility for special education services based on a primary disability of Specific Learning Disability and a secondary disability of Speech or Language Impairment. The IEP contained an Individual Transition Planning document noting claimant's future goal and requirements to achieve it. Nothing in this document established eligibility for regional center services.

11. Dr. Miller-Sabouhi testified that the psychoeducational evaluation performed when claimant was in ninth grade, as documented in a November 2, 2018, Psychoeducational Report, considered and ruled out intellectual disability. At the time, claimant lived with his father, stepmother and two siblings, because his mother had passed away in 2017. He had no medical diagnoses other than environmental allergies. His parent had checked "yes" for hearing problems, but claimant stated he did not have any. Claimant qualified for special education services under the categories of Specific Learning Disability and Speech/Language Impairment and had an auditory processing disorder. Several tests were administered and claimant's scores were in the average, low average, and deficient ranges, and processing disorders were documented. The discrepancies between claimant's abilities and achievements were found to be due to his auditory processing and phonological processing skills. Claimant was observed in his classroom. The "[o]bservation of claimant's self-help skills does not indicate concerns in this area." Claimant enjoyed playing sports and alternated chores with his brother at home. Claimant's future goals were identified.

Nothing in this document established eligibility for regional center services.

12. Records from Riverside Psychiatric Medical Group documented visits between 2020 and 2022. A September 1, 2020, note indicated that help was being sought because claimant had been placed on a 72 hour hold after suffering a psychotic episode for which he was prescribed Risperidone. He recently began taking Tenax [*sic*] for anxiety. Claimant was observed talking to himself and had been sad since his mother died in 2017. After his father and stepmother separated, claimant became more unhappy and the change in his lifestyle "was very stressful" and "no one knew what abuse he suffer[ed]" during the first two years he lived with his father. The goals for treatment and evaluation included getting claimant "back focusing learning

[sic] and being happy and energetic again." Claimant had recently gained 10 pounds and his current behaviors were noted, as was the impairment in his daily functioning, including self-care. Claimant's family history was documented, including possible bipolar type depression of both biological parents. There was a review of systems and claimant's diagnoses were adjustment disorder with mixed anxiety and depressed mood, rule out bipolar 1 manic episode and attention deficit disorder-combined type. The plan was to begin psychotherapy. Other records documented treatment through 2022, including several no-shows.

Nothing in this document established eligibility for regional center services.

13. An April 20, 2022, note from Christian Bernardo, MD, was addressed "To Whom It May Concern." The note indicated that on that date, claimant was evaluated by the Psychiatry Consult team in the emergency department and "it appears his symptoms are related to a neurodevelopmental disorder and intellectual disability and not consistent with the primary psychiatric disorder. We highly recommend he undergo neuropsychological testing to clarify diagnosis." No other evidence explaining how these conclusions were reached was offered and, absent anything more, nothing in this document established eligibility for regional center services. Dr. Miller-Sabouhi testified that this document was not consistent with claimant's psychiatric or school records and that claimant's records do indicate a concern for ADHD, which is a neurodevelopmental disorder.

14. The IRC intake form was filled out by claimant's grandmother. In the Self Help Skills section, she checked the boxes indicating that claimant self feeds, uses all utensils, toilets independently, dresses himself completely, performs his own hygiene and his mobility is independent. She did not check off any of the boxes asking if he needed assistance with these skills. His grandmother checked off the box that claimant

is not suspected of having autism spectrum disorder nor has he been diagnosed with that disorder. She checked off the box indicating that he is suspected of having an intellectual disability and was diagnosed by "Dr." at age 17 of having an intellectual disability. No other information regarding that claim was listed. The only behavioral characteristics identified were "sleeping difficulties." Claimant's grandmother noted that concerns regarding claimant's development began when he was 17 years old.

15. Dr. Miller-Sabouhi testified that based upon her review of the records submitted, claimant was not eligible for regional center services because he did not have a qualifying developmental disability. Moreover, assessing claimant was not warranted because the existing records were sufficient to show that claimant did not have an eligible diagnosis. Claimant had no history of a developmental disability occurring before the age of 18, and there were other conditions documented in the records consistent with non-qualifying psychiatric conditions. The records also did not support a finding that claimant had any adaptive deficits. His current presentation was due to life events and circumstances that impacted him emotionally, and were not due to a qualifying developmental disability.

16. Claimant's aunt testified that claimant should have been re-evaluated because he suffered psychiatric and developmental delays at age 15 when his mother died, but his father did not get him the proper care. Claimant's aunt and grandmother were "shut out" from his medical appointments and IEPs during that time and could not provide details to those evaluators about what was going on with claimant. They relayed their concerns to claimant's father, but he did not convey those at claimant's IEP and claimant's grandmother and aunt were not allowed to advocate for claimant at that time. Claimant's aunt asserted that the documents at issue in this case "pretty

much seem to me" a way "to modify his IEP" and "cover themselves." Those documents contain "a lot of verbiage."

When living with his father, claimant lost 60 pounds. He was not asking for food but was playing sports. There were no home assessments and no one stepped in until claimant's aunt and grandmother went to court and got full custody of claimant. This delay led to claimant having extreme issues because no one advocated for him from ages 15 to 17. Once claimant turned 17 and they obtained custody, they could ask for assessments. Claimant's aunt began taking him to his medical appointments and told his treaters his condition was more severe than what had been originally documented, and she reached out to IRC for services. Claimant has been given several "labeling disorders," such as PTSD, cognitive issues, social isolation, and repetitive behavior. Claimant has never been tested for PTSD or given any resources for that condition.

Claimant's aunt described claimant's severe self-care issues: he cannot brush his teeth, he cannot take a shower, his aunt and grandmother have to tell him what to do and monitor his actions. If they did not, he "would stand there for 30 minutes." He has no spatial awareness. His functioning capacity is extremely low. His condition is severe and "we are handling it all." Everything is "really out of our control, we are asking and looking for help." They are asking for claimant to be assessed and undergo a full evaluation.

17. Claimant's grandmother testified, "we've been searching for more than two years, trying to get him the right treatment." She thinks it is "so unfair that IRC will not evaluate him for themselves." She explained how when they go to a new physician, that person will do his own reevaluation, and not just rely on records, and she thinks IRC should do the same. Claimant is "stuck in a little parallel where he does not know which way to go next." He carries a book around with him and states that all he needs

is water, breakfast, and to walk around, but he does not know what to do. He does not have the excitement or motivation he used to have. His brain is not telling him what he needs to do next. He needs to be evaluated.

18. Dr. Miller-Sabouhi was recalled to testify after claimant's aunt and grandmother testified and opined that there was no evidence of a developmental disability before claimant's mother died. After age 17, his condition was not due to an eligible developmental disability. Further, sudden changes in an individual's condition, as noted here, are not indicative of a developmental disability. An individual can have conditions that affect cognitive abilities, but this is not the same as having an intellectual disability, and claimant's psychiatric condition, including PTSD, or depression, or the psychotic episodes noted in the records, may be affecting him. Intellectual disability is a very specific presentation, and claimant is presenting differently than one who presents with an intellectual disability. The law does not require IRC to perform an assessment based on a request for one; IRC must determine if an assessment is needed to make its eligibility determination. Here, one was not needed to make that determination. Because claimant's records did not establish he had an eligible condition, he did not need an assessment.

LEGAL CONCLUSIONS

Burden and Standard 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 of proof is a preponderance of the evidence. (Evid. Code, § 115.)

Statutory and Regulatory Authority

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.

Applicable Case Law

7. The Lanterman Act and implementing regulations clearly defer to the expertise of the Department of Developmental Services and regional center professionals and their determination as to whether an individual is developmentally disabled. General, as well as specific guidelines are provided in the Lanterman Act and regulations to assist regional center professionals in making this difficult, complex determination. (*Ronald F. v. State Department of Developmental Services* (2017) 8 Cal. App. 5th 84, 94–95, citations omitted.)

Evaluation

8. The Lanterman Act and the applicable regulations set forth criteria that a claimant must meet in order to qualify for regional center services. The documents introduced in this hearing do not demonstrate that claimant has a diagnosis of either autism or intellectual disability that constitutes a substantial disability, or that he qualifies under the fifth category which is defined as a disability closely related to an intellectual disability, or that requires treatment similar to that required for individuals with an intellectual disability, that constitutes a substantial disability. Although claimant does have numerous other emotional and psychiatric conditions, none of them are qualifying conditions. While claimant's aunt's and grandmother's testimony was genuine, and they are to be commended for caring for claimant and intervening on his behalf, their testimony did not establish eligibility for regional center services.

Moreover, IRC's role is to assess individuals for eligibility for services based on a qualifying developmental disability. IRC performs this role by reviewing records and, when necessary, performing evaluations. In cases, like this one, where the records do not indicate the individual has a qualifying developmental disability, a records review is sufficient and an evaluation need not be performed.

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ORDER

Claimant's appeal from IRC's determination that he is not eligible for regional center services is denied. IRC's determination that he is not eligible for regional center services is affirmed.

DATE: August 15, 2022

MARY AGNES MATYSZEWSKI
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.