

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

CLAIMANT

vs.

NORTH BAY REGIONAL CENTER, Service Agency.

OAH No. 2019060319

DECISION

Administrative Law Judge Holly M. Baldwin, State of California, Office of Administrative Hearings, heard this matter on May 15, 2020, by telephone and videoconference.

Guy Jack Bengé, Attorney at Law, represented North Bay Regional Center (NBRC), the service agency.

Claimant was represented by her mother. Claimant's father was also present. Claimant was not present at the hearing.

The record was held open to allow claimant to submit a signed copy of a letter from Christine Meade, Ph.D. Claimant timely submitted the letter, which was marked as Exhibit N and was admitted into evidence. The record closed and the matter was submitted for decision on May 18, 2020.

ISSUE

Is claimant eligible for regional center services because she is substantially disabled by a condition that is closely related to intellectual disability or that requires treatment similar to that required for individuals with intellectual disability?

FACTUAL FINDINGS

Introduction and Procedural History

1. Claimant is 19 years old. She lives with her parents and two younger sisters.
2. Claimant was first assessed by NBRC for eligibility for regional center services in 2016. NBRC issued a finding that claimant was not eligible for regional center services on January 26, 2017.
3. In late 2018 or early 2019, claimant sought another eligibility assessment from NBRC. After reviewing additional information provided by claimant and conducting an updated intake social assessment, NBRC again found that claimant was not eligible for regional center services. Claimant requested a hearing and this proceeding followed.
4. Claimant contends that she is eligible for regional center services in what is commonly referred to as the "fifth category" of eligibility: disabling conditions found to be closely related to intellectual disability or that require treatment similar to that required for individuals with intellectual disability. NBRC contends that claimant is not eligible for regional center services under the fifth category, or any of the other

qualifying developmental disabilities (intellectual disability, cerebral palsy, epilepsy, or autism). NBRC contends that claimant's functional limitations are due to medical and/or psychiatric issues, rather than an eligible developmental disability.

Applicable Diagnostic Criteria

INTELLECTUAL DISABILITY

5. Claimant does not contend that she is eligible for regional center services due to intellectual disability. However, the diagnostic criteria for intellectual disability are relevant to an eligibility claim under fifth category, which requires a determination of whether claimant has a condition similar to an intellectual disability or that requires similar treatment.

6. The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, (DSM-5), sets forth the diagnostic criteria for intellectual disability.¹ (DSM-5 at p. 33.) The essential features of intellectual disability are deficits in general mental abilities and impairment in everyday adaptive functioning, relative to an individual's age, gender, and socio-culturally matched peers. Three diagnostic criteria must be met for a diagnosis of intellectual disability. First, there must be deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience. Individuals with intellectual disability typically have IQ (intelligence quotient) scores in the 65 to 75 range. Second, there must be deficits in adaptive functioning that result in failure to meet developmental

¹ The term "intellectual disability" has replaced the formerly used term of "mental retardation."

and socio-cultural standards for personal independence and social responsibility. Third, the onset of the intellectual and adaptive deficits must occur during the developmental period.

FIFTH CATEGORY

7. The Lanterman Developmental Disabilities Services Act (Lanterman Act) provides assistance to individuals with five specified developmental disabilities: intellectual disability, cerebral palsy, epilepsy, autism, and the “fifth category” of disabling conditions closely related to an intellectual disability or that require treatment similar to that required for an individual with an intellectual disability. (Welf. & Inst. Code, § 4512, subd. (a).)² As with the other specified developmental disabilities, a disability under the fifth category must originate before the age of 18, must continue or be expected to continue indefinitely, and must constitute a substantial disability for the person. (*Ibid.*) Eligible developmental disabilities do not include disabling conditions that are solely physical in nature. (*Ibid.*) Non-eligible physical 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 [intellectual disability].” (Cal. Code Regs., tit. 17, § 54000, subd. (c)(3).)

8. Appellate courts have discussed the requirements of the fifth category of regional center eligibility. In *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1129, the court held that the fifth category condition must be very

² Statutory references are to the Welfare and Institutions Code, unless otherwise specified.

similar to intellectual disability, with many of the same, or close to the same, factors required in classifying a person as intellectually disabled. Another decision has found that fifth-category eligibility may also be based on the established need for treatment similar to that provided for individuals with an intellectual disability, notwithstanding IQ scores within the average range of intellectual functioning. (*Samantha C. v. State Dept. of Developmental Services* (2010) 185 Cal.App.4th 1462, 1492.) However, the court in *Samantha C.* rejected the argument that adaptive functioning impairment standing alone is sufficient for fifth category eligibility. (*Id.* at pp. 1486-1487.)

Developmental, Social, and Educational History

9. Claimant was born at full term with no birth complications. She met her developmental milestones on a typical schedule.

10. Claimant was diagnosed with ADHD (attention deficit hyperactivity disorder) at age six or seven. She also displayed tics, and was diagnosed with Tourette's syndrome at about age seven. Claimant received medication to control the symptoms of Tourette's syndrome for some years; the tics later stopped.

11. Claimant was homeschooled through fourth grade, due to difficulties paying attention and staying on task, concerns about exposure to food allergens, and her parents' personal beliefs. Claimant attended a Montessori charter school from fifth grade through eighth grade.

12. In childhood, claimant had appropriate social skills and engagement, made friends, and participated in school and social activities.

13. Starting at about age 13, claimant regressed socially, verbally, and behaviorally. Her parents noted that claimant's decline in functioning and regression in

schoolwork and abilities coincided with her receiving a TDAP vaccination before starting seventh grade.

14. Claimant displayed social withdrawal and increased anxiety that started in sixth grade and significantly worsened in seventh to eighth grade. In ninth grade, she found the classroom environment overwhelming, had severe anxiety, and hid in the bathroom at school, before she stopped attending altogether.

SPECIAL EDUCATION

15. In February 2014, when claimant was in the eighth grade, a special education Individualized Education Plan (IEP) with a classification of emotional disturbance was implemented. She received speech services due to selective mutism and accommodations for extra time to complete work and supervision between classes.

16. On February 9, 2014, Vanessa Pena, a speech language pathologist clinical fellow, wrote a speech and language evaluation report after assessing claimant. Pena noted that in her observation, claimant demonstrated appropriate eye contact and age-appropriate conversational skills, but she also displayed behaviors indicating social anxiety. Pena administered tests to measure claimant's speech and language skills. Claimant's scores revealed average skills in receptive and expressive language, and above-average skills in receptive and expressive vocabulary for her age. Claimant had deficits in the area of social language skills. Pena concluded from her observations and teacher feedback that claimant's deficits in social language skills were likely due to significant social anxiety. Pena recommended weekly speech-language therapy.

17. In ninth grade, claimant was reevaluated and made eligible for special education services based on an educational diagnosis of autism. Claimant attended a

mainstream high school in ninth grade with a one-to-one aide. She had attendance problems and eventually stopped going to school. Claimant had home-hospital instruction for the second half of ninth grade, with in-home behavioral and academic services. Claimant tried to transition back to school for tenth grade, but was unsuccessful. She withdrew from school and participated in an online school program for a semester.

18. Claimant enrolled in the twelfth grade in the fall of 2017, in an independent study "Cyber High" course, but as of her special education assessment in April 2018, she had not yet made any progress toward completing that course.

19. An updated IEP was established for claimant on February 1, 2018, when she was 17 years old and in the twelfth grade. This IEP listed claimant's primary disability as "Other Health Impairment, which causes her anxiety and withdrawal along with other social-emotional concerns," and her secondary disability as "Specific Learning Disability [which] adversely affects her ability to progress in the general education curriculum without special education support and services in the areas of math, and anxiety."

20. On April 25, 2018, school psychologist Sabrina Menart, M.A., P.P.S., completed a triennial review assessment report. Menart noted that claimant had previously been found to meet special education eligibility criteria for Behaviors Associated with Autism and Specific Learning Disability. Menart concluded that at the time of her 2018 assessment, claimant met special education eligibility criteria for Other Health Impairment due to diagnoses of Social Anxiety and Pediatric Autoimmune Neuropsychiatric Syndrome. She referred claimant to an IEP team to determine appropriate educational services.

HOSPITALIZATIONS

21. Claimant was in a residential placement at Edgewood's Hospital Diversion program in San Francisco for six weeks during the summer of 2015, when she was 14 years old, due to mental health concerns. That facility diagnosed claimant with major depressive disorder with psychotic features.

22. At hearing, claimant's parents report that she has been in and out of the hospital during the past year.

Assessment by Kaiser ASD Center in 2014

23. On April 30, 2014, at age 13, claimant was evaluated by the Kaiser Permanente Autism Spectrum Disorders Evaluation Center in San Francisco (Kaiser ASD Center). The evaluation team included two licensed psychologists, a practicum student, and a psychiatrist. Claimant was referred to the Kaiser ASD Center for evaluation by her treatment providers at the child psychiatry department at Kaiser Vacaville. The Kaiser ASD Center evaluation team reviewed claimant's records, interviewed claimant and her parents, and administered cognitive tests and autism diagnostic tools.

Claimant's cognitive testing showed high average verbal abilities and average nonverbal reasoning abilities, with a full scale IQ score of 108 on the Wechsler Abbreviated Scale of Intelligence, Second Edition (WASI-II). The evaluators noted these results were consistent with the cognitive testing administered by claimant's school district in February 2014.

Claimant's parents completed an adaptive behavior assessment that showed her adaptive abilities to be in the extremely low range, with deficits across domains.

The evaluation team determined that, although claimant displayed some autistic-like behaviors, overall her presentation and symptom history were not consistent with an ASD diagnosis. Claimant was a social and engaged toddler and young girl, and her significant anxiety and social withdrawal did not emerge until middle school. Despite those symptoms, claimant still maintained connections with at least one friend and a boyfriend. The evaluators found that the quality of claimant's responses and behaviors on the ADOS-2 (Autism Diagnostic Observation Schedule) "seemed outside of what is generally seen with teens on the autism spectrum and more consistent with the severity of her anxiety and social discomfort."

The evaluators concluded that claimant was experiencing debilitating anxiety and that she met diagnostic criteria for Social Phobia, with rule-outs to be considered for Obsessive Compulsive Disorder and Generalized Anxiety Disorder. They also noted claimant's impairments in adaptive daily living, social communications, and academic functioning were associated with significant anxiety. The evaluators recommended that claimant continue to receive psychological treatment and medication management.

24. A second evaluation of claimant by the Kaiser ASD Center was scheduled for April 2016, but claimant refused to cooperate.

Referral to NBRC

25. Claimant's mother contacted NBRC in 2015. Claimant was referred to the regional center by her behavioral therapist, Christine Meade, Ph.D.

26. In an undated letter, Dr. Meade stated she had been performing a functional behavioral assessment of claimant, who was receiving special education services under an educational classification of autism. Dr. Meade wrote: "[Claimant] requires assistance with daily life skills that range from accessing the community to

self-care. Currently, her parents are unable to leave her unattended within the home within the typical age peer norm expectation. Communication deficits derived from anxiety is her greatest skill deficit. She requires assistance relating her wants and needs and has difficulty with self-regulation. [¶] It is my professional opinion that [claimant] qualifies for services under the Lanterman Act in California.”

27. Claimant’s family also consulted with K. Paul Stoller, M.D., who conducted testing of claimant (the nature of that testing was not established by the record). On September 16, 2016, Dr. Stoller wrote a very brief letter, which stated in its entirety: “This letter is to serve as a referral to the Regional Center for [claimant], who has the diagnosis of autism. I certify that she is eligible for services afforded under the Lanterman Act.” At hearing, claimant’s mother explained that Dr. Stoller thought claimant was suffering from Lyme disease that manifested similarly to autism in terms of her behaviors and level of functioning.

Assessment by NBRC in 2016

28. On October 8, 2016, NBRC assessment counselor Suzette Soviero wrote an intake assessment report after reviewing claimant’s records and interviewing claimant’s parents at their home. Claimant refused to come out of her room to meet with Soviero. Her parents’ concerns about claimant’s behavior at that time included: claimant spent most of her time in her room; did not know how or did not want to talk to people; did not take care of herself and had to be told to eat, drink, or shower; and was not capable of independent living.

29. As part of the NBRC eligibility assessment, claimant was referred to a consulting psychologist for evaluation. Claimant was 16 years old at the time of this evaluation.

30. On November 30, 2016, Sara Rice Schiff, Ph.D., of SRP Psychological Services, Inc., wrote a psychological evaluation report. Dr. Schiff is a licensed clinical psychologist with a specialty in neuropsychology. Dr. Schiff reviewed claimant's records, interviewed claimant and her mother, and administered several testing instruments. She took a developmental history from claimant's mother which included a notation that claimant had genetic testing, which showed "DEAF1 gene with an in-frame deletion of 12 residues, the effect is unknown."

Dr. Schiff administered the Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV) to assess claimant's cognitive functioning. Claimant's scores indicated verbal skills in the low average range (85), nonverbal cognitive skills in the average range (100), working memory in the low average range (86), and processing speed in the borderline range (76). Dr. Schiff calculated a full scale IQ score of 84, but believed that it was not valid, due to the discrepancy between the lowest and highest subtest scores.

Dr. Schiff attempted to administer the ADOS-2, but was unable to complete it because claimant refused to speak or participate.

Claimant's mother completed the Adaptive Behavior Assessment System III (ABAS) questionnaire, with a result indicating that claimant's adaptive skills fell in the extremely low range. Dr. Schiff also interviewed claimant's mother using the Social-Communication Questionnaire (SCQ), which is based on the algorithm for the Autism Diagnostic Interview Revised (ADI-R). The results of the SCQ diagnostic interview yielded a score of 10, below the cutoff of 15 for an autism spectrum disorder.

Dr. Schiff made the following diagnostic conclusions:

Based on her behavior during testing as well as her parents' report of her development, [claimant] does not meet criteria

for a DSM-5 diagnosis of Autism Spectrum Disorder. At this time, her diagnostic profile is unclear.

[Claimant's] performance on a measure of cognitive functioning indicates verbal skills in the low average range, nonverbal cognitive skills in the average range, working memory in the low average range and processing speed in the borderline range. Her adaptive skills as reported by her mother fall in the extremely low range, lower than expected given her cognitive functioning, but consistent with her atypical in-person presentation. A parent report measure of Autism Spectrum Disorder symptomatology was negative. A formal observational measure of ASD symptomatology was unable to be completed.

While [claimant's] presentation in session was clearly atypical in regards to odd vocal tone (high pitched, breathy), unusual body posturing, poor eye contact, and selective mutism, her presentation was not consistent with that of an individual with an autism spectrum disorder. In addition, her developmental course is not consistent with autism in that she had relatively typical development until the age of 13, at which point all symptoms began. That said, [claimant's] difficulties do not appear, based on this examiner's opinion, to be purely emotionally based. The tics and body posturing in particular speak to a possible neurological etiology and warrant further testing. In

addition, [claimant] has a genetic difference that could possibly be related to atypical development. At this time, a more in depth look at [claimant's] cognitive strengths and weaknesses is recommended to aid in diagnostic clarification.

Dr. Schiff listed a diagnostic impression of "rule out specified neurodevelopmental disorder." Dr. Schiff recommended that claimant work with the school district to develop an appropriate IEP, be monitored by her physician for health concerns, obtain a full neuropsychological evaluation, and receive ongoing psychotherapy to address atypical behaviors.

31. NBRC issued a determination that claimant was not eligible for regional center services on January 26, 2017.

Medical Evaluations and Treatment from 2016 to 2019

32. Claimant began treatment with the child psychiatry department at Kaiser Permanente in 2014. Her medical records note a diagnosis of generalized anxiety disorder since July 16, 2014, and selective mutism since May 19, 2016.

33. Since 2016, claimant has been treated by neurologists at Kaiser Permanente. Claimant was first evaluated by pediatric neurologist Gregg Nelson, M.D., in April 2016, when she was 15 years old. Dr. Nelson ordered a full diagnostic workup including serum and CSF studies with an autoimmune panel, a medical genetics consultation and genetics test, and a brain MRI and EEG test. As described by claimant's current neurologist, most of those test results were unrevealing.

34. On June 28, 2016, Kamer Tezcan, M.D., wrote a letter to claimant's mother regarding the results of claimant's genetic testing. Claimant had clinical exome sequencing done, which did not find a well-known, previously reported mutation in any of the over 4,000 genes studied. However, the testing found three genes with changes that were classified as "variants of unknown significance." One of those variants was reported as "highly significant" and Dr. Tezcan stated that it warranted further investigation. That variant was summarized as "DEAF1 gene with an in-frame deletion of 12 residues, the effect is unknown."

35. Dr. Nelson referred claimant to a rheumatologist, Dr. Mombourquette. Claimant's mother had concerns that claimant's symptoms might be due to PANDAS (Pediatric Autoimmune Neuropsychiatric Disorders Associated with Streptococcal Infections) or PANS (Pediatric Acute-Onset Neuropsychiatric Syndrome), but Dr. Mombourquette noted that these conditions had not yet received widespread recognition as valid autoimmune processes in the rheumatology or neurology communities. The Northern California Kaiser Pediatric Rheumatology Clinics were not then evaluating patients for or treating PANDAS or PANS.

36. Claimant sought a second opinion from Amy Fishman-Smith, N.P., at the Open Medicine Institute in Mountain View, who supported a concern for PANS and recommended further testing. Fishman-Smith treated claimant with intravenous immunoglobulins (IVIG) and antibiotics for presumed Lyme disease in June 2017, with improvement of claimant's symptoms. Prior to infusion, claimant's mother reported that claimant was having psychosis, was unable to swallow and drooling frequently, talked at a high-pitched rate of speed, was unable to read or write, could not feed herself, and tended to have catatonia. These symptoms improved after IVIG.

37. Claimant was evaluated by neuroimmunologists at Stanford Children's Health. On September 8, 2017, Dr. Mackenzie noted that after the recent treatment with IVIG, claimant spoke more clearly, and was able to draw and read again. Claimant still had severe anxiety, was stiff, and had difficulty sitting up. A report suggested autoimmune encephalopathy as a possible diagnosis, but noted the lack of objective evidence apart from a positive Cunningham Panel (serology).

38. Claimant was subsequently evaluated in October or November 2017 by the Childrens Postinfectious Autoimmune Encephalopathy (CPAE) Clinic at Banner Children's Hospital in Tucson, Arizona. On October 27, 2017, those doctors found that postinfectious encephalopathy, possibly autoimmune, might be an appropriate diagnosis. They recommended a trial of IVIG, with a neurocognitive reassessment before and after the IVIG treatment. They also noted that IVIG was not a long-term treatment, and recommended that it be coupled with cognitive behavioral therapy and psychiatric treatment and support.

39. Claimant's Kaiser medical records include a diagnosis of encephalopathy since November 15, 2017.

40. Dr. Nelson saw claimant in the emergency department in July 2018, while she was in a state of serious decline, including catatonia, intermittent convulsions, mutism, and imbalance. Claimant received monthly IVIG treatments from July through December 2018 (she had previously been receiving less frequent IVIG).

41. In August 2018, claimant had a period of significant improvement, during which she went back to school, dated, engaged in social activities, communicated via text message, dressed herself, and attended to her daily needs.

42. An MRI of claimant's brain on August 8, 2018 showed normal results.

43. Claimant's Kaiser medical records note a diagnosis of nonspecific paroxysmal spells since September 18, 2018. Claimant's mother explained during her testimony that claimant's paroxysmal spells look similar to a seizure.

44. Claimant's level of functioning declined again in late December 2018.

45. In April, July, and early December 2018, a psychologist at Kaiser Permanente, Ryan K. Parrett, Psy.D., conducted a series of cognitive assessments of claimant to evaluate her intellectual functioning in response to immunological treatments. Dr. Parrett compared claimant's scores on these post-treatment tests (using the WAIS-IV) to her pre-treatment cognitive testing in January 2018 (using the WISC-IV). During Dr. Parrett's testing, claimant did not speak or respond verbally. She completed responses to the test questions in writing.

Dr. Parrett concluded that claimant showed improvement in her cognitive functioning after the immunological treatments. For example, claimant's pre-treatment verbal comprehension score was 95, and her post-treatment verbal comprehension scores were 87, 107, and 110. Throughout the year, claimant's scores on the working memory and processing speed subtests were considerably lower than her scores on the verbal comprehension and perceptual reasoning subtests. However, her working memory and processing speed scores also improved over the course of the year, from 56 to 92 for working memory, and from 50 to 79 for processing speed.

46. Claimant has been treated by Mark Waheed, D.O., a neurologist at Kaiser Permanente, for over a year. Dr. Waheed evaluated claimant at a new patient neuroimmunology consultation on January 24, 2019, examining claimant, reviewing her medical records, and interviewing her parents. Dr. Waheed wrote: "This is [an 18-year-old female] with a history and examination findings suggestive of possible

autoimmune encephalopathy. This is a highly unusual case, with no clear guidelines as to how one should proceed." He noted that claimant had been receiving monthly IVIG since July 2018 and did very well for five months, during which time she was interacting with peers, walking regularly, producing high-quality art, attending to her own needs, communicating via writing and text message, and engaging in other positive activities. Claimant experienced another unexplained decline in functioning in December 2018.

At the time of Dr. Waheed's examination, claimant was essentially mute and used a wheelchair. He found that she "appears to behave in a way similar to [one] with severe autism, but this is not inconceivably due to neurologic disease, as might be seen in some forms of encephalitis." Dr. Waheed noted that the results of claimant's neuroimaging, serology, and CSF studies were "unhelpful," and that there was a positive Cunningham Panel that was the only empirical evidence suggesting possible autoimmune encephalopathy. He concluded: "With very limited evidence, but at least some suggestion of possible autoimmune encephalopathy per the assessments of [two] different subspecialists, and supposed evidence of the patient's improvement after exposure to immunomodulatory therapy, I will cautiously proceed with an escalation of the patient's immunosuppressive therapy." Dr. Waheed prescribed intravenous rituximab (chemotherapy) for presumed autoimmune encephalitis, and also recommended that claimant continue with regular mental health counseling.

47. At a follow-up visit on April 25, 2019, Dr. Waheed noted that claimant had improved dramatically after receiving intravenous rituximab. She went from using a wheelchair and being unable to perform her own grooming and hygiene activities, to being able to walk, dress herself, brush her own teeth, and feed herself. Her communication also improved, and she expressed herself appropriately verbally and

started writing notes, dancing, and playing with her sister. The week before she saw Dr. Waheed, claimant had a sudden onset of psychiatric symptoms including manic behavior, but those behaviors subsided. At the time of Dr. Waheed's examination, he found that claimant had noticeably improved since his last evaluation. Dr. Waheed noted the lack of a clear diagnosis, but concluded: "I maintain hope that perhaps through a combination of neurologic and psychiatric interventions that she continues to improve in her day-to-day function to return to a good quality of life and [independence]." Dr. Waheed prescribed another six months of rituximab, and noted that he might consider supplemental immunoglobulin courses every three months.

Assessment by NBRC in 2019

48. In late 2018 or early 2019, claimant requested another eligibility assessment. NBRC reviewed the additional information provided by claimant, including updated medical and educational records.

49. The NBRC eligibility assessment team included assessment counselor Lester Baluyot; supervising intake coordinator Guadalupe Lopez; pediatrician Hemaluck Suwatanapongched, M.D.; and psychologist Todd Payne, Psy.D.

50. On August 1, 2019, Baluyot conducted an intake social assessment and wrote a report. Baluyot reviewed reports submitted by claimant and interviewed claimant and her parents at their home. Claimant did not speak or interact with Baluyot, did not make eye contact and ignored all questions asked of her. She hid behind a curtain for most of the meeting, and also attempted to hide under a bed.

At this meeting, claimant's parents described claimant's level of adaptive functioning. Claimant often refused to talk and only sometimes used hand gestures to communicate. When claimant did talk, she typically did not make sense and was

difficult to understand. Whereas she formerly wrote notes to communicate, she no longer did. Claimant had problems understanding conversations and needed to have information rephrased to a simpler level to understand. Claimant routinely had problems coping with fear, anxiety, and frustration. She also displayed self-injurious and aggressive behaviors, and had frequent emotional outbursts.

Claimant was severely limited in her ability for self-care. She wore pull-ups and had weekly toileting accidents in daytime hours. Claimant was not able to perform any of her own personal hygiene or grooming tasks, needing assistance with toileting, showering, dressing, and brushing her teeth. She was able to chew and swallow food, but was not able to use utensils and needed to be fed by family members. Claimant's parents reported that she did not have the capacity for age-appropriate independent living skills. She could not be left unsupervised due to her lack of safety awareness. She had limitations with ambulation and often needed to use a wheelchair.

Claimant had not been in school for the last several years, although there was an IEP in place. Claimant's mother reported that claimant had problems with acquiring and applying information, and very poor short-term and long-term memory, having difficulties following even one-step directions.

Baluyot noted claimant's reported medical diagnoses, including an autoimmune disorder, encephalopathy, selective mutism, and a genetic diagnosis of DEAF-1 gene 12 in-frame deletion. Claimant also had paroxysmal spasms lasting 30 seconds to a minute, with the last such spasm occurring three or four months earlier. Baluyot also noted claimant's mental health diagnoses of anxiety disorder and depressive disorder.

Baluyot obtained releases to obtain additional medical and educational records, which were subsequently received and reviewed by the eligibility assessment team.

51. Based upon a review of all of the updated information provided by claimant, the NBRC eligibility assessment team determined that claimant was not eligible for regional center services.

TESTIMONY OF DR. PAYNE

52. Dr. Payne has been a staff psychologist at NBRC for 17 years, and has conducted eligibility assessments for 16 years. He received his doctor of psychology degree (Psy.D.) from the University of Denver. Prior to his employment at NBRC, Dr. Payne worked as a psychologist at the Sonoma Developmental Center for people with developmental disabilities. Dr. Payne also previously worked at a residential treatment facility in Wyoming, providing psychological assessment and counseling. He completed an internship at the Veterans Affairs facility in Little Rock, Arkansas. Prior to graduate school, he was a direct care staff member at the Devereaux Foundation in Santa Barbara, working with children and adults with developmental disabilities.

53. Dr. Payne testified at hearing regarding his review of claimant's assessments, and his opinions about her claim for eligibility. He reviewed all of claimant's records, but did not personally meet claimant. When claimant sought eligibility for the second time, NBRC agreed to review the additional information provided by claimant. However, NBRC staff did not conduct another psychological evaluation of claimant, because it is claimant's responsibility to prove eligibility.

54. In Dr. Payne's opinion, claimant is not eligible for regional center services. She has a severe behavior disturbance, but it is not due to autism, intellectual disability, or a fifth-category condition.

(a) Dr. Payne found that claimant does not meet the diagnostic criteria for autism spectrum disorder. Those criteria require the manifestation of

specified behaviors in the toddler or preschool years; claimant's early childhood development was largely typical. The Kaiser ASD Center evaluation of claimant in 2014 (age 13) and Dr. Schiff's evaluation of claimant in 2016 (age 16) both found that claimant did not meet diagnostic criteria for autism. Although at one point claimant was found eligible for special education services under criteria for Behaviors Associated with Autism, Dr. Payne noted that the educational criteria are not identical to the clinical diagnostic criteria for ASD, and that the diagnostic criteria are controlling for the purpose of regional center eligibility.

(b) Dr. Payne found that claimant does not have intellectual disability. Claimant's cognitive testing results have consistently been in the average range. Dr. Payne noted that intellectual disability generally corresponds to an IQ score of 70 or lower, with adaptive deficits due to intellectual deficits. In reviewing the cognitive testing administered by Dr. Parrett in 2018, Dr. Payne found nothing to suggest intellectual disability. For example, claimant's verbal comprehension was in the average or above average range throughout. Her lower scores in working memory and processing speed indicate a possible neurological problem, but not intellectual disability. By July and December 2018, her scores in working memory and processing speed were in the low normal range. Dr. Payne opined that this cognitive testing showed claimant's condition was affecting her ability to concentrate and respond efficiently, but that this is different from intellectual disability.

(c) Dr. Payne opined that claimant does not have a disabling condition that falls within the fifth category. Claimant's condition is not similar to intellectual disability, as shown by her cognitive testing results. Nor does claimant's condition require treatment similar to that provided for individuals with intellectual disability. Claimant's medical records, including the records showing improvement in

response to immunotherapy, indicated that her treatment needs were for medical or psychiatric treatment, not treatment to address deficits in intelligence.

55. Dr. Payne explained that even if claimant has a medical condition such as an autoimmune or neuropsychiatric disorder that may cause behaviors and functional limitations similar to those seen in a person with autism, that does not mean claimant is eligible for regional center services. The eligibility criteria in the Lanterman Act provide for a fifth category of conditions similar to intellectual disability, but do not have a similar provision for a condition that may be similar to autism.

56. The opinions of Dr. Payne are persuasive and supported by the evidence.

Claimant's Additional Evidence

57. Claimant's mother and father each testified at hearing regarding claimant's medical conditions, level of functioning, and her claim for regional center eligibility.

58. Claimant's parents concede that claimant does not meet the eligibility criteria for autism.

59. Claimant's parents contend that claimant meets the eligibility criteria for regional center services under the fifth category, based on her level of adaptive functioning and substantial limitations in multiple areas of major life activity.

60. Claimant currently requires 24-hour supervision. As described above, claimant cannot engage in self-care activities. Claimant's parents both work, on different shifts, and they need additional help caring for claimant.

61. On August 28, 2019, claimant's neurologist, Dr. Waheed, completed an Assessment of Need for Protective Supervision for the In-Home Supportive Services Program (IHSS). He noted claimant's diagnosis as encephalopathy, a permanent or chronic condition. Dr. Waheed noted that claimant had severe memory deficits and was often unable to answer questions; had severe disorientation; and had severely impaired judgment, being "prone to psychotic rage."

62. Claimant was awarded IHSS hours and services. On October 11, 2019, claimant's mother was notified that she had been authorized to perform 234 monthly hours of service for claimant. Claimant is also receiving disability benefits.

63. Claimant has been in and out of the hospital over the past year. Her parents have thus been unable to obtain a functional assessment, which was recommended by Dr. Parrett after his cognitive testing of claimant in 2018, or an updated neuropsychological evaluation.

64. At hearing, claimant's mother explained that she has been researching the potential effect of claimant's DEAF1 genetic difference, and the relationship of neuroinflammation and encephalitis to autism-like symptoms. She believes that claimant's genetic difference and her encephalopathy play a role in claimant's behaviors and diminished level of functioning.

Ultimate Factual Findings

65. Claimant has shown that she has substantial limitations in her adaptive functioning, but she has not shown that these are due to a developmental disability as defined by the Lanterman Act. Claimant has not demonstrated by a preponderance of the evidence that she has a condition falling within the fifth category of regional center eligibility.

Claimant's cognitive testing results do not reflect intellectual deficits similar to those seen in people with intellectual disability. In addition, her cognitive skills and her level of adaptive functioning fluctuate, sometimes dramatically, which is not consistent with a condition similar to intellectual disability.

Nor has claimant demonstrated that she requires treatment similar to that required for intellectual disability—instead, the evidence shows that claimant's condition requires medical and psychiatric treatment. Claimant has shown improvement after immunotherapy treatment for her medical condition. In addition, her treating doctors and outside evaluators have consistently recommended psychiatric treatment for anxiety.

LEGAL CONCLUSIONS

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 developmental disability. The standard of proof required is a preponderance of the evidence. (Evid. Code, §§ 115, 500.)

2. The State of California accepts responsibility for people with developmental disabilities under the Lanterman Act. (§ 4500, et seq.) The purpose of the Lanterman Act is to rectify the problem of inadequate treatment and services, and to enable people with developmental disabilities to lead independent and productive lives in the least restrictive setting possible. (§§ 4501, 4502; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.)

3. A developmental disability is a disability that originates before an individual reaches age 18; continues, or can be expected to continue, indefinitely; and

constitutes a substantial disability for that individual. (§ 4512, subd. (a); Cal. Code Regs., tit. 17, § 54000, subd. (b).) The term “developmental disability” includes intellectual disability, cerebral palsy, epilepsy, autism, and disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability. (§ 4512, subd. (a); Cal. Code Regs., tit. 17, § 54000, subd. (a).) Under the Lanterman Act, conditions that are solely psychiatric in nature, solely learning disabilities, or solely physical disabilities are not considered developmental disabilities. (Cal. Code Regs., tit. 17, § 54000, subd. (c).) Handicapping conditions that are solely physical in nature 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.” (Cal. Code Regs., tit. 17, § 54000, subd. (c)(3).)

4. “Substantial disability” means major impairment of cognitive and/or social functioning, and the existence of significant functional limitations, as appropriate to the person’s age, in three or more of the following areas of major life activity: receptive and expressive language, learning, self-care, mobility, self-direction, capacity for independent living, and economic self-sufficiency. (§ 4512, subd. (l)(1); Cal. Code Regs., tit. 17, § 54001, subd. (a).)

5. Claimant has not met her burden of establishing that she has a developmental disability as that term is defined in the Lanterman Act. (Factual Finding 65.) It is undisputed that at present, claimant is substantially disabled. However, regional center services are limited to individuals who meet the statutory eligibility requirements. Claimant’s severely impaired adaptive functioning appears to be caused by her medical and/or psychiatric conditions. Individuals with handicapping conditions

that are solely physical or psychiatric in nature are not eligible for regional center services under the Lanterman Act. Because there is insufficient evidence that claimant has a condition similar to intellectual disability or that she has treatment needs that are similar to the intellectually disabled, her appeal must be denied.

ORDER

Claimant's appeal of the service agency's denial of regional center eligibility is denied. Claimant is not eligible for regional center services.

DATE:

HOLLY M. BALDWIN

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.