

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2016070247

DECISION

On October 11, 2016, Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California.

Leigh-Ann Pierce, Consumer Services Representative, Fair Hearings and Legal Affairs, represented the Inland Regional Center (IRC).

Claimant's mother, his legal guardian, represented claimant who was present.

Oral and documentary evidence was introduced, and the matter was submitted on October 11, 2016.

ISSUES

1. Was IRC clearly erroneous in its previous assessment that claimant was eligible for services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) on the basis of a diagnosis of autism?

2. Is IRC required to perform a second assessment of claimant by a different psychologist to determine if he continues to be eligible for regional center services under the Lanterman Act?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. Claimant is a 19 year-old man who has lived at an assisted living residential facility since April 1, 2006. Claimant has been receiving services from IRC since 2007 based upon a diagnosis of Autism Spectrum Disorder (ASD).

2. On June 21, 2016, a team of professionals at IRC met to review all information and assessments of claimant to determine whether claimant continues to be eligible for services from IRC under the Lanterman Act.

3. On June 22, 2016, IRC notified claimant that he was no longer eligible for regional center services based on a review of all his records, including a May 17, 2016, psychological assessment from IRC psychologist Paul Greenwald, Ph.D., because he does not have a disability that qualifies him to receive IRC services, and the previous determination that claimant has a developmental disability was not correct.

4. On June 30, 2016, claimant's mother filed a fair hearing request appealing IRC's decision.

DIAGNOSTIC CRITERIA FOR AUTISM SPECTRUM DISORDER

5. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5) identifies criteria for the diagnosis of Autism Spectrum Disorder. The diagnostic criteria includes persistent deficits in social communication and social interaction across multiple contexts; restricted repetitive and stereotyped patterns of behavior, interests, or activities; symptoms that are present in the early developmental period; symptoms that cause clinically significant impairment in

social, occupational, or other important areas of function; and disturbances that are not better explained by intellectual disability or global developmental delay. An individual must have a DSM-5 diagnosis of autism spectrum disorder that is substantially disabling in order to qualify for regional center services under the category of autism.

TESTIMONY OF PAUL ALLEN GREENWALD, PH.D.

6. Dr. Paul Greenwald received his Ph.D. in Psychology from California School of Professional Psychology in 1987. He received his Bachelor of Arts degree in Psychology from the University of Miami in 1974. Dr. Greenwald has worked as a staff psychologist at IRC for about eight years. His duties in the position of staff psychologist include reviewing records and conducting evaluations to assist the multidisciplinary team determine if potential clients are eligible for services, and if current clients continue to be eligible for services. During his career, Dr. Greenwald has worked with children with developmental disabilities and with mental health problems.

7. Dr. Greenwald was tasked with evaluating claimant for a determination of continued eligibility for IRC services. As part of that process, Dr. Greenwald reviewed all prior records in claimant's file, including the East Valley SELPA Individualized Education Program (IEP) dated April 7, 2014, the Redlands Unified School District Psycho-Educational Report dated January 23, 2012, and the September 14, 2007, report of the Diagnostic Center in Los Angeles. On May 17, 2016, Dr. Greenwald conducted a psychological assessment of claimant and summarized his findings in a report.

8. Dr. Greenwald testified and stated in his report that the previous assessment of claimant in his records from the East Valley SELPA Individualized Education Program (IEP) dated April 7, 2014, provided that claimant had a primary diagnosis of autism and a secondary diagnosis of emotional disturbance. Based on these diagnoses, the East Valley School District qualified claimant for special education services. Dr. Greenwald stated that claimant had been tested by the Diagnostic Center

located in Los Angeles on September 14, 2007, where he received a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) and of "Autism Disorder, high functioning with atypical features," and this was the basis of the autism diagnosis listed in the East Valley SELPA IEP. Dr. Greenwald noted that the 2007 report stated claimant "has the core diagnostic features of a High Functioning Autistic Disorder (HFA) in the areas of communication, socialization, and restrictive and repetitive behaviors and interests." The report further stated that "he has symptoms that are not typically seen in autism, and are indicative of additional abnormal processing." Dr. Greenwald noted that the 2007 evaluation of claimant by the Diagnostic Center utilized the DSM-4 instead of the DSM-5 for their diagnosis. He stated that the DSM-4 was used until 2013 and differs in criteria for a diagnosis of autism. Dr. Greenwald stated that High Functioning Autism Disorder is no longer a diagnosis under the DSM-5 and the only autism diagnosis now is Autism Spectrum Disorder (ASD). Unlike the Diagnostic Center, Dr. Greenwald utilized the DSM-5 for his assessment of claimant.

Dr. Greenwald also stated that the 2007 Diagnostic Center report showed that claimant was administered the Autism Diagnostic Observation Schedule (ADOS) test, a diagnostic tool for use in diagnosing autism, when he was nine years old. He noted that claimant's overall score on the ADOS test administered by the Diagnostic Center was 12, which is a score that falls within the diagnostic range for autism. However, he also noted that the Diagnostic Center report also stated that claimant had a diagnosis of ADHD and indications of mental health disorders, as well as a family history of mental health disorders. Dr. Greenwald explained that it is possible and common for a nine year old child to have an inflated ADOS test score because of mental health issues and or an ADHD diagnosis rather than autism.

Dr. Greenwald noted that the East Valley SELPA IEP stated that claimant's language, communication and speech development assessment included finding that

claimant's communication with his staff had improved, and he was able to communicate his needs and talk to the staff about his concerns to de-escalate himself when he became upset. The East Valley SELPA IEP report also noted that claimant was very unmotivated academically, particularly with reading, and that he had previously threatened others and destroyed property, but he had improved by expressing his concerns and emotions more often with language than behavior. The East Valley SELPA IEP report stated that claimant had struggled with social skills in the past, but he has become more appropriate with his social skills. He further stated that the East Valley report noted that claimant had a family history of mental illness, including Bipolar Disorder and Schizophrenia.

9. Dr. Greenwald testified and stated in his report that the previous assessment of claimant, the Redlands Unified School District Psycho-Educational Report, dated January 23, 2012, concluded that claimant had average cognitive skills (and claimant's assessment was impacted by high distractibility and low frustration); had problems with externalizing behaviors, attention problems and behavioral symptoms; had "autistic like behaviors"; and met eligibility requirements for special education under an emotional disturbance diagnosis. The Redlands report further stated that claimant "talks excessively with pressured speech" and "demonstrates pragmatic deficits which correlate to his diagnosis of high functioning autism." The Redlands report also provided results of various tests administered to claimant, including the Kaufman Brief Intelligence Test 2nd Edition, Woodcock-Johnson III Tests of Achievement and Social Responsiveness Scale (SRS)-Parent Report.

Dr. Greenwald explained that the SRS-Parent Report is a caregiver survey given as an autism screening tool. He noted that the results of the SRS-Parent Report showed that claimant's social awareness, social cognition, social communication and social motivation all fell within the "moderate" range, and the only category that fell outside of

that range was the category of “Autistic Mannerisms” which fell within the “severe” category. Dr. Greenwald testified that while the Redlands report attributed claimant’s talking excessively and pressured speech to a diagnosis of autism, there was no evidence specifically linking those behaviors to a diagnosis of autism.

10. Dr. Greenwald performed his psychological assessment of claimant on May 12, 2016. In conducting his assessment, Dr. Greenwald performed a mental status exam and clinical interview of claimant, reviewed all of claimant’s clinical records, administered two different tests to claimant, and administered one test to claimant’s mother. Specifically, Dr. Greenwald administered the Autism Diagnostic Observation Schedule 2nd Edition (ADOS-2) Module 4, and the Children’s Autism Rating Scale 2nd Edition (CARS2-ST) to claimant. He administered the Vineland-II Adaptive Behavior Scales (Vineland-II) test to claimant’s mother.

Dr. Greenwald stated that the ADOS-2 test is a language based test with exercises embedded in the test and is considered the “gold standard” for ASD real time observational assessment. The ADOS-2 test consists of a semi-structured interview and cooperative play activities that provide contexts for observing real time behaviors critical to determining ASD in diagnostically crucial areas of communication and reciprocal social interaction. Dr. Greenwald stated that claimant obtained a total score of 6 on the ADOS-2 test. He explained that a score of 6 is far below the cutoff for a diagnosis of ASD. Dr. Greenwald further explained that claimant’s communication skills were good. With regard to claimant’s clinical presentation, Dr. Greenwald observed that claimant talked a lot and was euphoric during the test, and that his communication was sometimes tangential but that he communicated very well with no limitations. He noted that claimant was able to tell if a character in a picture book was angry, and he could read emotions, which is a characteristic that is not typical in ASD. Dr. Greenwald also noted that claimant demonstrated some grandiosity when he spoke about girls who

were “waiting for him” indicating that claimant had a high sense of self, which is not unusual with Bipolar Disorder, but is very atypical with ASD. Dr. Greenwald also said that claimant did not evidence any sensory vulnerabilities or repetitive stereotyped behaviors. He stated that claimant readily used multiple gestures to illustrate his meanings when communicating, coordinated with context congruent facial expressions and flexible eye contact.

Dr. Greenwald also administered the CARS2-ST test to claimant, which is an ASD screening tool that relies on a number of contributing sources of information including parent reports and other tests like ADOS. Dr. Greenwald explained that there are a number of sections of the CARS2-ST test and each section is rated on a scale of one to four with four being the most severely symptomatic level and one being minimal. Dr. Greenwald testified that claimant obtained an overall score of 21 on the CARS2-ST test, which result indicates “Minimal to Mild” ASD symptoms. Dr. Greenwald explained that the cut off score for a diagnosis of “Mild to Moderate” ASD symptoms is 27.5, and claimant’s score fell well below that cut-off.

11. Dr. Greenwald also administered the Vineland II test to claimant’s mother. Dr. Greenwald explained that the Vineland II test assigns ratings for discrete behaviors in the categories of communication, daily living skills, and socialization. Claimant’s mother assigned ratings of “severe” to claimant’s communication skills, “moderate” to his daily living skills and “mild” to his socialization. Dr. Greenwald noted that these ratings fall significantly below the ratings that were provided in 2012 by the Redlands Unified School District’s Psycho-Educational Report. He noted that the discrepancy of the ratings approached four standard deviations, which is an extremely unusual finding.

12. Dr. Greenwald summarized and concluded that claimant is no longer eligible for IRC services under the diagnosis of autism because he did not meet the criteria for a diagnosis of ASD on two grounds. First, claimant’s scores on the ADOS-2

were significantly below the cut-off for a diagnosis of ASD and claimant's clinical presentation did not conform to a diagnosis of ASD. Second, his review of claimant's clinical records and his clinical presentation indicate that a number of very likely alternative diagnoses of Bipolar Disorder, Persistent Depressive (Dysthymic) Disorder, and Defiant Disorder need to be ruled out and likely explain the previous diagnosis of high functioning autism disorder. Dr. Greenwald stated that claimant needs to be assessed to rule out those diagnoses, but that, regardless, ASD is not a proper diagnosis for claimant and claimant does not have a diagnosis that would qualify him for services at IRC.

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TESTIMONY OF CLAIMANT'S MOTHER

13. Claimant's mother is employed by IRC. She testified that claimant "tests very well." She stated that claimant knows what response a person wants to hear and will give it to them, but he is not actually capable of performing the tasks that he says he can do. She stated that claimant has been known to leave the stove on all day multiple times in a month. She also stated that claimant shows no remorse for his actions when he hurts his brother or sister. She testified that when claimant hurts his brother or sister, he will rationalize to himself why his actions were appropriate and that his brother and sister are not hurt. With regard to his emotions, she stated that claimant does not have appropriate feelings. As an example, she stated that claimant had a friend in high school who was murdered. When his friend was murdered, claimant told his mother that he knew that he should feel sad, but that he felt nothing. Another example she provided was with regard to a shooting at her workplace where many workers were killed. Claimant told his mother that it did not bother him that his mother was in danger of being killed because if she died, he knew that she would go to heaven so it was fine.

14. Claimant's mother stated that claimant does have sensory vulnerabilities indicative of ASD. She stated that claimant attends a day program where he is given an opportunity to work. She stated that he was required to wear a specific jacket for a job given to him one day, but he only worked a partial day before quitting the job because he refused to wear the jacket saying it was scratchy on his skin. Claimant's mother stated that she can make his favorite meal and he will sometimes refuse to eat it because he complains that the food "feels weird in his mouth."

15. Claimant's mother further testified that claimant recently got lost in San Bernardino because he did not realize that the buses do not run as late at night on weekdays as they do on weekends. As a result he missed his bus and got lost. He did not know any landmarks to tell others where he was. With regard to his hygiene, she noted that on the day of his evaluation by Dr. Greenwald, she insisted that he take a shower and groom himself. However, if left to his own devices he simply would not do so. She stated that claimant "does not live in reality" and his ideas "don't line up with reality."

Claimant's mother stated that Child Protective Services (CPS) is currently investigating an incident in which claimant threatened to kill his sister. She stated that during the investigation, claimant told the CPS worker that he would not kill his sister but would instead break her bones. She stated that claimant has no idea of the severity of his actions and has no emotion or remorse.

16. Claimant's mother stated that claimant had first started receiving services from IRC in 2007 after the Diagnostic Center in Los Angeles provided their report concluding that claimant had high functioning autistic disorder. She stated that IRC informed her that claimant would have to be reevaluated for eligibility, but that until Dr. Greenwald assessed him he had not been reassessed for eligibility.

17. Claimant's mother believes that IRC must reevaluate her son for eligibility under a diagnosis of autism with a psychologist other than Dr. Greenwald and with another test other than ADOS because she has friends whose children have been denied IRC services and when they sought other tests and another psychologist's opinion, they were granted IRC services.

TESTIMONY OF MAGDALINA DIANA SAMUELS

18. Magdalina Diana Samuels is a Consumer Services Coordinator (CSC) at IRC and has held that position for one and a half years. Her responsibilities as a CSC include ensuring that consumers' individual program plans (IPP) are up to date and that consumers are in a safe environment and receive appropriate services funded by IRC. As part of her responsibilities Ms. Samuels communicates with consumers' representatives. Ms. Samuels has been claimant's CSC for the almost one and a half years.

19. Ms. Samuels testified that she has observed claimant's conduct during the time she has been his CSC. She stated that she went with claimant's mother and claimant to the federal building downtown to obtain Social Security benefits. During the time they were in the federal building, she observed claimant say very loudly, with an officer observing them, that he could do things to the officer. Ms. Samuels stated that claimant had no idea of the possible consequences from his actions, and he had no concern of offending anyone and no remorse. When she explained to claimant that he could be arrested for making such remarks, he stated "I would not be arrested, I would just kill everyone." She stated claimant has told her that he was not able to wear a sweater because it was too itchy, and she believed that was a sensory issue for him. She also stated that claimant lacks any sense of empathy or sympathy and has difficulty relating to others in a social setting. Ms. Samuels stated that claimant has no concept of "stranger danger"; he has received rides from strangers and has taken money out of his bank account and given it to strangers. She stated he has wandered around and talked

to transients with mental illnesses and did not understand why that would be dangerous.

20. Ms. Samuels further testified that claimant is not able to manage his finances even though he has only one bill to pay. She stated that he feels others owe him money when they do not. She does not believe that claimant would be able to live independently or be able to hold down a job. Ms. Samuels stated that claimant wanted to get his driver's license and did not understand how he would do that. Instead, he told Ms. Samuels that he "would just have sexual intercourse with everyone there and would get his driver's license."

21. Ms. Samuels admitted that she is not trained to diagnose ADS and has worked with emotionally disturbed youth in the past. She also stated that it is possible that a young person with a mental health disorder could have made the same comments regarding the officer at the federal building and regarding the driver's license. She also acknowledged that it is possible for a mental health disorder to explain why claimant got lost or was not able to take care of his daily needs.

THE PARTIES' ARGUMENTS

22. IRC argued that Dr. Greenwald's psychological assessment and review of all records failed to establish that claimant has a diagnosis that would qualify him for services from IRC. IRC further asserted that it is not required to provide another psychologist or another test to reassess claimant for eligibility because the assessment provided by Dr. Greenwald was standardized to ensure consistency between different psychologists administering those tests and evaluations.

23. Claimant's mother disagreed with IRC's position that claimant has no indicators to show that he is autistic, and she believed that IRC should reassess claimant with a different psychologist and/or different test to determine if he has autism and is eligible for services.

LEGAL CONCLUSIONS

THE BURDEN AND STANDARD OF PROOF

1. In a proceeding to determine whether an individual continues to be eligible for regional center services, the burden of proof is on the regional center to establish that the previous qualifying diagnosis was clearly erroneous. 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. Pursuant to the Lanterman Act (Welf. & Inst. Code, § 4500, et seq.), the State of California accepts responsibility for persons with developmental disabilities. 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. The Lanterman Act explains that a regional center can decide that a person is no longer eligible for regional center services after reassessment pursuant to Welfare and Institutions Code, Section 4643.5, subdivision (b), which states:

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.

6. California Code of Regulations, title 17, section 54000, also 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:

(a) Developmental Disability means a disability that is attributable to mental retardation¹, 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;

¹ Although the Lanterman Act has been amended to eliminate the term "mental retardation" and replace it with "intellectual disability," the California Code of Regulations has not been amended to reflect the currently used terms.

- (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."

7. When an individual is found to have a developmental disability as defined under the Lanterman Act, the State of California, through the 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.)

8. "Services and supports" for a person with a developmental disability can include diagnosis and evaluation. (Welf. & Inst. Code, § 4512, subd. (b).)

9. 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. A school providing services to a student under an autism disability is insufficient to establish eligibility for regional center services. Regional centers are governed by California Code of Regulations, title 17. Title 17 eligibility requirements for services are much more stringent than those of title 5.

EVALUATION

10. Claimant's mother asked for a Fair Hearing to obtain a second reassessment of claimant for a determination of eligibility under a diagnosis of autism. She believed that because she is familiar with other families who have obtained a second opinion from another psychologist to establish eligibility, IRC should provide her with the second psychologist and/or another test because she did not agree with the results of the IRC's reassessment. However, IRC has no obligation to provide claimant's mother with another test administered by a different psychologist, particularly because the assessments provided by Dr. Greenwald and the tests administered are designed to provide consistent results among psychologists.

11. The psychological reassessment performed by Dr. Greenwald and the information contained in claimant's records supports the conclusion that claimant's original diagnosis of autism was clearly erroneous. Claimant's school records and assessment show that claimant suffers from ADHD and mental health disorders that likely affected his previous scores on the ADOS test administered to him in 2007 from which his original diagnosis of high functioning autism disorder arose. Claimant's most recent evaluation and tests demonstrate that he does not present the symptoms of an ASD diagnosis. The weight of the evidence established that claimant does not have a condition that makes him eligible for regional center services and that his previous diagnosis of autism was clearly erroneous.

ORDER

Claimant's appeal from IRC's determination that he is not eligible for regional center services and supports is denied.

Claimant's appeal from IRC's determination that it will not provide a second psychologist and/or second testing of claimant to reassess his eligibility is denied.

DATED: October 24, 2016

DEBRA D. NYE-PERKINS
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.