BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CLAIMANT, and INLAND REGIONAL CENTER, Service Agency.	OAH No. 2015020808

DECISION

This matter was heard on April 2, 2015, by Susan J. Boyle, Administrative Law Judge, Office of Administrative Hearings, State of California, in San Bernardino, California.

Jennifer Cummings, Program Manager, represented Inland Regional Center (IRC).

Claimant's grandmother represented claimant, who was not present during the hearing. Claimant's mother was also present during the hearing. Claimant's grandmother represented that she and claimant's mother were claimant's adoptive parents.[1]

The matter was submitted on April 2, 2015.

ISSUES

1. Does claimant have a developmental disability resulting from autism spectrum disorder?

2. Does claimant have a developmental disability resulting from a disabling condition that is closely related to an intellectual disability or that requires treatment similar to that required for individuals with intellectual disabilities?

[1] Claimant is the biological child of his adoptive mother's cousin. Reference to "mother" in this Decision is to claimant's adoptive mother unless otherwise noted.

FACTUAL FINDINGS

Jurisdictional Matters

1. Claimant is a six year old boy who lives with his mother and grandmother.

2. Through his representatives, claimant sought regional center services based on a claim that he had autism spectrum disorder and/or he had a disability that was closely related to an intellectual disability or that required treatment similar to that required for individuals with intellectual disabilities.

3. IRC provided intake and evaluation services to claimant to determine if he was eligible for regional center services. Through a form letter dated January 12, 2015, IRC advised claimant that it determined that claimant was not eligible for regional center services because he did not have a "'substantial handicap'" as a result of a disabling condition.

4. On February 9, 2015, claimant's representative signed a Fair Hearing Request appealing IRC's decision. In her hearing request, claimant's representative stated that she disagreed with "IRC testing or testing procedures" and that she has "independent evidence contracting IRC." His representative suggested that IRC should "[u]se independent testing, notes from home services, school in-put, and parent input for assessing eligibility."

Claimant's School Records

5. Claimant receives special education services through his school district. An Individualized Education Program (IEP) dated September 30, 2014, which was created and implemented for claimant, was presented in evidence. The IEP indicated that claimant began receiving special education services in late 2012 and that his primary disability was "Other Health Impairment."

The IEP noted that claimant was administered the Wechsler Individual Achievement Test, 3rd ed. (WIAT III) in September 2014. The WIAT III evaluates academic strengths and weaknesses. Claimant's results placed him in the average to high average range in most subject areas, including reading, sentence composition and spelling, and math problem solving. His lowest score was in oral reading fluency and placed him in the low average range in that subtest. Claimant's kindergarten teacher reported that claimant was able to read at grade level with good comprehension, and was performing at grade level in mathematics, but had poor organization in writing, and was inconsistent in responding to writing prompts.

In other standardized tests, claimant scored in the average to above average range in language fundamentals and fine and gross motor skills. He had difficulty following classroom rules and became emotional when he did not get his way. His teacher noted that claimant requires "constant redirection to maintain focus" to complete a task.

Claimant was outside of the regular classroom for 2 percent of the school day and received instruction in the regular classroom for 98 per cent of the school day.

Functional Behavior Assessment

6. A Functional Behavior Assessment (FBA) was performed by claimant's school district in December 2014. The assessment was requested by claimant's IEP team to "assist with behavior planning." The behaviors the team sought to address included, "difficulty with transitions, resisting teacher instructions and/or having difficulty accepting "no," and "crying loudly (tantrum like behaviors) when changes are made in a routine or schedule." The evaluators gathered information through observation, review of records, interviews with personnel who worked with claimant, and input from claimant's mother. The FBA report noted that, based upon information provided by claimant's mother, the IEP team had included autism as a secondary basis for eligibility for special education services "in addition to OHI for his diagnosis of ADHD."

The FBA report reviewed claimant's September 2014 assessments and noted that his overall cognitive ability was measured to be in the above average range and that he was performing within or above age and grade expectations in all academic areas. His fine motor skills were found to be delayed in the area of hand-eye coordination. The report stated that claimant was receiving 15 minute social skills lessons at school that focused on behaviors such as following instructions, staying on task, waiting your turn, listening to others, and accepting "no" for an answer.[2]

Claimant's teacher reported to the assessment team that claimant had difficulty getting along with others, but that he had one close friend. The teacher selected students who exhibited model behavior and kindness towards others to be claimant's tablemates in small group activities. Claimant was observed to show his work to his tablemates and seek their approval.

The assessment team concluded that claimant's behaviors negatively impacted his education. However, it was determined that a Tier III Behavior Support Plan would not be implemented because it was reported that the negative behaviors had declined since the request for the FBA was made. The assessment team suggested that the IEP team consider drafting a Tier II Behavior Support Plan and provide "social skills training to support [claimant] within his classroom/school setting."

CARES Psychological Assessment

7. In March and April 2014, Novata Cares, a "Center for Autism Research, Evaluation and Service" (CARES), performed a psychological assessment of claimant.

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[2] Claimant's grandmother testified that claimant was removed from the social skills lessons because the classes were attended by students in the first to fifth grades and she felt he was too young for them.

CARES staff administered a battery of nine tests relating to intelligence, visual-motor skills, behavior, adaptive behavior, visual attention and indicators of autism. They observed claimant at school and during the administration of the various tests. They also gathered information from claimant's parent.

In the Wechsler Preschool and Primary Scale of Intelligence – Third Edition (WPPSI-III) claimant's scores ranked him in the average range of intellectual functioning. CARES staff also selected and administered subtests in the WIATT-3. In that testing CARES determined that claimant's "academic performance on all of the subtests were consistently in the Average range." CARES administered the Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI). Claimant scored in the average range on this test.

Claimant's mother completed the Child Behavior Checklist for Ages 1.5-5 (CBCL/1.5-5). The analysis of the checklist indicated that claimant's mother reported more problems than typically reported by parents of boys aged 1.5 to 5 particularly behaviors of an aggressive nature.

Claimant's teachers and his mother completed the Behavior Rating Inventory of Executive Function (BRIEF) by identifying "problems with different types of behavior related to the eight domains of executive functioning." Executive functioning was defined as "a person's ability to manage or regulate a collection of basic cognitive and emotional processes. This includes planning, initiation, organization, and execution of tasks as well as the ability to cope with transitions or regulate emotional responses." On the BRIEF, elevated scores suggest difficulty with executive function. Claimant's scores were "significantly elevated" in seven of the nine areas reported.

CARES administered the Test of Variables of Attention (TOVA) – Visual. This test is used to assess and treat attention problems. The test measurements are compared to a group of individuals of average intelligence who do not have attention problems and also to a group of individuals who were diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). Claimant's TOVA results were not within normal limits and indicated that claimant has an attention problem, including ADHD.

The Autism Diagnostic Observation Schedule, Second Edition (ADOS-2) Module 3 was administered by CARES. Claimant's scores met the autism spectrum cutoff point, which suggested that claimant was within the autism spectrum. The Gilliam Autism Rating Scale (GARS) was completed by either claimant's parent or teacher. The results of this rating scale indicated that it was "Unlikely" that claimant had autism.

CARES staff administered the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II). The Vineland – II assesses "what a person actually does, rather than what he or she is able to do." In this test, claimant's overall adaptive behavior composite score indicated that claimant's adaptive functioning is adequate.

CARES staff determined that claimant's "diagnostic impression is Autism Spectrum Disorder without accompanying language impairment 299.00 and ADHD-Combined Type 314.01 (F90.2)."

Testimony of, and Assessment by, Michelle M. Lindholm. Ph.D.

8. Michelle M. Lindholm, Ph.D. is a licensed clinical psychologist. She was employed by IRC as a psychologist assistant in 2003; she became a clinical psychologist with IRC in 2011. Her duties in both positions include reviewing records and documentation, performing comprehensive intellectual assessments, and evaluating individuals' eligibility for regional center services. Dr. Lindholm reviewed and evaluated claimant's records and was able to form an opinion whether claimant is eligible for IRC services.

Dr. Lindholm administered two standard assessments to claimant (the Scales of Independent Behavior – Revised [SIB-R] and the Childhood Autism Rating Scale – 2 HF [CARS-2 HF]); reviewed his records and past test results; interviewed his mother, and observed him during her assessment. She opined that claimant was not eligible for IRC services based on a diagnosis of autism spectrum disorder or under the Fifth Category.

From her review of claimant's records and her interview with his mother, Dr. Lindholm learned that claimant was placed in foster care at birth and was placed with his adoptive mother and grandmother when he was approximately four months old. He attended preschool from approximately eight months of age until he entered kindergarten. He is in a regular education kindergarten class and has an aide for one hour, four days a week, to help him focus on his school work. Dr. Lindholm noted that claimant's school district had updated his IEP and "added another aide to assist on the playground to address behaviors and social skill development."

Dr. Lindholm's testing result scores showed mild symptoms of Autism Spectrum Disorder. His adaptive level was determined to be age appropriate on two subtests and limited-age appropriate in two other subtests. In Dr. Lindholm's assessment, claimant's intellectual functioning was in the average range. Claimant's previous testing results achieved in the Vineland II were consistent with results achieved in the SIB-R administered by Dr. Lindholm – both indicated adaptive functioning in the low average to average range. His lowest scores were obtained in the personal living and community living skills sections. Dr. Lindholm's conclusions after administering the CARS - HF were consistent with prior testing: she determined claimant's behaviors were in the mild range of autism spectrum disorder and that he has ADHD. She opined that some of his social deficits were a result of the ADHD.

9. Dr. Lindholm testified that claimant was not eligible for IRC services on the basis of autism spectrum disorder, intellectual disability, or under the fifth category because he did not have a substantial disability as defined in the Lanterman Act. (Welf. & Inst. Code § 4512, subd. (l); Cal. Code of Regs., tit. 17, § 54001, subd. (a).) She noted in her report that claimant's family was "providing extra assistance in all areas of need and [claimant] is

currently receiving services from [CARES] . . . ." Dr. Lindholm opined that claimant has behavioral challenges but they are minimal or mild and are adequately being addressed by claimant's school district. She observed that claimant engaged in play with toys provided at IRC and he brought some of his own. He was imaginative in his play. Claimant told Dr. Lindholm that he has a best friend and wants to have friends. He displayed some characteristics of being impulsive and interrupted Dr. Lindholm on occasion.

10. Dr. Lindholm was present during the entire hearing. She listened to the information provided by claimant's grandmother in the presentation of claimant's case. Dr. Lindholm stated that, after hearing claimant's evidence, her opinion that claimant was not eligible for regional center services had not changed. She stated that what she heard from claimant's grandmother related primarily to behavioral issues that were being addressed by claimant's school and CARES. Based upon everything she heard, Dr. Lindholm did not believe that claimant's level of impairment was different from what she had observed or what was reflected in the records she reviewed.

Evidence Presented on Claimant's Behalf

CLAIMANT'S GRANDMOTHER'S TESTIMONY

11. Claimant's grandmother presented claimant's case. She was well prepared with a PowerPoint presentation and a binder of exhibits. She testified that claimant was active and very smart. She stated that he "does a lot of things that kids older than him do not do." He is innovative when provided various play materials and can assemble Legos bricks in configurations designed for children ten years old.

Claimant was placed with his grandmother and mother when he was four months old. Claimant's grandmother reported that claimant was deprived of oxygen at birth and believes that this may have contributed to some of claimant's problems. She also reported that claimant's biological mother took drugs during her pregnancy and had medical conditions that may have been passed on to claimant. She observed that claimant did not respond to stimuli as other babies do. He did not interact with the family, and he startled easily. He could not bend his legs. Claimant's grandmother and mother consistently work with claimant. They massage his legs and read books to him every night. They provide many recreational and social activities for claimant, including amusement theme parks, science fairs, park outings and other events to enrich his education and social interactions. Claimant's grandmother said that she and claimant's mother have no down time because they cannot leave claimant unsupervised and they are constantly working with him.

Claimant's deficits are seen in his social interactions and behavior. During a family trip to Disneyland, claimant "made friends" with strangers and invited them to live in his home. Claimant wanders from his parents when he is in public places such as a shopping mall, SeaWorld, Disneyland and the beach. He will open the door to the family home when someone rings the doorbell without understanding the potential safety risk.

Claimant's grandmother stated that claimant does not process social interactions with other children in the way other children do. She observed claimant playing with neighborhood children who were playing with Nerf guns. She reported that all of the other children aimed their Nerf guns at claimant. She also observed a child approach claimant and push him to the ground. When claimant's grandmother spoke to him about the incident, claimant told her he was just playing with his friends. Claimant's grandmother was concerned that claimant did not recognize when he was being bullied and potentially in danger of being injured.

Claimant also needs services relating to self-care. He often shoves food in his mouth and then chokes. He requires reminders to use the bathroom. If claimant is outdoors and occupied, he will not stop when he needs to use the bathroom and will soil himself. He does not know how to use home appliances safely.

Claimant has a hard time focusing. He cannot always verbalize his feelings when he is frustrated and reverts to screaming. Claimant hits himself in the head when he cannot remember things. He frequently cries and has tantrums where he drops to the floor.

Claimant's grandmother stated that claimant receives two hours of behavior training four times a week from CARES, which are paid through her insurance. She represented that claimant had an aide for one hour each day in school, but the IEP was amended in January 2014 and since that time has an aide with him the entire school day, including during lunch.

Claimant's grandmother believes that claimant requires treatment similar to that required to treat an individual with an intellectual disability. She is seeking services from the regional center that focus on social and recreational interventions. She expressed her belief that claimant will be able to be a functioning adult if he is provided with these services now.

Claimant shows signs of social immaturity. He will become attached to inanimate things, such as toys, a blanket and his jacket. He will "cry for hours" when a bug that landed on him files away. If he is not permitted to do what he wants, he will "scream for five minutes." He has difficulty following rules and waiting to take turns when playing with others. Routines are helpful to him, but he reacts negatively when a routine is changed.

Claimant interprets language literally. He has difficulty understanding facial expressions and gestures. He does not always make eye contact with those he is communicating with. He interrupts when others are talking in order to talk about his own interests; he will not notice when others are not interested in what he is talking about.

Claimant prefers to play alone. During lunch or recess he will choose to spend time in the "Friendship Room," a room set aside for quiet play where he does not engage with other students, rather than be on the playground and engaged in group activities. His behaviors interfere with his ability to form and maintain friendships.

AMENDMENTS TO CLAIMANT'S IEP

12. On January 8, 2014, claimant's IEP was amended in several areas. One addition to the IEP was a Tier II Behavior Support Plan. The plan's target focus was "for social scenarios that present in the classroom or on the playground. [Claimant] will respond to teacher/therapist prompt to stop, identify how other student's might feel, and generate a strategy to improve the situation." The plan lists the "Level of Severity for the Target Behavior" as "Mild."

13. The IEP team also reviewed whether claimant required adapted physical education (APE). The APE teacher screened claimant to determine whether APE services were needed. He determined that claimant completed all tasks asked of him at age appropriate levels; he understood the rules of the games he played; he exhibited "great" behavior and was excited to participate; and showed no signs of gross motor delays. Based upon his screening tests, the APE teacher determined that claimant was not in need of APE services.

14. The amended IEP noted that claimant participated in a social skills group weekly and increased this service to 60 minutes daily. The team also reported that claimant's classroom teacher had implemented strategies that minimized claimant's extreme behaviors. The team discussed providing additional classroom supports to claimant with the goal of eliminating or reducing 1:1 instructional aide time so that claimant would not become dependent upon the presence of the aide.

LEGAL CONCLUSIONS

The Burden and Standard of Proof

1. In a proceeding to determine whether an individual is eligible for regional center services, the burden of proof is on the claimant to establish that he or she has a qualifying diagnosis. The standard of proof required is preponderance of the evidence. (Evid. Code, § 115.)

2. A preponderance of the evidence means that the evidence on one side outweighs or is more than the evidence on the other side, not necessarily in number of witnesses or quantity, but in its persuasive effect on those to whom it is addressed. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

The Lanterman Act

3. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4500, et seq.) The purpose of the Act is to rectify the problem of inadequate treatment and services for the developmentally disabled and to enable developmentally disabled individuals to lead independent and

productive lives in the least restrictive setting possible. (Welf. & Inst. Code, §§ 4501, 4502; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) The Lanterman Act is a remedial statute; as such it must be interpreted broadly. (*California State Restaurant Association v. Whitlow* (1976) 58 Cal.App.3d 340, 347.)

4. An applicant is eligible for services under the Lanterman Act if he or she is suffering from a substantial disability that is attributable to intellectual disability, cerebral palsy, epilepsy, autism, or what is referred to as the fifth category – a disabling condition closely related to intellectual disability or requiring treatment similar to that required for intellectually disabled individuals. (Welf. & Inst. Code, § 4512, subd. (a).) A qualifying condition must also start before the age 18 and be expected to continue indefinitely. (Welf. & Inst. Code, § 4512.)

5. Welfare and Institutions Code section 4512, subdivision (l), provides:

> Substantial disability" means the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:
>
> (1) Self-care.
>
> (2) Receptive and expressive language.
>
> (3) Learning.
>
> (4) Mobility.
>
> (5) Self-direction.
>
> (6) Capacity for independent living.
>
> (7) Economic self-sufficiency.
>
> Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.

6. California Code of Regulations, title 17, section 54001, subdivision (a), also defines "substantial disability" and requires "the existence of significant functional limitations, as determined by the regional center, in three or more of the . . . areas of major life activity . . . ." listed above.

7. California Code of Regulations, title 17, section 54000, defines "developmental disability" and the nature of the disability that must be present before an

individual is found eligible for regional center services. It states, in part:

> (a) Developmental Disability means a disability that is attributable to mental retardation[3], 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.

Section 54000, subdivision (c) further provides that the term "developmental disability" does not include handicapping conditions that are solely psychiatric disorders, solely learning disabilities or solely physical in nature.

8. When an individual is found to have a developmental disability as defined under the Lanterman Act, the State of California, through a regional center, accepts responsibility for providing services and supports to that person to support his or her integration into the mainstream life of the community. (Welf. & Inst. Code, § 4501.)

9. A regional center is required to perform initial intake and assessment services for "any person believed to have a developmental disability." (Welf. & Inst. Code, § 4642.) "Assessment may include collection and review of available historical diagnostic data, provision or procurement of necessary tests and evaluations, and summarization of developmental levels and service needs . . . ." (Welf. & Inst. Code, § 4643, subd. (a).) To determine if an individual has a qualifying developmental disability, "the regional center may consider evaluations and tests . . . that have been performed by, and are available from, other sources." (Welf. & Inst. Code, § 4643, subd. (b).)

10. California Code of Regulations, title 5, section 3030, provides the eligibility criteria for special education services required under the California Education Code. The criteria for special education eligibility are not the same as the eligibility criteria for regional center services found in the Lanterman Act.

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[3] The California Code of Regulations has not yet been amended to replace "mental retardation" with "intellectual disability."

Evaluation

11. In this hearing, claimant asserted that he is eligible for services based upon a diagnosis of autism spectrum disorder and/or that he has a fifth category condition closely related to intellectual disability, or that requires treatment similar to that required for individuals with intellectual disabilities.

ELIGIBILITY BASED UPON AUTISM SPECTRUM DISORDER

12. Claimant's Fair Hearing Request sought to require IRC to provide services and supports based upon a diagnosis of autism spectrum disorder. IRC did not dispute that claimant is properly diagnosed with autism spectrum disorder. Rather, IRC asserted that claimant did not have a developmental disability based upon this diagnosis.

13. The Lanterman Act and applicable regulations specify the criteria and diagnosis an individual must meet to qualify for regional center services. Claimant, who has the burden to establish his eligibility for regional center services, did not establish that he has a substantial disability based on autism spectrum disorder. When the evidence is viewed under the diagnostic guidance of the DSM-V, the weight of the evidence established that claimant is not eligible for regional center services because he did not establish that his condition is substantially disabling.

14. Claimant's disability impacts his life, but, based on the totality of the evidence, it does not place significant functional limitations on his life activities as an almost seven-year-old child. While claimant has challenges and needs the supports that he is receiving at school and through CARES, he does not have a developmental disability under the Lanterman Act that is substantially disabling for him, and he is not eligible for regional center services.

15. The fact that claimant is qualified for special education at school does not establish whether he has a substantial disability within the meaning of the Lanterman Act. Eligibility for special education is more inclusive than eligibility for regional center services and is addressed in California Code of Regulations, title 5, section 3030. Eligibility for regional center services is addressed in California Code of Regulations, Title 17.

16. Claimant's grandmother was understandably concerned about what would happen to claimant if he does not continue to improve or if his troublesome behaviors or social difficulties increase. This legitimate concern does not make claimant eligible for regional center services. Claimant's special education program and services provided by CARES will continue and, hopefully, based on claimant's history, will result in continued progress. However, if claimant's condition changes, and his disability evolves into a substantial disability for him, claimant can request that the regional center conduct another evaluation for regional center eligibility.

17. Based on this record, claimant does not have a substantial disability on the

basis of autism spectrum disorder, and he is not is eligible to receive regional center services on that basis.

ELIGIBILITY BASED UPON FIFTH CATEGORY

18. According to the DSM-V, an individual is diagnosed as having an intellectual disability when he or she has deficits in intellectual and adaptive functioning and the onset of these deficits occurs during the individual's developmental period. The DSM-V further notes that the "levels of severity (of intellectual disability) are defined on the basis of adaptive functioning, and not IQ scores, because it is the adaptive functioning that determines the level of supports required." According to a chart of expected characteristics of an individual with mild intellectual disability, children and adults would have "difficulties in learning academic skills involving reading, writing, arithmetic, time, or money, with support needed in one or more areas to meet age-related expectations." Additionally, communication and social judgment are immature and the individual may be easily manipulated by others. Individuals with mild intellectual disabilities "need some support with complex daily living tasks . . . . In adulthood, supports typically involve grocery shopping, transportation, home . . . organizing, nutritious food preparation, and banking and money management."

19. Claimant does not claim to have an intellectual disability, but he claims to have a condition closely related to an intellectual disability or that requires treatment similar to that required to treat individuals with intellectual disabilities – the "fifth category condition." The fifth category is not defined in the DSM-V. 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 [intellectual disability], with many of the same, or close to the same, factors required in classifying a person as intellectually disabled. Furthermore, the various additional factors required in designating an individual developmentally disabled and substantially handicapped must apply as well."

ASSOCIATION OF REGIONAL CENTER AGENCIES GUIDELINES

20. 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 confirmed that eligibility for Regional Center services under the fifth category required a "determination as to whether an individual <u>functions in a manner that is similar to</u> that of a person with (intellectual disability) **OR** <u>requires treatment similar to</u> that required by

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

individuals with (intellectual disability).[5]" (Emphasis in original.) 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 (intellectual disability?)**
>
> (Intellectual disability) is defined in the DSM-IV 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 (an intellectual disability) 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 (intellectual disability) 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 (intellectual disability).
>
> 3. As an individual's intelligence quotient rises above 70, it becomes increasingly essential for the eligibility team to demonstrate that:

[5] The Guidelines have not been updated and refer to "mental retardation" as that term was defined by California codes and regulations prior to their amendment in 2015. The term "mental retardation" in the Guidelines has been replaced for purposes of this Decision with the term "intellectual disability".

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 (intellectual disability). In some cases, these individuals may be considered to function more like persons with learning disabilities than persons with (intellectual disability).

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 (intellectual disability)?

In determining whether an individual requires 'treatment similar to that required for (intellectually disabled) 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 (intellectual disability).

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 (intellectual disability).

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 (intellectual disabilities) 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."

21. In *Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462, the court cited with approval to the ARCA Guidelines (*Id*. at p. 1477.) Additionally, the court confirmed that individuals may qualify for regional center services under the fifth category on either of the two independent bases contained in the statute.

APPLICATION OF THE ARCA GUIDELINES

22. The first question under the ARCA Guidelines is whether claimant functions in a manner similar to that of a person with an intellectual disability. In this case, the evidence established that claimant's intellectual functioning is in the low to high average range. Claimant has not demonstrated delays in learning and does not have substantial adaptive deficits for his age. Claimant is almost seven years old. Some of the categories for evaluating adaptive skills are not applicable to him, such as capacity for independent living and economic self-sufficiency. As relates to the other categories, claimant's skills are within or slightly below what is expected for his age.

23. The second question is whether claimant requires treatment similar to that required by an individual who has an intellectual disability. Insufficient evidence was presented concerning the treatment claimant is alleged to require that is similar to treatment required by individuals who have intellectual disabilities.

24. The third question is whether claimant is substantially handicapped by his condition. The factors to consider in determining whether an individual is substantially handicapped are similar to those used to determine whether an individual has deficits in adaptive functioning. Claimant has not established that he has deficits in adaptive learning that qualify his condition as substantially handicapping.

25. The final question is whether claimant's disability originated before the age of 18 and is likely to continue indefinitely. Claimant has satisfied that criteria.

26. The evidence does not support a finding that claimant has a substantial disability based upon a disabling condition that is closely related to intellectual disability such as to establish eligibility for IRC services and supports.

Conclusion

27. Claimant's mother and grandmother have provided claimant with every cultural, social and educational opportunity they can. They clearly love him and are attempting to ensure that he has all the services available to him to grow to be a well-adjusted and successful adult. Their work and efforts on his behalf are admirable. In fact, they have provided so well for claimant that, at this time, the evidence does not support a finding that claimant has a substantial disability on the basis of autism spectrum disorder or under the fifth category. Claimant is not eligible for regional center services on this record.

ORDER

Claimant is not eligible for regional center services and supports under the Lanterman Developmental Disabilities Services Act. Claimant's appeal from the service agency's determination that he is not eligible for regional center services and supports is denied.

DATED: April 16, 2015

SUSAN J. BOYLE
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.