

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

In the Matter of:

CLAIMANT

and

INLAND REGIONAL CENTER, Service Agency

OAH No. 2020090086

DECISION

Marion J. Vomhof, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter telephonically on September 28, 2020.¹

¹ In light of the Governor's proclamation of a State of Emergency and Executive Orders N-25-20, N-33-20, and N-63-20 arising out of the COVID-19 pandemic; the declarations of county and city public health emergencies throughout the State; the directives from state and local officials to ensure and facilitate physical distancing and to shelter in place; and in order to protect the health and safety of all public and OAH personnel; this matter was conducted telephonically.

Senait Teweldebrhan, Fair Hearings Representative, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

Patrick Williams, representative, and Judith Edmundson, Licensed Therapist, represented claimant, who was present for the hearing.

Oral and documentary evidence was received. The record was closed and the matter submitted for decision on September 28, 2020.

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 (the "fifth category"), which constitutes a substantial disability?

CASE SUMMARY

The evidence established that claimant is not 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.

FACTUAL FINDINGS

Jurisdictional Matters

1. On July 23, 2020, 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 did not have a "substantial handicap" as a result of autism, cerebral palsy, epilepsy, or intellectual disability, nor did he appear to have a handicapping condition closely related to intellectual disability or that required treatment similar to that provided to individuals with an intellectual disability.

2. August 18, 2020, Patrick Williams, claimant's representative and administrator at Ettie Lee Youth and Family Services, filed a Fair Hearing Request on claimant's behalf and stated the following as reasons for requesting a hearing: "Received a denial letter. I feel I am eligible to receive services."

In the Request, Mr. Williams described what was needed to resolve the complaint as: "To have my case reviewed to see if I am eligible to receive services."

Background Information

3. Claimant is 18 years old and currently resides at the Ettie Lee Group Home. He is the second of nine siblings but has no contact with any of his siblings. Claimant has been "in the system" his entire life. Claimant receives special education services under the diagnosis of "emotionally disturbed." His cognitive ability is average to low average. Claimant's diagnoses include mood disorder, Attention Deficit Hyperactivity Disorder (ADHD), depression, bipolar disorder, and oppositional defiance disorder.

Applicable Diagnostic Criteria

INTELLECTUAL DISABILITY

4. The *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (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.

Intellectual functioning is typically measured using intelligence tests. Individuals with intellectual disability typically have intelligent quotient (IQ) scores in the 65-75 range.

The "Fifth Category"

5. 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.”² 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, 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.”

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

² Welfare and Institutions Code section 4512, subdivision (a).

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.

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 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

6. In determining whether a person requires treatment similar to a person with an intellectual disability, a regional center should 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; the type of educational supports needed to assist children with learning.

Evidence Introduced at Hearing

7. Dr. Alejandra Diaz testified at the hearing. She received her Psy.D. in Clinical Psychology in 2015 and her Master of Clinical Psychology in 2012. She has been a bilingual staff psychologist at IRC for two and one-half years. Prior to joining IRC, she worked as a licensed psychologist on a contract basis, and as a licensed psychiatric technician with California Mental Health Services from 1998 through 2010. In preparation for this hearing, Dr. Diaz reviewed claimant's file, the evidence packet received from IRC, and claimant's most recent IEP assessment dated September 22, 2020.

IRC has clinical team that makes the decision as to an individual's eligibility. The team consists of a medical doctor, an intake coordinator, a program manager, and a staff psychologist. Dr. Diaz is part of that team.

Dr. Diaz explained the difference between treatment and services. Treatment targets cognitive function. Treatment may include developing skills, long-term training

with steps broken and taught through repetition, or placement in a group setting of peers so the individual can associate with others of similar cognitive functioning. Services include resources available to consumers, including personal care, daycare, special living arrangements, occupational therapy, speech therapy, public transportation, and money management. Individuals without developmental disabilities may benefit from these services.

8. Dr. Diaz reviewed a Multidisciplinary Assessment Report, dated May 16, 2012, which provides the results of various tests administered at claimant's school when he was 10 years old. Below is a list of the tests administered, the areas being tested, and claimant's scores:

- The Naglieri Nonverbal Ability Test (NNAT) and the Cognitive Assessment System (CAS) measure cognitive and learning ability; claimant scored in the average range and borderline to low average range, respectively.
- The Woodcock-Johnson III (WJIII) measures academic achievement; claimant's scores were borderline average to average.
- The Wide Range Assessment of Memory and Learning – Second Edition (WRAML2) measures learning, memory, and processing skills; claimant's scores were borderline to average.
- The Comprehensive Receptive and Expressive Vocabulary Test (CREVT-2) measures oral language skills; claimant's scores were in the deficient to low average range.
- In visual-perceptual/psycho-motor functioning, claimant scored low average.

- In adaptive behavior prevocational/vocational skills, which measures independent functioning, claimant's teacher gave him a score of average; his caretaker scored him as borderline;
- In social-emotional skills, his teacher gave him a score of deficit; his caretaker scored him as borderline.
- The Connors' rating scale reflects scores that are clinically significant as to oppositional behavior, cognitive problems/inattention, hyperactivity, and Attention Deficit Hyperactivity Disorder (ADHD).

The report stated the following as the basis for making the determination recommendation: "No severe discrepancy exists between academic achievement and cognitive ability at this time." Dr. Diaz stated that these test results are not consistent with an individual with an intellectual disability. Nothing in this report suggests that claimant has a substantially handicapping condition due to a qualifying condition of developmental disability.

9. Dr. Diaz reviewed the following additional reports and IEPs:

Claimant's Individual Education Program (IEP) dated May 15, 2012, stated that his eligibility for special education services was due to emotional disturbance," . . . which interferes with his ability to establish and maintain appropriate peer and teacher relationships" Emotional disturbance is an inability to learn that cannot be explained by intellectual, sensory, or health factors; the child is often unhappy or depressed, and frequently displays inappropriate behavior in response to normal situations. The IEP also states that claimant is "intelligent." These are not qualifying conditions for regional center services.

A Health and Welfare Agency Appraisal/Needs and Services Plan, dated June 26, 2012, stated in part that: “[Claimant] was diagnosed with ADHD and this may have contributed to a lot of his unmanageable and later problems.” ADHD is defined as persistent inattention or hyperactivity that interferes with functioning or development; this is not a qualifying condition for regional center services.

A Health and Education Passport – Instructions for Foster Parents, dated January 15, 2013, stated that claimant has mood swings, ADHD, and a disruptive behavior disorder.” Again, these are not a qualifying conditions under the Lanterman Act.

Berhe Group Home’s quarterly progress report for the period November 2012 - January 2013, reflected that, as to “independent living readiness,” claimant has met some of his “developmental milestones.” He is able to bathe, dress, keep himself groomed, and feed himself. Claimant is often uncooperative in doing his chores, but he does have the ability to perform them.

A report from Ettie Lee Youth and Family Services, dated January 31, 2018, listed claimant’s diagnosis as “disruptive mood dysregulation disorder,” and stated that client is “age appropriate” and “intelligent.” Disruptive mood dysregulation disorder consists of recurrent temper outbursts, verbally or behaviorally, which are out of proportion to the situation, and is not a qualifying condition for regional center services.

An IEP data summary dated October 30, 2018, lists emotional disturbance as the primary disability, and specific learning disability (SLD) as the secondary disability, for claimant’s eligibility for a special education IEP. Dr. Diaz explained that with SLD, the individual may have a significant difference between cognitive skills, such as problems with speech; with intellectual disability, the person demonstrates a deficit across

cognitive skills. Neither of these conditions are qualifying conditions for regional center services.

An Ettie Lee Client Recovery Plan dated August 3, 2018, states that client presents with symptoms consistent with bipolar disorder, including depressed mood, lack of motivation, crying, and irritability; client also presents with symptoms consistent with ADHD and oppositional defiance disorder. Per Dr. Diaz, with a bipolar I disorder, a person may have a manic episode, which may be preceded by or followed by a depressive period. The person does not need sleep, and is active, restless or irritable. A Bipolar II disorder is less severe and generally lasts for more than two weeks. Symptoms include depressed mood, restlessness and lethargy, feelings of worthlessness, and suicidal thoughts. An individual with oppositional defiance disorder is often angry, argues with, defies or refuses to comply with requests from authority figures, is vindictive, easily annoyed, and loses his temper.

An IEP dated February 20, 2020, identified the following: claimant is able to obtain concepts within the literature and identify answers regarding what he has read; he is able to compose a single sentence or a paragraph with writing prompts; he has a "high area of interest is math," and is able to do algebra and linear equations; and he is able to regulate his emotions and access coping skills at school.

10. Dr. Diaz opined that claimant does not meet criteria for eligibility under the "fifth category" as he does not have a disabling condition that requires treatment similar to what individuals with intellectual disability require. Claimant does not have autism spectrum disorder. Claimant does have problem with interpersonal relationships, however, Dr. Diaz stated that this is not due to a deficit but rather, a result of his ADHD and aggression. Although claimant is defiant, he does understand

there are authority figures. He has no repetitive movements or hypersensitivity, and there was no indication of either of those symptoms during his developmental years.

Regarding intellectual disability, claimant has no sub-average intellectual functioning. Cognitively, claimant is in the below average to average range, and he does not have any substantial adaptive functioning, which precludes him from being eligible for regional center services.

11. Judith Edmundson testified at the hearing. She is a Licensed Therapist at Ettie Lee Youth and Family Services and has been claimant's therapist for two and one-half years. Claimant was exposed to drugs at birth and he has been "in the system" his entire life. While "everything looks fine" at school, the reason claimant is able to do these things is because other people help him. He is 18 years old and not able to care for himself; he is prompted to take care of himself. Ms. Edmundson understands that claimant has oppositional defiance disorder, but said, "when you look at him and ask, could he go out into the world and be successful with the way we have built him up in the system? The answer to that is 'no.'"

Claimant has had five or six "rounds" of Therapeutic Behavioral Services (TBS). The TBS clinician said there is nothing more they can do for him, they have modeled all the behaviors and he just cannot remember. Ms. Edmundson said this is not because claimant is defiant, "he has a disconnect." While she understands IRC's guidelines, she said, "W]e've put so many services around him," and "we feel that there is some type of disability that is preventing him from being who he needs to be." She said, "His future doesn't look that great, and that is why we are pursuing this [IRC services] on his behalf."

Ms. Edmundson said, "I worry about him because he is not prepared, and it is not because he hasn't tried." Because claimant is 18, he will be moved very soon. We are sending a "wonderful" young man into the world when he cannot care for himself. She concluded, "I feel like we are throwing him to the wolves, and that is hard thing for me."

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; 500.)

Applicable Statutes

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 which originates before an individual attains age 18, 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 mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

5. Welfare and Institutions Code section 4512, subdivision (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.” (Welf. & Inst. Code, § 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 therapist

and his representative justifiably want to make sure 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 or 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.

ORDER

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

DATE: October 12, 2020

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.