

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

v.

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2016080337

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on September 22, 2016.

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

Claimant's mother represented claimant who was not present.

The matter was submitted on September 22, 2016.

ISSUE

Is claimant eligible for regional center services under the Lanterman Act as a result of Autism Spectrum Disorder (autism) or an intellectual disability?

FACTUAL FINDINGS

BACKGROUND INFORMATION

1. Claimant is a 17-year-old African American female who is receiving special education services based on a primary disability of autism, and a secondary disability of

speech and language impairment. Claimant lives at home with her mother, father, and 14-year-old sister. Claimant also has a 30-year-old sister.

2. On July 5, 2016, IRC notified claimant that she was not eligible for regional center services because the records claimant provided to IRC did not establish that she had a substantial disability as a result of an intellectual disability, autism, cerebral palsy, epilepsy, or a disabling condition closely related to an intellectual disability that required similar treatment needs as an individual with an intellectual disability.

3. On August 11, 2016, IRC representatives, claimant, claimant's mother, and claimant's aunt, attended an informal meeting to discuss claimant's fair hearing request. IRC explained that the psychological assessment performed by Paul Greenwald, Ph.D., and a review of claimant's records, did not show she had autism. Further, claimant's records showed that her scores in the area of cognitive functioning were above the range of a person with an intellectual disability. Following the informal meeting, IRC adhered to its original determination that claimant was not eligible for regional center services.

DIAGNOSTIC CRITERIA FOR INTELLECTUAL DISABILITY

4. The *American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) contains the diagnostic criteria used to diagnose intellectual disability. Intellectual disability is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. Three diagnostic criteria must be met in order to receive a diagnosis of intellectual disability: Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience; deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility; and, the onset of these deficits must have occurred during the

developmental period. Intellectual functioning is typically measured using intelligence tests. Individuals with an intellectual disability typically have intelligent quotient (IQ)¹ scores at or below the 65-75 range. The essential features of intellectual disability are deficits in general mental abilities and impairment in everyday adaptive functioning, as compared to an individual's age, gender, and socioculturally matched peers.

DIAGNOSTIC CRITERIA FOR AUTISM

5. The DSM-5 also identifies criteria for the diagnosis of autism. 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 to qualify for regional center services under autism.

EVIDENCE PRESENTED BY IRC

6. Dr. Greenwald, a staff psychologist at IRC, testified at the hearing. Dr. Greenwald reviewed claimant's records, which included claimant's 2013 Individualized Educational Program (IEP) from her school district and a 2015 psycho-educational assessment report from claimant's school psychologist. Dr. Greenwald also conducted

¹ Districts typically do not use IQ tests to assess African-American students for intellectual disabilities; they use alternative means of assessing these students in order to determine eligibility.

his own psychological assessment on June 20, 2015. Dr. Greenwald concluded claimant did not meet the diagnostic criteria for intellectual disability or autism under the DSM-5. Prior to the hearing, Dr. Greenwald reviewed claimant's February 18, 2016, IEP, which had not been available at the time he completed his comprehensive assessment. The 2016 IEP did not change Dr. Greenwald's conclusions.

Regarding claimant's 2013 IEP, Dr. Greenwald noted that it stated claimant demonstrated appropriate articulation and voice skills. Claimant's fluency was considered adequate in social exchanges. Claimant was not observed to have any problems communicating her wants, needs, or ideas, although claimant did have difficulty with social language and social problem solving skills. The IEP also noted claimant had friends and she appeared appropriately groomed. Dr. Greenwald did not see anything in claimant's 2013 IEP that rendered her eligible for regional center services under a diagnosis of intellectual disability or autism.

Regarding claimant's 2015 psycho-educational assessment by her school district, Dr. Greenwald similarly concluded that he did not see anything in claimant's 2013 IEP that rendered her eligible for regional center services under a diagnosis of intellectual disability or autism. The psycho-educational assessment noted claimant was self-confident, put forth good effort, polite, and helpful. Claimant was quiet and did not reciprocate conversation beyond what was asked of her. Claimant, according to the examiner, appeared to be a perfectionist. The examiner concluded claimant presented with autistic-like behaviors as follows: Claimant did not always express interest in others' statements; claimant did not always understand the give and take of conversations; claimant was reported to exhibit repetitive, odd behaviors at school; claimant showed some sensory issues with certain objects; and claimant showed an "extreme" preoccupation with certain topics or subjects.

A review of the 2015 psycho-educational assessment supported Dr. Greenwald's conclusion. The examiner administered seven different assessments to test claimant's intellectual and social functioning. Most important, claimant's score on the Autism Diagnostic Observation Schedule – Module 4 (ADOS) was eight. Dr. Greenwald administered the same assessment on June 20, 2015, and claimant received a score of seven. As Dr. Greenwald explained, although claimant met the cutoff of seven for autistic like features, she did not meet the overall cutoff for an autism diagnosis, which is 10.

Dr. Greenwald also administered the Childhood Autism Rating Scale – Second Edition (CARS 2-ST) and the Vineland-II Adaptive Behavior Scales (Vineland II). Specifically, the Vineland II is a survey of adaptive functioning so it is useful in determining whether a person has significant functional limitations in three or more areas of major life activities, such as self-care, expressive and receptive language, learning, and self-direction. The Vineland-II, however, is based on parental reporting in areas of communication, daily living, and socialization. Claimant's scores on the Vineland II showed a mild to moderate deficit. Dr. Greenwald noted that these results were inconsistent with claimant's cognitive outcomes in the 2015 assessment completed by her school district, which showed her as having average cognitive functioning.

The CARS 2-ST helps identify children with autism and symptom severity using quantifiable ratings based on direct observation. According to Dr. Greenwald, this assessment has proven especially effective in distinguishing children with autism from those with severe cognitive deficits, and distinguishing mild-to-moderate from severe autism. Dr. Greenwald found that claimant's results were mostly age appropriate, with some mild deficits in relating to people, imitation, emotional response, body, and object use. Thus, while claimant's scores reflected minimal autistic-like symptoms, it did not meet the overall cutoff for minimal to mild autism.

Dr. Greenwald's clinical observations similarly did not show that claimant has an intellectual disability or autism. He observed claimant to be reciprocating in social communication, polite, and able to engage in productive social exchange. Her articulation was clear and, although soft spoken, she did not exhibit signs of echolalia. Claimant discussed her experiences at school with other students, demonstrating her social awareness. Claimant did not exhibit any complex repetitive mannerisms, did not have any unusual sensory sensitivities, and did not focus intently on any subject or object. Dr. Greenwald testified that claimant's most significant social deficit was poor eye contact, which improved by the end of the assessment.

Dr. Greenwald's diagnostic impressions following his assessment, review of claimant's records, and his clinical observations, were that claimant was not intellectually disabled or autistic but that she should be assessed for an anxiety disorder and possibly Attention Deficit Hyperactivity Disorder (ADHD).

CLAIMANT'S MOTHER'S TESTIMONY

7. Claimant's mother testified that claimant has always been very sensitive and "different." She said when claimant was young, she would flap her arms and frequently disappear. Even now, claimant often walks away without telling anyone where she is going. Claimant does not like being told what to do by her mother, father, or teachers. Claimant thinks everyone is trying to control her. Claimant is easily upset and will shut down at times. Claimant can be socially awkward; for example, when her mother tries to kiss her, claimant will put her head down for her mother to kiss her on her head. Claimant likes to run – sometimes she will run around the church or the house.

Claimant is always running. Claimant tried to join the track team in high school this past school year, but when she felt the coach yelled at her in front of other people, she no longer wanted to participate.

Claimant enjoys art. Claimant's mother and claimant went to the local community college to try and register for an art class together, but claimant did not know how to register and needed assistance in the process.

According to claimant's mother, claimant realizes she is different and has said that is "okay because that is how God made her."

Claimant sometimes tells people she is thinking "bad" things in her head and asks forgiveness for thinking those things, but will not tell anyone what she is thinking. Claimant cries frequently and also becomes quite anxious at times.

Claimant currently sees a psychologist weekly, and has been doing so since January 2016. Claimant's medical doctor sent her to a psychologist because she wanted to put her on medication for ADHD and depression. Claimant's mother explained that there is a lot of mental illness in the family (i.e. bipolar disorder and depression), and her brother, claimant's uncle, killed himself as a result of depression. Claimant's mother said that the look on claimant's face sometimes reminds her of the look that her brother used to have. Therefore, claimant's mother does not want claimant to take any medications.

Claimant also saw a psychologist in middle school. Claimant's mother pulled her out of the sessions when claimant became upset because the psychologist said, in front of claimant, that claimant had the mind of a seven or eight year old. Prior to middle school, claimant almost failed sixth grade. Claimant's mother said she tried tutors and counselors, but claimant generally would argue with everyone and not want to do what she was told.

Claimant exhibits odd behaviors. For example, claimant's mother has made a lot of pottery over time. During a conversation, claimant's mother told claimant that sometimes during the process little bubbles can develop in the pot and collect bacteria.

Claimant proceeded to start removing all the pottery and dishes from the cabinets because she did not want them in the house.

Claimant is in the final year of high school but does not want to leave high school. Claimant's mother said claimant is a teaching assistant for the Life Skills class because she enjoys helping other students by explaining assignments.

Claimant's mother testified that claimant needs help, and she simply does not know what else to do.

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LEGAL CONCLUSIONS

BURDEN OF PROOF

1. In a proceeding to determine eligibility, the burden of proof is on the claimant to establish he or she meets the proper criteria. The standard is a preponderance of the evidence. (Evid. Code, § 115.)

STATUTORY AUTHORITY

2. The Lanterman Act is set forth at Welfare and Institutions Code section 4500 et seq.

3. Welfare and Institutions Code section 4501 provides:

The State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. Affecting hundreds of thousands of children and adults directly, and having an important impact on the lives of their families, neighbors and whole communities, developmental disabilities present social,

medical, economic, and legal problems of extreme importance . . .

An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community. To the maximum extent feasible, services and supports should be available throughout the state to prevent the dislocation of persons with developmental disabilities from their home communities.

4. Welfare and Institutions Code section 4512, subdivision (a), defines developmental disability as a disability that "originates before an individual attains 18 years of age; continues, or can be expected to continue, indefinitely; and constitutes a substantial disability for that individual. A developmental disability includes "disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability." (*Ibid.*) Handicapping conditions that are "solely physical in nature" do not qualify as developmental disabilities under the Lanterman Act.

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5. California Code of Regulations, title 17, section 54000 provides:

- (a) "Developmental Disability" means a disability that is attributable to mental retardation², 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

² 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.

are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

6. California Code of Regulations, title 17, section 54001 provides:
 - (a) "Substantial disability" means:
 - (1) A condition which results in major impairment of cognitive and/or social functioning, representing 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.
 - (b) The assessment of substantial disability 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 of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.
 - (c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client

- representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.
- (d) Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.

EVALUATION

7. Claimant had the burden to establish by a preponderance of the evidence that she is eligible for regional center services. Claimant's records, Dr. Greenwald's assessment, and the testimony of claimant's mother, established claimant exhibits features of autism but does not meet the DSM-5 diagnostic criteria for autism. Similarly, although the various assessments performed on claimant showed she had deficits in some areas, none of the assessments showed claimant met the DSM-5 criteria for an intellectual disability. Further, even if claimant did have autism or was intellectually disabled, no evidence established that claimant has significant functional limitations in three or more areas of major life activities as set forth in applicable regulations. Accordingly, claimant is not eligible for regional center services.

ORDER

Claimant's appeal from the Inland Regional Center's determination that she is not eligible for regional center services is denied.

DATED: October 3, 2016

_____/s/_____

KIMBERLY J. BELVEDERE

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.