

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MARIE S.,

Claimant,

vs.

NORTH BAY REGIONAL CENTER,

Service Agency.

OAH No. 2012060653

DECISION

Administrative Law Judge Jill Schlichtmann, State of California, Office of Administrative Hearings, heard this matter on September 10, 2012, in Santa Rosa, California.

Kristen Casey, Attorney at Law, represented North Bay Regional Center, the service agency.

Paul Wick and Adam Brown, Disability Services & Legal Center, represented claimant Marie S. Also present at hearing were claimant's parents.

The matter was submitted for decision on September 10, 2012.

ISSUE PRESENTED

Is claimant eligible to receive services from the North Bay Regional Center because she suffers from mental retardation, a disabling condition closely related to mental retardation, or requires treatment similar to that required for individuals with mental retardation?

FACTUAL FINDINGS

1. Marie S. (claimant) applied for services from North Bay Regional Center (NBRC). Following consideration by its assessment team, NBRC notified claimant of its

decision, in a Notice of Proposed Action dated May 23, 2012, that she was not eligible for regional center services. Claimant appealed and this hearing followed.

Introduction

2. Claimant is a 19-year old woman who lives with her parents. She currently attends the Sonoma County Office of Education (SCOE) transition program for adults, who are 18 to 22 years of age.

3. Claimant contends that she is eligible for services because she suffers from mental retardation, or what is commonly referred to as the fifth category, a disabling condition that is either closely related to mental retardation, or which requires treatment similar to that provided to individuals with mental retardation.

NBRC contends that claimant does not suffer from a developmental disability, but suffers instead from learning disabilities as well as schizophrenia, a psychiatric condition. Learning disabilities and psychiatric conditions are not developmental disabilities for which regional center services are provided under the Lanterman Developmental Disabilities Services Act (Lanterman Act).¹

Claimant's Medical and Academic Background

4. Claimant and her twin sister were born without complication. Claimant's mother reports that claimant's sister does not suffer from a developmental or psychiatric disability, or learning disorder.

5. Claimant has received special education services since February 2002, when she was in the second grade. She was initially eligible due to "specific learning disability." In the ninth grade, claimant's eligibility criteria for special education services changed when "emotionally disturbed," was added. Claimant continues to be eligible for special education services under the primary disability of "emotionally disturbed" and a secondary disability of "specific learning disability."

6. In July 2007, at age 14, claimant began to experience visual and auditory hallucinations and was diagnosed with schizophrenia. Claimant had a prior history of depression, and excessive compulsive behavior associated with an anxiety disorder, agoraphobia. Claimant was referred to psychiatrist Richard Goldwasser, M.D. Claimant was hospitalized for ten days at Alta Bates psychiatric hospital during this episode.

7. Claimant underwent EEG testing, which was normal, and an MRI of the brain. The MRI showed a small area of gray matter which was thought to be from a non-specific inflammation or infection. No neurological diagnosis was made as a result of the testing.

¹ Welfare and Institutions Code, section 4500 et seq.

8. On December 20, 2007, claimant underwent an assessment pursuant to Chapter 26.5 of the Government Code,² which defined the interagency responsibilities for serving handicapped school children. If found eligible, the Department of Mental Health would provide psychotherapy and other related mental health services, out-of-home placement and case management for seriously emotionally disturbed pupils, pursuant to the pupil's Individualized Education Program (IEP). Claimant was found to be eligible for services because her psychotic disorder interfered with her ability to benefit from special education services. Claimant attended New Directions Adolescent Services, a small private school with on-site therapeutic services from ninth through twelfth grade.

9. In January 2008, claimant began treatment with Jasper Hollingsworth, M.D., an adolescent psychiatrist associated with the Sonoma Department of Health Services, Mental Health Division. In January 2008, claimant was responding well to a medication regimen that included Seroquel and Abilify (anti-psychotic medications), Prozac (an anti-depressant), and on an as-needed basis, Ativan (an anti-anxiety medication). Claimant continued to suffer from auditory hallucinations and disorganized thinking, and Dr. Hollingsworth tried numerous changes in medications to treat her symptoms. In early 2009, claimant had a significant beneficial response to Clozapine, an anti-psychotic medication used to treat schizophrenia. She was able to discontinue all medications except for the Clozapine and Prozac by mid-2010. Although she still suffers from significant symptoms of schizophrenia, the Clozapine has greatly reduced claimant's auditory hallucinations.

10. In a February 10, 2011 reassessment, claimant continued to qualify for Chapter 26.5 services because her mental disorders impeded her ability to benefit from educational services.

11. Claimant underwent Child and Adolescent Needs and Strengths (CANS) assessments on August 9, 2010, October 21, 2010, April 11, 2011 and October 24, 2011. The CANS assessments were conducted by the Sonoma Department of Health Services, Mental Health Division. On each assessment, claimant was found to be suffering from schizophrenia, an anxiety disorder and depression. No evidence of a developmental disorder was identified. Based upon claimant's mental health condition, which affected her ability to

² In 1984, the California Legislature passed Assembly Bill 3632, adding Chapter 26.5 to the Government Code, which provided that mental health services required by IEPs for special education students would be delivered by community health agencies. These were commonly referred to as AB 3632 or Chapter 26.5 evaluations and services. On October 8, 2010, the former Governor vetoed funding for mental health services provided by county mental health agencies. In *California School Boards Association v. Brown* (2011) 192 Cal.App.4th 1507, the court found that the veto suspended the mandate of county mental health agencies to provide mental health services. Subsequently, on June 30, 2011, the Governor signed into law a budget bill (SB 87) and a trailer bill affecting educational funding (AB 114). Together they made substantial amendments to Chapter 26.5 of the Government Code which is no longer referred to as AB 3632.

benefit from her education, ongoing mental health services were provided to assist her in completing her academic goals.

Claimant's IQ Testing

12. In February 2001, claimant underwent a Wechsler Intelligence Scale for Children III (WISC III) assessment. Her WISC III Full Scale Intelligence Quotient (FSIQ) was determined to be 86, which is in the low average range.

13. On March 2, 2004, claimant was assessed by Mark Sessions, a Healdsburg Unified School District psychologist. Claimant was 10 years old and attending the fifth grade at the time. The WISC III assessment found claimant's verbal abilities to be in the low average range, her visual performance abilities to be in the low average range, and her overall cognitive ability to be in the low average range. Claimant's 2004 WISC III FSIQ was 84.

14. On June 2, 2011, claimant underwent a psycho-educational assessment by the Sonoma County Special Education Local Plan Area. School psychologist Sessions again performed the assessment. Claimant was 18 years, two months old and in the twelfth grade at the time of the assessment. The WISC IV found claimant's verbal cognitive ability to be in the mildly delayed range, her visual performance ability to be in the mildly delayed range and her overall ability to be in the delayed range. Claimant's WISC IV FSIQ on June 2, 2011, was 66.

15. Sessions testified at hearing. He had the opportunity to observe claimant while she attended elementary and high school. He has observed claimant to have difficulty learning since she was in elementary school. Sessions was unable to explain the significant decrease in claimant's FSIQ between 2004 and 2011.

16. Claimant's mother also testified at hearing. She is a marriage and family therapist with a small private practice, and is a counselor in the Healdsburg Unified School District. Claimant's mother has always been concerned about claimant's development, and feels that her developmental delays preceded her schizophrenia. In her view, claimant has always been developmentally delayed compared to her twin sister. After her 2007 psychotic episode, claimant has been less capable and more fearful. Claimant's reading level did not progress after the 2007 psychotic episode. Dr. Hollingsworth has been able to control claimant's schizophrenia symptoms with medication, but her cognitive functioning has not improved. Claimant's mother believes that claimant fits in well at the SCOE transition program, where many of the kids in the program suffer from mental retardation.

In claimant's mother's opinion, claimant has a dual diagnosis of schizophrenia and developmental delays.

NBRC Evidence

17. Mary Heyward, Psy.D., a licensed psychologist, performed a psychological evaluation of claimant at NBRC's request on March 9, 2012. Dr. Heyward spent time with claimant, reviewed her medical and educational history, including the three IQ tests, and administered the Stanford-Binet Intelligence Scales, Fifth Edition (SB5). The SB5 is individually administered and assesses intelligence and cognitive abilities. In the nonverbal portion of the test, claimant received a score of 57, in the mildly impaired or delayed category. On the verbal portion of the test, claimant received a score of 62, in the mildly impaired or delayed category. Claimant's FSIQ was 58, which is in the mildly impaired or delayed category.

Dr. Heyward found the SB5 results to be consistent with the June 2011 WISC IV results, which both demonstrated that claimant's FSIQ score is in the mild deficit range.

18. Dr. Heyward also assessed claimant pursuant to the Wide Range Achievement Test: Fourth Edition (WRAT4). The WRAT4 is a test that measures basic academic skills of word reading, sentence comprehension, spelling and math computation. Claimant's academic skills tested in the borderline to extremely low range on the WRAT4.

19. Dr. Heyward also administered the Adaptive Behavior Assessment System-Second Edition to evaluate claimant's adaptive behavior functioning. The composite results of the ABAS-II testing were as follows:

<u>Composite</u>	<u>Score</u>	<u>Percentile Rank</u>
General Adaptive Composite	62	1
Conceptual Composite	65	1
Social Composite	70	2
Practical Composite	56	0.2

The ABAS-II assesses the daily functional skills of a child, measuring what the child actually does. Nine skill areas are measured. The scores for all the skill areas combine to form a series of composites, including the General Adaptive Composite, an overall measure of the child's adaptive development. Claimant's score of 62 is in the extremely low range. The ABAS-II findings described adaptive functioning in the borderline to extremely low range. Claimant's General Adaptive Composite described overall adaptive functioning in the moderately delayed range. In Dr. Heyward's view, the low adaptive scores are consistent with the SB5 finding of deficit cognitive capabilities.

20. After reviewing claimant's file and evaluating her abilities with the SB5 and ABAS-II assessments, Dr. Heyward concluded that claimant suffers from mild mental retardation and schizophrenia. Dr. Heyward concluded that claimant would benefit from regional center services.

21. Patrick Maher, M.D., a medical consultant for NBRC for 18 years, testified at hearing. Dr. Maher was part of the multi-disciplinary team that reviewed claimant's eligibility for regional center services. In addition to Dr. Maher, a psychologist, assessment counselor and an administrator reviewed claimant's request for services. The team has extensive experience in assessing individuals for regional center eligibility.

22. Dr. Maher reviewed claimant's medical records which identified claimant's diagnoses as psychotic disorder, psychotic depression, paranoid schizophrenia, depression, learning disabilities, and an anxiety disorder with obsessive compulsive features. Dr. Maher pointed out that regional center services are not available to those who are eligible for special education because they are emotionally disturbed or have a learning disability. They must have a developmental disability as that term is defined by the Lanterman Act.

23. Dr. Maher noted that there was a marked decrease in claimant's FSIQ between 2004 and 2011. In Dr. Maher's opinion, claimant's decreased cognitive impairment is due to her schizophrenia, which is a disease of the brain. Cognitive impairment progresses with schizophrenia. An individual's cognitive impairment drops most just before the first symptoms of schizophrenia occur and after the first acute phase of the disease. After an initial drop, the individual's cognitive impairment tends to stabilize. Medications that are used to treat the disease, however, can cause further cognitive impairment. An individual suffering from schizophrenia often suffers from thought disorder, hallucinations, and delusions which lead to a marked deterioration of cognitive function. Schizophrenia has a major impact globally on cognitive function.

24. In Dr. Maher's opinion, claimant's recent low FSIQ scores are secondary to her schizophrenia and do not constitute a developmental disability as that term is defined in the Lanterman Act. Claimant was not born with a developmental disability, rather, her mental illness caused a drop in her cognitive function.

25. Dr. Maher does not consider claimant to be eligible pursuant to the fifth category because schizophrenia is not a condition similar to mental retardation (it is a psychiatric illness), and because she does not require treatment similar to that required by individuals suffering from mental retardation. In Dr. Maher's opinion, claimant would benefit from mental health services, such as those she has received from Dr. Hollingsworth, rather than the services provided to individuals suffering from mental retardation.

26. Although some regional center clients have both developmental disabilities and a mental illness, such is not the case here.

Conclusion

27. None of the information submitted establishes that claimant suffers from mental retardation, a disabling condition closely related to mental retardation, or that she requires treatment similar to that required by individuals with mental retardation. The

evidence establishes that claimant suffers from psychiatric disorders which have caused a decrease in her cognitive functioning.

LEGAL CONCLUSIONS

1. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. A developmental disability is defined in the Lanterman Act as a “disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes as substantial disability for that individual.” (Welf. & Inst. Code, § 4512, subd. (a).) The term “developmental disability” includes mental retardation, cerebral palsy, epilepsy, autism or what is commonly referred to as the “fifth category.” (Welf. & Inst. Code, § 4512, subd. (a).).

The “fifth category” includes “disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.” (Welf. & Inst. Code, § 4512, subd. (a).)

2. Under the Lanterman Act, conditions that are solely psychiatric in nature, or solely learning or physical disabilities, are not considered developmental disabilities. California Code of Regulations, title 17, section 54000, subdivision (c), provides that the term developmental disability shall not include 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. Claimant has the burden of proof with respect to demonstrating her eligibility for services under the Lanterman Act. In the instant case, claimant has not met this burden because she has not demonstrated that she suffers from mental retardation, a condition similar to mental retardation or that she requires treatment similar to that provided to

individuals with mental retardation. The evidence established that claimant suffers from schizophrenia, other psychiatric disorders and a learning disability. (Factual Findings 5 through 26.) Individuals with learning disabilities, and disorders that are psychiatric in nature, are not developmentally disabled, as that term is defined by the Lanterman Act. While it is undisputed that claimant suffers from a host of impairments in adaptive functioning, these impairments stem from claimant's psychiatric condition and not a developmental disability. Consequently, she is beyond the reach of the Lanterman Act.

4. Claimant's parents work tirelessly to mitigate the challenges posed by claimant's mental illness. Their steadfast commitment to claimant's well-being is laudable. Unfortunately, no exception exists under the law to make claimant eligible for regional center services.

ORDER

The appeal of claimant Marie S. is denied. Maris S. is not eligible for regional center services.

DATED: _____

JILL SCHLICHTMANN
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.