

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Eligibility of:

OAH No. 2012010369

Cody K.,

Claimant,

and

San Diego Regional Center,

Service Agency.

DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Marcos, California, on October 2, 2012.

Wendy Dumlao, Staff Attorney, University of San Diego Legal Clinic, represented Cody K. (Cody or claimant) who was not present at the fair hearing.

Ronald House, Attorney at Law, represented the San Diego Regional Center (SDRC).

On October 2, 2012, oral and documentary evidence was introduced. The record remained open until October 18, 2012, to allow the parties to submit written closing arguments, at which time it was closed and the matter was submitted.¹

ISSUE

Is claimant eligible for regional center services under the Lanterman Act as a result of a condition requiring treatment similar to that required for a mentally retarded individual, which constitutes a substantial handicap (fifth category)?²

¹ Claimant's closing argument was marked and received as Claimant's Exhibit 13 and SDRC's closing argument was marked and received as SDRC Exhibit 8.

² Claimant stipulated that he was not eligible for regional center services as a result of autism, mental retardation or a condition closely related to mental retardation.

FACTUAL FINDINGS

Jurisdictional Matters

1. On December 14, 2011, SDRC notified claimant that he was not eligible for regional center services.
2. On January 4, 2012, claimant filed a fair hearing request appealing that decision and this hearing ensued.

Diagnostic Criteria for Mental Retardation

3. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, (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"

4. 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."³ 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.

³ Welfare and Institutions Code section 4512, subdivision (a).

5. The fifth category is not defined in the *DSM-IV-TR*. In *Mason v. Office of Administrative Hearings* (2001) 89 CalApp.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.”

6. 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).⁴ 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*⁵ 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

⁴ The ARCA guidelines have not gone through the formal scrutiny required to become a regulation.

⁵ The *DSM-IV-TR* definition is discussed in Factual Finding No. 3.

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.

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."

7. A recent appellate decision has suggested, 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. (*Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462.) In *Samantha C.*, the individual applying for regional center services did not meet the criteria for mental retardation. Her WAIS-III 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 Association of Regional Center Agencies had guidelines which 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.

8. Here, claimant believes he requires treatment similar to that required for individuals with mental retardation. Claimant contends that he is eligible for regional center services because deficits in his adaptive functioning suggest that he requires services or treatment similar to that received by individuals with mental retardation. Fifth category eligibility determinations typically begin with a threshold consideration of whether an individual has deficits in intellectual functioning. This is done prior to consideration of other fifth category elements related to similarities between the two conditions, or the treatment needed. Claimant seeks to bypass such threshold consideration of intellectual functioning, and focus instead on his significant limitations in adaptive functioning, and need for services similar to that provided to individuals with mental retardation.

9. Preliminarily, "treatment" and "services" do not mean the same thing. They have separate meaning. Individuals without developmental disabilities, including those without any diagnosed disabilities, may benefit from many of the services and supports provided to regional center consumers. Welfare and Institutions Code section 4512, subdivision (b), defines "services and supports" as follows:

'Services and supports for persons with developmental disabilities' means specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives.

Regional center services and supports targeted at improving or alleviating a developmental disability may be considered “treatment” of developmental disabilities. Thus, section 4512 elaborates further upon the services and supports listed in a consumer’s individual program plan as including “diagnoses, evaluation, *treatment*, personal care, day care, domiciliary care, special living arrangements, physical, occupational and speech therapy, training, education, supported and sheltered employment, mental health services, . . .” (Welf. & Inst. Code, § 4512, subd. (b). Italics added.) The designation of “treatment” as a separate item is clear indication that it is not merely a synonym for services and supports, and this stands to reason given the broader mission of the Lanterman Act:

It is the intent of the Legislature that regional centers 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.

(Welf. & Inst. Code, § 4640.7, subd. (a).)

10. Fifth category eligibility must be based upon an individual requiring “treatment” similar to that required by individuals with mental retardation. The wide range of services and supports listed under section 4512, subdivision (b), are not specific to mental retardation. One would not need to suffer from mental retardation, or any developmental disability, to benefit from the broad array of services and supports provided by regional centers to individuals with mental retardation. They could be helpful for individuals with other developmental disabilities, or for individuals with mental health disorders, or individuals with no disorders at all. The Legislature clearly intended that an individual would have a condition similar to mental retardation, or would require *treatment* that is specifically required by individuals with mental retardation, and not any other condition, in order to be found eligible.

11. In *Samantha C.*, no attempt was made to distinguish treatment under the Lanterman Act as a discrete part or subset of the broader array of services provided to those seeking fifth category eligibility. Thus, the appellate court made reference to individuals with mental retardation and with fifth category eligibility both needing “many of the same kinds of treatment, such as services providing help with cooking, public transportation, money management, rehabilitative and vocational training, independent living skills training, specialized teaching and skill development approaches, and supported employment services.” (*Samantha C. v. State Department of Developmental Services, supra*, at p. 1493.) This broader characterization of “treatment” cannot properly be interpreted as allowing individuals with difficulties in adaptive functioning, and who require assistance with public transportation, vocational training, or money management, to qualify under the fifth category without more. For example, services such as vocational training are offered to individuals without mental retardation through the California Department of Rehabilitation. This demonstrates that it is not necessary for an individual to have mental retardation to demonstrate a need for services which can be helpful for individuals with mental retardation.

Individuals with mental retardation might require many of the services and supports listed in Welfare and Institutions Code section 4512, which could benefit any member of the public: assistance in locating a home, child care, emergency and crisis intervention, homemaker services, paid roommates, transportation services, information and referral services, advocacy assistance, technical and financial assistance. If one were to extend the reasoning of *Samantha C.*, as claimant suggests, an individual found to require assistance in any one of these areas could be found eligible for regional center services under the fifth category. This was clearly not the intent of the Legislature.

Thus, while fifth category eligibility has separate condition and needs-based prongs, the latter must still consider whether the individual's condition has many of the same, or close to the same, factors required in classifying a person as mentally retarded. (*Mason v. Office of Administrative Hearings, supra*, at p. 1119.) Furthermore, the various additional factors required in designating an individual as developmentally disabled and substantially handicapped must apply as well. (*Id.* at p. 1129.) *Samantha C.* must therefore be viewed in context of the broader legislative mandate to serve individuals with developmental disabilities only. A degree of subjectivity is involved in determining whether the condition is substantially similar to mental retardation and requires similar treatment. (*Id.* at p. 1130; *Samantha C. v. State Department of Developmental Services, supra*, at p. 1485.) This recognizes the difficulty in defining with precision certain developmental disabilities. Thus, the *Mason* court determined: "it appears that it was the intent of those enacting the Lanterman Act and its implementing regulations not to provide a detailed definition of 'developmental disability' so as to allow greater deference to the [regional center] professionals in determining who should qualify as developmentally disabled and allow some flexibility in determining eligibility so as not to rule out eligibility of individuals with unanticipated conditions, who might need services." (*Id.* at p. 1129.)

For all the above reasons, the treatment needs of claimant will be viewed within the narrower context of those services and supports similar to and targeted at improving or alleviating a developmental disability similar to mental retardation.

Documents Introduced at Hearing

12. Cody is currently 20 years old. A 2001 psychoeducational assessment conducted when he was age nine and in fourth grade determined that Cody's Verbal IQ was in the high average range and his Performance IQ was in the borderline range. Other cognitive test scores were in the "essentially average ability" ranges. Attention problems were noted, as were reading comprehension difficulties.

13. Cody's 2001 Individual Education Program (IEP), when he was in fourth grade, documented that he received resource specialist education services 40 percent of the day due to a "Learning Disorder." He was not a discipline problem, but was disorganized and had difficulty focusing. Cody also had problems retaining and remembering what he had been taught. Over the next few years Cody's resource specialist education services were increased to 45 percent of the day, then increased to 48 percent of the day, and then

decreased to 29 percent of the day, all still due to a “Learning Disability.” Difficulties with organization and focus continued to occur, although Cody had good communication and comprehension skills. Cody remained in general education classes and nothing in any of the IEPs demonstrated that Cody was eligible for regional center services.

14. A 2004 psychoeducational assessment, when Cody was 12 years old and in seventh grade, noted that Cody’s basic reading skills, math, and spelling were at grade level. His perceptual motor skills were in the average range. He had friends at school and got along well with others. The examiner concluded that Cody continued to meet the eligibility criteria as a student with a learning disability because there was a “severe discrepancy between his ability and his achievement in reading comprehension with a visual and auditory processing disorders [sic].”

15. In 2005, when Cody was 13 years old, a note in his school records documented that Cody was failing all of his classes, missing a lot of school, and that all of his teachers were concerned.

16. A 2007 multidisciplinary evaluation conducted by a Nevada school district when Cody was in the tenth grade, noted that Cody was arriving from an out of state school district with an eligibility determination of autism. The Nevada school district administered several tests and determined that Cody’s cognitive functioning varied between the high average, average and low average ranges. On the Gilliam Autism Rating Scale Cody scored in the “possibly probability of autism [sic],” with a high probability for Asperger’s Disorder, the latter of which is not a qualifying diagnosis for regional center services. Based on all the testing, Cody’s Nevada school district determined he was eligible for services under an eligibility criteria of autism. Because eligibility for education services is different than eligibility for regional center services, this finding is not definitive for regional center purposes. Moreover, claimant’s expert at this hearing conceded that his testing did not find that claimant suffered from Autistic Disorder, a required diagnosis to establish regional center eligibility. No evidence was introduced at hearing that Cody presently has a diagnosis of Autistic Disorder.

17. A 2007 Nevada school district IEP noted an eligibility category of “autism” and “emotional disturbance.” However, as noted above, eligibility for educational services is different than eligibility for regional center services. Moreover, “autism” as an IEP eligibility category is merely an administrative category and not a diagnosis.

18. A 2007 Discharge Summary Report from Lost and Found, a family counseling center in Colorado, demonstrated that when Cody was 15 years old, he had been a patient of the center for 440 days. The report stated that Cody suffered from “some documented brain trauma, malfunctions as presented in his Brain Scan” and had been “following his medication regime to address OCD [obsessive compulsive disorder] and possible emergence of schizophrenic symptoms.” Cody was currently living with his grandparents.

19. The 2006 Brain Spect Report referenced in the Lost and Found report was conducted in Colorado when Cody was 14 years, 10 months old, and noted that Cody's current diagnosis was Obsessive Compulsive Disorder. A History of Traumatic Brain Injury noted that at "age 10-12 Cody was reportedly 'hit above his eyebrow by a baseball' with no reported loss of consciousness. [Cody] was reportedly 'bit by a dog' under his eye on September 2, 2006, with no reported loss of consciousness." The "Impressions – Emerging Indications" were "suggestive" of atypical/cyclic mood disorder, anxiety-related disorder, OCD-like tendencies, learning/autism spectrum disorder, ADHD, none of which established eligibility for regional center services. Moreover, this report and its references to a remote baseball head injury and facial dog bite were insufficient to establish that Cody suffered from a brain injury that would make him eligible for regional center services.

20. A Discharge Summary from a facility called Spring Mountain Treatment Center noted that when Cody was 16 years old, he had been admitted to that facility from September 16-24, 2008. His admitting diagnoses were psychotic disorder, NOS and history of autism. Cody was hearing voices and feeling paranoid. His discharge diagnoses were:

Axis I: Psychosis, Not Otherwise Specified
Autism
Axis II: None
Axis III: None
Axis IV: Psychosocial Stressors: Family Conflict

21. A Discharge Summary from Spring Mountain Treatment Center noted that Cody was hospitalized again from October 3-17, 2008, with an admitting diagnosis of rule out schizophrenia. Cody had been re-admitted due to a relapse of his psychosis. His discharge diagnoses were:

Axis I: Schizophreniform Disorder
History of Autism
Axis II: None
Axis III: None
Axis IV: Psychosocial Stressors: Medication Nonadherence

22. A 2008 psychiatric evaluation from Desert Willow Treatment Center in Nevada noted that Cody was referred to the facility because of his psychotic behavior. He was hearing voices and acting "strange." He was having auditory hallucinations and believed people on TV were talking to him. Although the report contained a statement that Lost and Found had previously diagnosed a pervasive development disorder, the records from Lost and Found introduced at this hearing did not support that statement. The Desert Willow admitting diagnosis was:

Axis I: Psychotic Disorder NOS
Pervasive Development Disorder NOS
Axis II: Deferred

Axis III: None
Axis IV: Poor social support network

23. A 2009 Desert Willow Treatment Center Discharge Summary, when Cody was 18 years old, documented that Cody had been doing well and then began to decompensate and he began to have delusions again and was exhibiting symptoms of psychosis. Having reached the maximum benefit of the residential program he was discharged in guarded condition. His discharge diagnosis was:

Axis I: Schizophrenia, Disorganized Type
Pervasive Development Disorder NOS
Axis II: Deferred
Axis III: None
Axis IV: Problems with primary support

24. The psychiatric records introduced in this hearing demonstrated that several psychotropic medications were prescribed to Cody during these hospitalizations and admissions.

25. A 2010 California school district IEP, when Cody was 18 years old and in twelfth grade, noted “Autism” as his primary disability and “Emotional Disturbance” as his secondary disability. However, an IEP category is not a diagnosis and eligibility for Title 5 education services is broader than for Title 17 regional center services. Moreover, no claim that Cody was eligible for regional center services due to a diagnosis of Autistic Disorder was made in this hearing.

26. On February 24, 2012, Beatriz Netter, Ph.D., performed a psychological evaluation when Cody was 20 years old. After administering testing, reviewing records, and obtaining information regarding Cody’s history, Dr. Netter’s diagnostic impression was:

Axis I: Asperger’s Disorder
Diagnosis or Condition Deferred (reported diagnosis of paranoid schizophrenia)
Axis II: Borderline Intellectual Functioning
Axis III: Please refer to medical records (none reported)
Axis IV: None reported

Dr. Netter reported that Cody presented with a “complex clinical picture.” He demonstrated several indicators of pervasive developmental disorder. There was “no evidence of any significantly abnormal functioning prior to the age of three that is necessary for a diagnosis of Autistic Disorder. There were no reported concerns by parents, day care providers or pediatrician.” Further, Cody’s “overall presentation and difficulties appear to most closely resemble that of Asperger’s Disorder; however, in combination with chronic debilitating deficits in executive functioning and the reported experience of a psychotic break, Cody’s social and occupational functioning is significantly impaired. At present his cognitive

functioning appears to be at the borderline level.” Nothing in Dr. Netter’s report established eligibility for regional center services.

27. Christopher Ingalls, Ph.D., Q.M.E., performed a comprehensive neuropsychological evaluation in July 2001 when Cody was 20 years old. After taking a history and administering testing, Dr. Ingalls’ diagnostic impression was:

Axis I:	Asperger Disorder [sic]
Axis II:	Mild Mental Retardation
Axis III:	Refer to medical reports
Axis IV:	Moderate

Dr. Ingalls wrote in his report that Cody “is functioning within **the mild range of mental retardation based on his Full Scale I.Q. of 70.**” (Emphasis in original.) “Additionally, Cody’s overall memory and social adaptive scores are consistent with intellectual functioning in the severely impaired range.” Dr. Ingalls opined that Cody met regional center criteria under the fifth category based upon his IQ scores in the mild mental retardation range and due to his substantial disability or significant functional limitations in the areas of self-direction.

However, at hearing Dr. Ingalls retracted many of his opinions. Dr. Ingalls explained that at the time he expressed his opinions in his report he had not received all of Cody’s records. Now, after having read all of Cody’s records, Dr. Ingalls no longer believes that Cody qualifies for services under a diagnosis of Autistic Disorder or Mental Retardation. Dr. Ingalls explained that his review of school records demonstrated cognitive test scores before age 18 that were in the average range which would rule out a diagnosis of mental retardation. Thus, Cody is not eligible for regional center services as a result of having a condition closely related to mental retardation. Instead, now having reviewed all the records, Dr. Ingalls opines that Cody is eligible for services because of the second prong of the fifth category in that Cody has a condition requiring treatment similar to that required for a mentally retarded individual, which constitutes a substantial handicap.

Witness Testimony

28. Lynn Gregory, Ph.D., is the SDRC Director of Clinical Services. Her testimony established that she has an extensive background determining eligibility for regional center services. She has assessed eligibility cases under the fifth category since the *Samantha C.* decision. Dr. Gregory oversees the SDRC Interdisciplinary staff that determines eligibility for regional center services. Dr. Gregory testified that Cody was not eligible for regional center services under the fifth category because he did not present with a developmental disability before the age of 18. While he does have many needs, these are associated with the development of his psychotic condition which occurred while he was a teenager. A psychotic condition, alone, is insufficient to qualify for regional center services.

29. Harry Eisner, Ph.D., is the coordinator of psychological serves at SDRC. He has participated in an “astronomical number” of eligibility determinations, close to 20,000 cases. Dr. Eisner gave a comprehensive, detailed, thorough, and very careful analysis of all that went into SDRC’s eligibility evaluation of Cody, providing great detail of how records were reviewed, and how considerations of Cody’s psychotic episodes factored into the SDRC decision. Dr. Eisner testified that prior to age 15 approximately, all of the records demonstrated that Cody had attention, focus, memory and learning disability issues. None of the records before Cody’s psychiatric records demonstrated that Cody had a developmental disability that would qualify him for regional center services. At approximately age 15, Cody suffered severe psychiatric issues – the records demonstrated concerns regarding Obsessive Compulsive Disorder OCD, schizophrenia, delusions, and psychotic disorders. Thus, as Dr. Eisner credibly and reasonably explained, Cody’s needs before his psychosis were not due to a developmental disability and his increased needs afterwards were due to his psychiatric condition. Thus, his needs are not due to a developmental disability, they are not due to the fifth category; they are due to his learning disability and his psychoses. Therefore Cody is not eligible for regional center services.

30. Dr. Ingalls also testified in this matter. As noted above, he retracted his original opinions and testified that Cody was eligible under the second prong of the fifth category because he had substantial deficits in his adaptive skills which constitute a condition requiring treatment similar to that required for a mentally retarded individual. Dr. Ingalls testified about the types of services Cody requires. However, his testimony was unpersuasive. He seemed to put the cart before the horse; arguing that because Cody required services he was eligible but without adequately demonstrating that Cody’s needs were due to a developmental disability and not due to his pre-existing learning disability compounded by his psychotic breakdown. Given Cody’s history, it is understandable why now, after several psychotic episodes, that Cody’s adaptive skills would be low; they are low due to his psychiatric condition which overlays his pre-existing learning disability. All of Dr. Ingalls’ tests were performed now, after Cody has suffered numerous psychotic episodes. Everything about those poor test results can be explained by Cody’s learning disability and the psychotic episodes, making it more than likely that those scores are not due to a developmental disability and demonstrating that Cody does not have a condition requiring treatment similar to that required for a mentally retarded individual, which constitutes a substantial handicap. Rather, Cody has had numerous psychotic episodes on top of a pre-existing, well documented, non-qualifying, learning disability. This history accounts for his low scores on adaptive skills. The low scores are not due to a developmental disability.

Moreover, Dr. Ingalls’ demeanor and presentation at this hearing appeared slick and contrived. He clearly had not spent the time that Dr. Eisner had spent reviewing and analyzing Cody’s extensive records. Dr. Ingalls’ opinions were all the more undermined by the fact that he retracted several of his opinions after he eventually obtained and reviewed Cody’s prior records. No valid explanation was offered as to why Dr. Ingalls rendered the opinions he initially rendered without having all of the records and facts in his possession. This made him appear careless and detracted from his opinions.

As Dr. Ingalls' initial opinions contained in his report were not supported by the records and his testimony at this hearing was less than compelling, he made an unreliable and non-persuasive expert witness. Furthermore, his testimony appeared glib when compared to the careful, measured, and thorough opinions offered by Dr. Eisner during this hearing.

31. Kevin K., Cody's father testified in this matter. He described the bitter divorce which led him to only be a "weekend father" during Cody's early school years, which is the reason he believes there are not many school records noting any issues. Once he assumed custody of Cody he realized there was a problem and sought help. He testified that as an infant a relative thought there were issues as there was something about Cody's eyes, but he acknowledged he never pursued those concerns and absent anything else, that testimony was insufficient to establish eligibility. Kevin K. described Cody's many needs and described the network of support he receives from family, friends and neighbors. While Kevin K.'s testimony was heartfelt and sincere, and his desire to find help for his son admirable, nothing in that testimony established that Cody had a developmental disability that would make him eligible for regional center services.

Written Closing Arguments

32. Claimant argued that he was eligible for regional center services as a result of a condition requiring treatment similar to that required for a mentally retarded individual, which constitutes a substantial handicap. Claimant asserted that his condition was not solely attributable to a psychiatric disorder and his condition occurred before he was 18 years of age. Claimant asserted that his required needs make him eligible for services.

33. SDRC argued that the evidence established that Cody was not eligible for services. SDRC asserted that claimant's expert's opinions were problematic and that deference should be given to SDRC's expert.

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 proper criteria. The standard of proof 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.”

Evaluation

7. The Lanterman Act and the applicable regulations set forth criteria that a claimant must meet in order to qualify for regional center services. All of the documents have been considered, along with the relative experience and expertise that Dr. Gregory, Dr. Eisner and Dr. Ingalls have in assessing individuals with developmental disabilities. This is a case where deference should properly be given to regional center professionals in determining eligibility. (*Mason v. Office of Administrative Hearings, supra*, 89 Cal.App.4th 1119, 1129.) As noted above, Dr. Eisner’s testimony was more thorough, measured and reliable than Dr. Ingalls. It appeared that Dr. Eisner had spent considerable time reviewing the records and evaluating them for eligibility. In contrast, many of Dr. Ingalls’ original opinions were retracted because they were not supported by the records and his proffered opinions were unpersuasive in light of Cody’s numerous psychotic episodes coupled with his previous history of learning disability which were the more likely cause of Cody’s low scores on adaptive skill testing. It does appear that claimant’s adaptive behavior deficits arise from his severe psychiatric disorder, and not a developmental disability. Under these circumstances, it cannot be found that he requires treatment similar to that received by individuals with mental retardation.

It was not established that Cody is eligible to receive regional center services and supports by reason of a condition found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation. None of the documents introduced in this hearing demonstrated that Cody had a condition similar to mental retardation requiring similar treatment. While Cody has significant deficits in adaptive functioning, these deficits do not result from any deficits in general cognitive ability. They likely result from difficulties with attention, memory, and focus, as noted in his IEPs, and which were exacerbated by his many psychotic episodes. Cody has psychiatric disorders requiring mental health treatment very different than that provided for individuals with mental retardation. As such, they are not developmental disabilities as defined under the Lanterman Act and Cody does not qualify for services through SDRC.

The burden was on claimant to establish his eligibility for regional center services. As claimant introduced no evidence demonstrating that he was eligible to receive regional

center services, his appeal of SDRC's determination that he is ineligible to receive services must be denied.

ORDER

Claimant Cody K.'s appeal from the San Diego Regional Center's determination that he 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: October 19, 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.