

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:	)	OAH No. L 2005090744
	)	
RICARDO M.,	)	
	)	
Claimant,	)	
	)	
vs.	)	
	)	
KERN REGIONAL CENTER,	)	
	)	
Service Agency.	)	
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DECISION

This matter was heard by Carolyn D. Magnuson, Administrative Law Judge of the Office of Administrative Hearings, on October 20, 2005 in Bakersfield, California.

Jeffrey Popkin, Director of Case Management Services for Kern Regional Center (KRC or Service Agency), represented the Service Agency.

Delia V., Claimant's mother represented Claimant.

Testimonial and documentary evidence was received, and the matter was submitted for decision at the close of the hearing.

ISSUE

The issue to be decided is whether Kern Regional Center should continue to provide services to Claimant.

FACTUAL FINDINGS

1. Claimant is a 12-year-old boy who is a Service Agency consumer. In May 1996, a psychological evaluation was done of Claimant by Carol Kelly, Ed.D. Dr. Kelly administered, inter alia, the Leiter International Performance Scale to assess Claimant's intellectual capacity. Claimant's full-scale I.Q. was 104, which is in the normal range. However, Dr. Kelly observed that Claimant demonstrated difficulty

with communication skills and recommended further testing. Dr. Kelly diagnosed a phonological disorder on Axis I. There was no diagnosis for Axes II and III.

2. Thereafter, KRC determined that Claimant was eligible to receive Service Agency services. However, the evidence did not establish the Claimant's qualifying condition or on what information the Service Agency relied in making the eligibility determination.

3. In February and March 2004, Claimant was evaluated by a school psychologist, Cory J. Snow, as part of his triennial Individualized Education Program (IEP) review. The psychologist administered the Wexler Intelligence Scale for Children-Fourth Edition (WISC-IV) to assess Claimant's intellectual functioning. Claimant's full-scale I.Q. as measured by this test was 74, which placed him in the borderline category. Claimant's score on the Visual-Motor Integration test was in the low average range; his score on the Visual Perception test was in the low range. The psychologist recommended Claimant receive special education services based on his diagnosis of attention deficit hyperactivity disorder (ADHD).

4. On July 13, 2005, a psychological assessment of Claimant was performed by Kimball Hawkins, Ph.D. To assess intellectual functioning, Dr. Hawkins administered the WISC-IV. Claimant's full-scale I.Q. was 84, which placed him in the low average range. On the Wide Range Achievement Test-Revision 3 (WRAT-III), Claimant scored at the fifth-sixth grade level in reading skills and at the fourth grade level in arithmetic skills. On the Vineland Adaptive Behavior Scales II, Claimant scored overall in the borderline deficit range. Dr. Hawkins gave Claimant an Axis I diagnosis of ADHD and a learning disorder. Dr. Hawkins made no Axis II diagnosis. His Axis III diagnoses were based on medical reports. Dr. Hawkins concluded Claimant did not have an eligible condition for case management services through KRC.

5. Thereafter, a KRC eligibility diagnostic team reviewed Claimant's records and determined that, "[t]here is no evidence of MR (mental retardation), CP (cerebral palsy), autism, or epilepsy" and that, therefore, Claimant was not eligible for ongoing Service Agency Services. Claimant was informed of this determination and filed for fair hearing on the issue of eligibility.

6. Claimant's mother reports that Claimant has deficits which are not reflected in the test results and which might not be noticed in the relatively limited amount of time testing involves. Claimant is not entirely toilet trained and still wets and soils himself. He does not have good bathroom habits and must be monitored to assure good hygiene. He does not recognize when he needs to bathe and cannot perform personal hygiene tasks on his own. Claimant cannot complete even simple chores without direct supervision. All instructions must be very specific, and Respondent cannot be asked to do more than one thing at a time or to perform a task which requires him to take multiple steps. Moreover, Respondent has difficulty

learning to perform a task and, when he does, in generalizing this skill to other applications.

7. In addition, Claimant experiences violent mood swings and, when angry, can be menacing to family members. He has also threatened to harm classmates.

8. Claimant has a number of ongoing medical needs: he has arthritis in his hands, feet, and legs; he has significant breathing problems; and he must consult with a psychiatrist regularly for his psychopathic medications. KRC has provided transportation for Claimant to see the doctors treating him for these conditions.

9. Claimant's mother expressed deep gratitude for the assistance provided to Claimant and his family by KRC. She credits this assistance with making Claimant's life much better, but she is concerned about her ability to provide for Claimant without the Service Agency's services.

#### LEGAL CONCLUSIONS

10. The State has accepted a responsibility for persons with developmental disabilities and assumed an obligation to them, which it must discharge. (Welf. & Inst. Code, § 4501.) The overriding policy in the Lanterman Act is that the regional centers, through which the state's mandate is carried out, must do everything necessary to allow a developmentally disabled individual to be integrated into the community and become as independent as possible.

11. Welfare & Institutions Code section 4512, subdivision (a), defines "developmental disability" as being:

[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 . . . 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 individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.

12. This provision is echoed and elucidated by California Code of Regulations, title 17, section 54000, which states as follows:

(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.

13. California Code of Regulations, title 17, section 54001 provides:

(a) "Substantial Handicap" means:

(1) 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 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.

14. These are the criteria by which the Service Agency was supposed to have initially assessed Claimant's eligibility for Lanterman Act services through KRC.<sup>1</sup> Whether or not these standards were observed is unknown because no evidence was introduced on the issue. This lack of information is a major obstacle in this case because, under the provisions of Welfare and Institutions Code Section 4643.5, subdivision (b),

An individual who is determined by any regional center to have a developmental disability shall remain eligible for services from regional centers unless a regional center, following a comprehensive reassessment, concludes that the original determination that the individual has a developmental disability is clearly erroneous.

15. Therefore, before an individual who has been found eligible can be denied that status, the regional center challenging eligibility must show by clear and convincing evidence that, at the time the original eligibility determination was made, it was patently wrong. Evidence of a consumer's current intellectual functioning and adaptive abilities is relevant only to the extent that it demonstrates the correctness/incorrectness of that initial determination.

16. Thus, in order to decide whether the original eligibility determination was clearly erroneous, one would have to know the Claimant's original qualifying condition as well as the information used to support that determination, so one could compare and contrast the evidence relied upon by the regional center to reach the original eligibility conclusion with that relied upon to reverse the decision.<sup>2</sup>

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<sup>1</sup> At the time the Claimant was originally assessed, a person needed to demonstrate only two areas of substantial handicap.

<sup>2</sup> From the fact that Respondent was determined to be eligible for KRC services, one must infer that the normal I.Q. reported by Dr. Kelly in 1996 was discredited in some manner and was not relied upon in finding Claimant eligible for services.

In the absence of such information, one can only speculate about those facts; and speculation is insufficient to sustain the burden of proof.

17. However, the Service Agency is not foreclosed from reinitiating the eligibility decertification process against Claimant in the future and providing, at that time, the evidence which was lacking here.

ORDER

Claimant's appeal of KRC's determination to terminate services is sustained and services to Claimant shall continue.

Dated:

CAROLYN D. MAGNUSON  
Administrative Law Judge  
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter, and both parties are bound by it. Either party may appeal this decision to a court of competent jurisdiction within ninety (90) days of this decision.