

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

JESSICA S.,

Claimant,

v.

Inland Regional Center,

Service Agency.

OAH No. 2011090528

DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on March 28, 2012.

The Inland Regional Center (IRC) was represented by Leigh-Ann Pierce, Consumer Services Representative, Fair Hearings and Legal Appeals.

William N. Woodson, III, Attorney at Law, represented Jessica S. (claimant) who was present at this hearing

Oral and documentary evidence was received and the matter was submitted on March 28, 2012.

ISSUE

Is claimant eligible for regional center services under the Lanterman Act as a result of mental retardation or a condition closely related to mental retardation or requiring treatment similar to that required for a mentally retarded individual, which constitutes a substantial handicap?

FACTUAL FINDINGS

*Jurisdictional Matters*

1. On July 19, 2011, IRC notified claimant that she was not eligible for regional center services under the Lanterman Act because she did not have one of the five qualifying diagnoses.

2. On September 12, 2011, claimant filed a Fair Hearing Request appealing IRC's determination that she was ineligible for regional center services and requested an informal meeting.

3. An informal meeting took place on September 27, 2011. Thereafter, the Office of Administrative Hearings conducted a trial setting with the parties, the matter was set for hearing and continued several times, and the hearing occurred on March 28, 2012.

#### *Diagnostic Criteria for Mental Retardation*

4. The DSM-IV-TR contains the diagnostic criteria used for mental retardation and learning disorders. The DSM-IV-TR provides that, "The essential feature of mental retardation is significantly subaverage intellectual functioning (Criterion A), that is accompanied by significant limitation in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must be before the age of 18 years (Criterion C)." The DSM-IV-TR further notes that, "Significantly subaverage intellectual functioning is defined by IQ of about 70 or below..."

The DSM-IV-TR observed that with Learning Disorders "the development in a specific area (e.g. reading, expressive language) is impaired but there is no generalized impairment in intellectual development and adaptive functioning." Additionally, "Learning Disorders are characterized by academic functioning that is substantially below that expected given the person's chronological age, measured intelligence and age-appropriate education. The specific disorders identified as learning Disorders are Reading Disorder, Mathematics Disorder, Disorder of Written Expression, and Learning Disorder Not Otherwise Specified."

#### *The "Fifth Category"*

5. Under the "fifth category" the Lanterman Act provides assistance to individuals with "disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals" but does "not include other handicapping conditions that are solely physical in nature."<sup>1</sup> Along with the other four qualifying conditions (cerebral palsy, epilepsy, autism, and mental retardation), a disability involving the fifth category must originate before an individual attains age 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-IV-TR. In *Mason v. Office of Administrative Hearings* (2001) 89 CalApp.4<sup>th</sup> 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.

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<sup>1</sup> Welfare and Institutions Code section 4512, subdivision (a).

Furthermore, the various additional factors required in designating an individual developmentally disabled and substantially handicapped must apply as well.”

On March 16, 2002, in response to the *Mason* case, the Association of Regional Center Agencies (ARCA) approved the *Guidelines for Determining 5<sup>th</sup> Category Eligibility for the California Regional Centers* (Guidelines).<sup>2</sup> 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 following factors to be considered when determining eligibility under the fifth category:

“I. Does the individual function in a manner that is similar to that of a person with mental retardation?

Mental retardation is defined in the DSM-IV<sup>3</sup> as “significantly subaverage general intellectual functioning . . . that is accompanied by significant limitations in adaptive functioning. . .”

General intellectual functioning is measured by assessment with one or more standardized tests. Significantly sub-average intellectual functioning is defined as an intelligence quotient (IQ) of 70 or below.

An individual can be considered to be functioning in a manner that is similar to a person with mental retardation if:

A. The general intellectual functioning is in the low borderline range of intelligence (I.Q. scores ranging from 70-74). Factors that the eligibility team should consider include:

1. Cognitive skills as defined in the California Code of regulations, Title 17, Section 54002: “. . . the ability of an individual to solve problems with insight, to adapt to new situations, to think abstractly and to profit from experience.”

2. The higher an individual’s IQ is above 70, then the less similar to a person with mental retardation is the individual likely to appear. For example, an individual with an IQ of 79 is more similar to a person with a low average intelligence and more dissimilar to a person with mild mental retardation.

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<sup>2</sup> The ARCA guidelines have not gone through the formal scrutiny required to become a regulation.

<sup>3</sup> The DSM-IV-TR definition is discussed in Factual Finding No. 4.

3. As an individual's intelligence quotient rises above 70, it becomes increasingly essential for the eligibility team to demonstrate that:

- a. There are substantial adaptive deficits; and
- b. Such substantial adaptive deficits are clearly related to cognitive limitations.

4. Occasionally, an individual's Full Scale IQ is in the low borderline range (IQ 70-74) but there is a significant difference between cognitive skills. For example, the Verbal IQ may be significantly different than the Performance IQ. When the higher of these scores is in the low average range (IQ 85 or above), it is more difficult to describe the individual's general intellectual functioning as being similar to that of a person with mental retardation. In some cases, these individuals may be considered to function more like persons with learning disabilities than persons with mental retardation.

5. Borderline intellectual functioning needs to show stability over time. Young children may not yet demonstrate consistent rates and patterns of development. For this reason, eligibility for young children in the 5th category should be viewed with great caution.

B. In addition to sub-average intellectual functioning, the person must also demonstrate significant deficits in *Adaptive* skills, including, but not limited to, communication, learning, self-care, mobility, self-direction, capacity for independent living, and economic self-sufficiency. Factors that the eligibility team should consider include:

1. Adaptive behavior deficits as established on the basis of clinical judgments supplemented by formal Adaptive Behavior Scales (e.g., Vineland ABS, AAMR-ABS) when necessary.

2. Adaptive deficits are skill deficits related to intellectual limitations that are expressed by an inability to perform essential tasks within adaptive domains or by an inability to perform those tasks with adequate judgment.

3. Skill deficits are not performance deficits due to factors such as physical limitations, psychiatric conditions, socio-cultural deprivation, poor motivation, substance abuse, or limited experience.

II. Does the person require treatment similar to that required by an individual who has mental retardation?

In determining whether an individual requires “treatment similar to that required for mentally retarded individuals,” the team should consider *the nature of training and intervention* that is most appropriate for the individual who has global cognitive deficits. The eligibility team should consider the following to determine whether the individual requires treatment similar to that required by an individual who has mental retardation.

A. Individuals demonstrating *performance based deficits* often need treatment to increase motivation rather than training to develop skills.

B. 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 mental retardation.

C. Persons requiring *habilitation* may be eligible, but persons requiring *rehabilitation* are not typically eligible as the term rehabilitation implies recovery of previously acquired skills; however, persons requiring rehabilitation may be eligible if the disease is acquired before age 18 and is a result of traumatic brain injury or disease.

D. Individuals who require *long term training* with steps broken down into small discrete units taught through repetition may be eligible.

E. The eligibility team may consider the intensity and type of *educational supports* needed to assist children with learning. Generally, children with mental retardation need more supports, with modifications across many skill areas.

III. Is the individual substantially handicapped based upon the statewide definition of Substantial Disability/Handicapped?

The W&I Code (Section 4512) defines *Developmental Disability* as a disability which originates before an individual attains the age of 18, continues, or can be expected to continue, indefinitely, and constitutes a *substantial disability* for that individual. The CCR, Title 17 (Section 54001) defines *substantial handicap* as:

a) Substantial handicap means a condition which results in major impairment of cognitive and/or social functioning. Moreover, a substantial handicap represents a condition of sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential.

b) Since an individual’s cognitive and/or social functioning is many-faceted, the existence of a major impairment shall be determined through an assessment which shall address aspects of functioning including, but not limited to:

- 1) Communication skills;
- 2) Learning;

- 3) Self-care;
- 4) Mobility;
- 5) Self-direction;
- 6) Capacity for independent living;
- 7) Economic self-sufficiency.

c) The assessment 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 serving the potential consumer. The group shall include as a minimum, a program coordinator, a physician, and a psychologist.

d) The Regional Center professional group shall consult the potential consumer, parents, guardians, conservators, educators, advocates, and other consumer representatives to the extent that they are willing and available to participate in its deliberation and to the extent that the appropriate consent is obtained.

Regional Centers should use criteria of three or more limitations in the seven major life activities as used in the federal definition for Developmental Disability . . . .

IV. Did the disability originate before age 18 and is it likely to continue indefinitely?

The eligibility team should provide an opinion regarding the person's degree of impairment in the adaptive functioning domains, identifying skill deficits due to cognitive limitations and considering performance deficits due to factors such as physical limitations, psychiatric conditions, socio-cultural deprivation, poor motivation, substance abuse, or limited experience. Additional information, such as that obtained by a home visit, school or day program observation, or additional testing may be required to make this determination."

#### *Evidence Presented At Hearing*

6. Claimant is currently a thirty-three year old female who graduated high school, attended college and is currently married. Her husband also attended this hearing and the two held hands, smiled at each other and communicated to each other during this hearing.

7. An October 12, 1984, school district psycho-educational summary written when claimant was five, documented that claimant was referred by her teacher because of her fine and gross motor problems, speech and language difficulties and attentional problems in class. "Although her learning ability seems to be average to above average, [her] neuro-muscular incoordinations hamper her school production." Her intellectual functioning was in the borderline to low average range, with her verbal skills being significantly stronger than her performance skills, with those delays seemingly "highly correlated with her neuro-motor handicap."

8. A September 9, 1987, school district psycho-educational summary written when claimant was eight, documented that claimant's intellectual functioning was in the borderline to sub average range, with "much of her ability negatively affected by her neuromuscular problem."

9. A June 27, 1990, school district psycho-educational summary written when claimant was 11, documented that claimant's intellectual functioning was in the significantly below average to low average range. Her "verbal IQ score is significantly stronger than her performance IQ score and suggests significant weakness in the performance area, due to a mild neuromuscular problem."

10. A March 31, 1993, school district psycho-educational summary written when claimant was 14, documented that claimant's intellectual functioning was in the borderline range.

11. A March 20, 1996, school district psycho-educational summary written when claimant was 17, documented that claimant's strengths were abstract reasoning and her limits were long term memory, spatial relations/orientation, and expressive language. Her visual coordination with fine motor skills presents a problem and her fine motor issues result in deficits in written production both in speed and quality. Claimant manifests behaviors much younger than her age and very much wants to be liked. Her current evaluation placed her cognitive functioning in the borderline range of ability. Her social emotional status was delayed and had the potential to negatively impact her level of school success.

12. On her school district IQ testing in 2000 claimant received scores that fell in the below average/borderline range. The reason for the referral was listed as "Learning Disability Assessment."

13. Claimant's Individualized Education Program (IEP) demonstrated that she was eligible for services with a primary disability of a learning disability. The records noted weaknesses in receptive and expressive language. Nothing in the school records supported a diagnosis of mental retardation. Moreover, a school providing services to a student is insufficient to establish eligibility for regional center services. Schools are governed by California Code of Regulations, title 5 and regional centers are governed by California Code of Regulations, title 17. Title 17 eligibility requirements for services are much more stringent than those of title 5.

14. Edward Frey, Ph.D., performed a psychological assessment to determine eligibility on April 4, 2001, when claimant was twenty-two years old. He performed several tests, reviewed records and authored a report. He noted that claimant had a history of a compulsive disorder and had taken Prozac in the past. She was born with corpus collasum angenis<sup>4</sup> with impaired motor coordination. Developmental motor delays were noted. Dr.

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<sup>4</sup> The corpus callosum is a thick band of nerve fibers that divides the cerebrum into left and right hemispheres. It connects the left and right sides of the brain allowing for communication between both hemispheres. The corpus callosum transfers motor, sensory,

Frey administered several tests to determine claimant's cognitive abilities and evaluate her for mental retardation. Dr. Frey found that claimant's IQ fell in the borderline range. Her verbal abilities were at the high borderline range and her performance abilities were at the very upper end of the mild range of delay. Claimant did "quite well" academically. She graduated from high school and had attended a local college. Her social adaptive abilities were mild to borderline. Dr. Frey's diagnostic impression was: Axis I- Diagnosis deferred, Axis II-Borderline intellectual functioning. Dr. Frey found that claimant was not eligible for regional center services and recommended she receive services through the Department of Rehabilitation.

15. Jerry Shaw, M.S., a school psychologist wrote a letter on March 11, 2012, in his "capacity a School Psychologist and Coordinator of Special Education for [claimant's elementary school district]." Although Mr. Shaw opined that based upon his review of documents he believed that claimant was eligible for services under the fifth category, his letter contained little more than speculation and conjecture for that premise. For instance, he opined that Dr. Frey indicated weaknesses in communication and daily living skills that "apparently...were within the mild range of retardation" but acknowledged that "the Vineland subtest scores were not reported," so the basis for his statement was unsupported. Additionally, Mr. Shaw acknowledged that only Dr. Frey had performed formal adaptive functioning tests and speculated that the school districts had not because, "Perhaps the reason was that within the school system [claimant] did not need to be identified as mentally retarded to receive special education services." Mr. Shaw's opinions were insufficient to refute the overwhelming evidence that claimant is not mentally retarded nor does claimant have a condition closely related to mental retardation or one that requires treatment similar to that required for a mentally retarded individual.

16. Sandra Brooks, an IRC staff psychologist, assigned to determine eligibility for services, reviewed all of the documents at issue in this case and determined that claimant is not eligible for services.<sup>5</sup> Dr. Brooks testified that she observed a pattern in all of the IQ testing which demonstrated that claimant has difficulty with fine motor skills which explained her lower scores received on the performance testing. Dr. Brooks opined that those scores might actually be depressed because of claimant's motor difficulties. Moreover, claimant consistently demonstrated a pattern of academic achievements greater than expected given her IQ scores, again supporting the idea that her scores were largely due to her motor deficits and not her intellect. Although claimant argued and Dr. Brooks acknowledged that there is a five point differential in IQ test scores, such that a score could be five points higher or lower than reported, that argument did not establish that claimant's scores were five points

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and cognitive information between the brain hemispheres. Agenesis of the corpus callosum is a rare birth defect (congenital disorder) in which there is a complete or partial absence of the corpus callosum.

<sup>5</sup> Claimant's assertion that Dr. Brooks was biased because she has only testified on IRC's behalf in fair hearings lacked merit because the only time there would be a hearing would be if IRC denied eligibility and then, of course, Dr. Brooks would be testifying on IRC's behalf, explaining why. In those cases where Dr. Brooks determines a claimant is eligible for services, there would be no need for a hearing.

lower, placing them in the mental retardation range, since they could have just as easily been five points higher taking her even further from that range.

17. Claimant's mother and sister testified about claimant's deficits and issues that have arisen during her life. Claimant's mother read a letter written by claimant in high school after she stuck her tongue out at a classmate. In the letter claimant apologized and acknowledged her cognitive limitations, noting how much she hates them. The family's testimony was insufficient to establish eligibility for services in light of the numerous records and Dr. Brooks' testimony.

## LEGAL CONCLUSIONS

### *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 is a preponderance of the evidence. (Evid. Code, § 115.)

### *Statutory 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 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. 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.”

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.”

### *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 a claimant must meet in order to qualify for regional center services. None of the documents introduced in this hearing demonstrated that claimant had a diagnosis of mental retardation or a condition similar to mental retardation requiring similar treatment. The burden was on claimant to establish her eligibility for regional center services. Claimant introduced no evidence demonstrating that she was eligible to receive regional center services.

ORDER

Claimant Jessica S.’s appeal from the Inland Regional Center’s determination that she is not eligible for regional center services and supports is denied. Claimant is ineligible for regional center services and supports under the Lanterman Developmental Disabilities Services Act.

DATED: April 13, 2012

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 ninety days.