BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CLAIMANT, and INLAND REGIONAL CENTER, Service Agency.	OAH No: 2014040021

DECISION

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on November 3, 2014, in San Bernardino, California.

Leigh Ann Pierce, Consumer Services Representative, represented the Inland Regional Center (IRC).

Claimant's mother represented claimant, who was not present during the hearing.

The matter was submitted on November 3, 2014.

ISSUES

Is IRC required to conduct a formal intake and assessment of claimant to determine if he is eligible for regional center services under the Lanterman Act based on autism, mental retardation, or a disabling condition closely related to mental retardation or that requires treatment similar to that required for individuals with mental retardation?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. Claimant is an 8-year-old boy who lives with his mother. Claimant qualifies for special education services through his school district.

2. On February 24, 2014, IRC issued a Notice of Proposed Action that denied claimant's application for regional center services. In the Notice of Proposed Action, IRC stated that after a review of claimant's records IRC determined that "no 'intake' services can be provided" because he did not have a disability that qualified him for regional center services.

3. On March 24, 2014, claimant's mother signed and submitted a Fair Hearing Request appealing IRC's decision. In the hearing request, claimant's mother stated that she strongly feels that claimant needs assistance and further evaluation needed to be completed to successfully validate IRC's decision.

CLAIMANT'S INDIVIDUALIZED EDUCATION PLAN, PSYCHOLOGICAL TESTING, AND SPEECH & LANGUAGE TESTING

Claimant's Ieps

4. Individualized Educational Programs (IEP)s dated June 3, 2013, and August 27, 2013, were admitted as evidence. These IEPs state that claimant is eligible for special education services based on a specific learning disability in the areas of expressive vocabulary and grammar and language processing for categorization of vocabulary and a speech and language impairment. Claimant receives the majority of his instruction in the general education environment, and he is pulled out from regular classes for periods of specialized academic instruction with a one to one aide through his day. He has a diagnosis of Attention Deficit Hyperactivity Disorder. No other disability was recorded.

5. Claimant's performance levels were documented in his IEP as follows: He demonstrated average math calculation skills, although the score did not reflect claimant's lack of understanding of basic addition or subtraction. Claimant has below average spelling skills; he did not demonstrate the ability to write a complete sentence. Claimant has difficulty sustaining a conversation and is at times difficult to understand. He does make efforts to initiate conversation; however, he often attempts to redirect conversation back to his areas of interest. He makes appropriate eye contact and appropriately expresses emotion. He presents with some articulation errors but these errors were found to be developmentally age appropriate. He participates in the school's Speech Program. Claimant was described as a relatively happy student who will interact with others. His classroom behavior was noted to have improved, and he is able to follow classroom routines with occasional reminders. However, he was noted to have periodic days where he is non-compliant and argumentative. He was also noted to have fine motor delays, and he was referred for a screening with an occupational therapist. Claimant was described as able to take care of himself, but he was described as having some functional difficulties. Claimant was noted to be very hyperactive and distractible. He has some difficulty following classroom routines; in a one-on-one environment he can be personable and interactive.

Diagnostic Center Report Dated January 31, 2014

6. Claimant was evaluated by a trans-disciplinary team during the week of November 12, 2013, through the Diagnostic Center of the California Department of Education. This team included Jenny Quan, Ph.D., Education Specialist; Gina O'Brien, School Psychologist; Nitza Fregosi, Speech-Language Pathologist; Shirly Korula, Developmental Pediatrician; and Kelly Hunsicker, Clinical Psychologist. The evaluation included formal and informal assessments; school and parent interviews; and observations of claimant within a variety of environments, including his school.

Developmental, medical, familial and educational histories were obtained from claimant's mother and from available records. Claimant was administered a number of tests: The Southern California Ordinal Scales; Stanford Binet Intelligence Scales-Fifth Edition; Clinical Evaluation of Language Fundamentals, Fifth Edition; Test of Narrative Language; Khan-Lewis Phonological Analysis; the Kaufman Test of Educational Achievement, Second Edition; and the Phonological Awareness Test. Dr. Quan, Ph.D. prepared a detailed and comprehensive report dated January 31, 2014, that summarized the team's assessment.

7. According to the Binet Intelligence Scales, claimant's Full Scale IQ score was 82, which is at the 12 percentile; his Fluid Reasoning standard score was 88, which is at the 21 percentile; his Knowledge standard score was 86, which is at the 18 percentile; quantitative reasoning was at 89, which is at the 23 percentile; his Visual Spatial standard score was 94, which is at the 34 percentile; his Working Memory scaled score was 65, which is at the 1 percentile; his Nonverbal IQ was 87, which is at the 19 percentile; and his Verbal IQ was 78, which is at the 7 percentile. According to the Kaufman Test of Educational Achievement, claimant was measured at below average in the following categories: Reading Composite; Letter and Word Identification; Reading Comprehension; Math Composite; Math Concepts and Applications; and Comprehensive Achievement Composite. Claimant was measured at the lower extreme in Written Language Composite and Written Expression. He was measured as average in Listening Comprehension and Math Computation.

8. The diagnostic team noted that claimant exhibits highly social behaviors, but he is also socially unaware and struggles to read and interpret social cues. At times, the team observed that claimant eagerly shared information with others but dominated the conversation, with little regard for the other person's interest or participation. His

limited social skills, the team commented, can be a barrier to successful social interactions, particularly with peers.

9. The diagnostic team also noted that, until his ADHD symptoms subside, claimant will be in need of on-going adult guidance to help him problem solve as well as to help him effectively cope with his emotions. He performs at the kindergarten level in all areas; he is impulsive; has poor attention; lacks organization; and has difficulty shifting from one task to the next, which the team said is consistent with the features of ADHD. He demonstrated many expressive skills typical of two to four-year-old development with limited expressive skills typical of four to seven-year development. The team recommended a wide range of techniques and approaches to facilitate his learning.

Psycho-Educational Report for School District

10. Steve Gooch, Psy.D. School Psychologist with the Redlands Unified School District, evaluated claimant on April 30, 2013, May 20, 2013, and May 21, 2013. Dr. Gooch administered a series of tests to claimant; the Woodcock-Johnson Test of Achievement; the Woodcock Test of Cognitive Abilities; Comprehensive Test of Phonological Awareness; Adaptive Behavior Assessment System; Behavior Assessment System for Children; Behavior Rating Inventory of Executive Functioning; Student on-Task Observation. Dr. Gooch also interviewed claimant, observed him in the classroom, and reviewed available records.

Based on these assessments, Dr. Gooch concluded that claimant qualifies for special education services under the handicapping condition of specific learning disability in the areas of basic reading skills, reading comprehension, reading fluency, written expression, and math calculation. Dr. Gooch found that claimant possessed significant deficits in academic skills, in all areas except math. According to the Woodcock Test of Cognitive Abilities, claimant performed in the very low range.

According to the Woodcock-Johnson Test of Achievement, claimant's basic reading/decoding skills were found in the in the low average range. Dr. Gooch commented that claimant was highly distracted, and he found it likely that claimant's distractibility impacted his performance. Claimant demonstrated average math calculation skills, although Dr. Gooch said this was misleading because claimant did not demonstrate an understanding of basic addition or subtraction. His teacher said that claimant recognizes numbers only from 1 to 5. Claimant demonstrated below average spelling skills. Claimant also demonstrated poor phonological awareness and memory skills. His rapd naming ability was in the poor range.

Dr. Gooch noted that claimant's mother reported that claimant had extremely low adaptive skills, while his teacher reported that claimant had average adaptive skills. Dr. Gooch did not reconcile their disparate reports.

Language, Speech, and Hearing Assessment

11. Speech Language Pathologist Donna Roath, MS-CCC/SLP, assessed claimant for articulation, phonological processes, fluency, voice, language, augmentative/alternative communication, and hearing. She prepared a report summarizing her findings dated May 31, 2013. Ms. Roath found that claimant had deficits with expressive vocabulary and grammar and language processing for categorization. She commented that claimant is aware of a communication breakdown but believes it is the listener's fault and not his own miscommunication or misunderstanding. Ms. Roach found claimant to be friendly and talkative, but she also noted that he was easily distracted, frequently was off topic, and frequently had inappropriate responses.

//

Psychological Testing Report Dated July 25, 2011

12. Laurie Dickson-Gillepsie, Ph.D., evaluated claimant at the request of claimant's grandmother on June 27, 2011, and prepared a report dated July 25, 2011. Claimant's grandmother was concerned about his oppositional and physically aggressive behaviors at home and at school, in addition to his anxiety and inattentiveness. Dr. Dickson-Gillepsie evaluated claimant with a number of assessments: Adaptive-Behavioral Scales-2; Asperger's Syndrome Diagnostic Scale; Behavior Rating Inventory of Executive Function; Bender Visual-Motor Gestalt Test; Connor's Rating Scale: Parent; Developmental Neuropsychological Assessment; Leiter International Performance Scale-2; Marschack Interaction Method; Peabody Picture Vocabulary. Dr. Dickson-Gillepsie also interviewed claimant's grandmother and reviewed claimant's 2011 IEP.

Based on these test results, Dr. Dickson-Gillepsie diagnosed claimant with ADHD with cognitive deficits in language, memory, and expression. She also found that claimant has a number of symptoms typical of pervasive developmental disorders. These included odd stereotypical behaviors; sensitivity to loud noises; stress reaction when he experiences changes in his daily routine; difficulty imitating; social aloofness; and very minimal initiation of social interaction. But, Dr. Dickson-Gillepsie deferred making a formal diagnosis because she felt that a number of these symptoms may be due to claimant's history of trauma and frequent changing in care giving. Claimant had moved at least fifteen times since birth and has been cared for by various family members. She did recommend another brief screen/assessment for pervasive developmental spectrum disorders after he completes the therapy plan Dr. Dickson-Gillepsie detailed.

DR. GREENWALD'S TESTIMONY

13. Paul Greenwald, Ph.D., received a doctorate in clinical psychology from the California School of Professional Psychology in 1987. He has been licensed in California

as a clinical psychologist since 2001 and has served as a staff psychologist for IRC since 2008. He has extensive experience assessing, evaluating, and developing treatment plans for persons diagnosed with, or identified as being at risk for, autism, mental retardation and psychological disorders.

14. Dr. Greenwald reviewed the materials of record. Based on his review of these records, Dr. Greenwald concluded that claimant has a specific learning disability and ADHD, and not an intellectual disability or autistic disorder, and he does not qualify for services based on a disabling condition closely related to mental retardation or that requires treatment similar to that required for individuals with mental retardation (the Fifth Category).

Dr. Greenwald found it significant that claimant's cognitive test result were scattered between 78 and 94. Scatter is the range of scores in a battery of cognitive scores that are tallied and generate a mean that is used as a full scale score like a full scale IQ. Dr. Greenwald stated that this scatter in claimant's test scores is consistent with a learning disability and/or ADHD and does not reflect an intellectual disability. He noted that claimant's full range IQ score and fluid reasoning score were high borderline or low average, and these scores also are inconsistent with an intellectual disability diagnosis. Dr. Greenwald commented that fluid reasoning refers to the most sophisticated part of the intellectual process because it is refers to creativity; it refers to the ability to adapt problem solving. In contrast, however, claimant's working memory scores were very low. Dr. Greenwald attributed these low scores to claimant's language mediated ADHD.

Dr. Greenwald testified that claimant does not qualify under the Fifth Category for regional center services. He felt it would be "a huge inaccuracy" to conclude that claimant's learning disability is closely related to an intellectual disability or that it requires treatment similar to that required for an intellectual disability.

Dr. Greenwald also testified that claimant does not qualify for regional center services under the autism category. Dr. Greenwald rejected Dr. Dickson-Gillepsie's suggestion that claimant may have a pervasive developmental disorder and that claimant required further assessment to rule this out. He dismissed her suggestion for two reasons: Claimant was five months too young to be administered the Asperger's Syndrome Diagnostic Scale. And, claimant was reported to be very social, which is inconsistent with an autism diagnosis. Dr. Greenwald added that while claimant has had the symptomology of autism, these symptoms are not due to autism. Dr. Greenwald believed that they may be due to a possible reactive attachment disorder. This is a severe reaction to neglect or abrupt transition. It is akin to post traumatic stress disorder (PTSD).

CLAIMANT'S MOTHER

15. Claimant's mother testified that claimant's behaviors concern her and that claimant needs an assessment to see what is wrong with him. She noted that claimant has been in a stable environment for the last three years, but he still has problems. He can't attend school assemblies due to the noise and will scream if she turns on a food blender. He takes medications for ADHD, but these medications have not alleviated his hyperactive symptoms. She has accessed occupational and play therapies, but these have not worked. She added that claimant will have an IEP meeting soon, and she will raise her concerns at that meeting.

LEGAL CONCLUSIONS

THE BURDEN AND STANDARD OF PROOF

1. In a proceeding to determine whether an individual is eligible for regional center services, the burden of proof is on the claimant to establish that he or she has a

qualifying diagnosis. The standard of proof required is preponderance of the evidence. (Evid. Code, § 115.)

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

THE LANTERMAN ACT

3. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4500, et seq.) The purpose of the Act is to rectify the problem of inadequate treatment and services for the developmentally disabled, and to enable developmentally disabled individuals to lead independent and productive lives in the least restrictive setting possible. (Welf. & Inst. Code, §§ 4501, 4502; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) The Lanterman Act is a remedial statute; as such it must be interpreted broadly. (*California State Restaurant Association v. Whitlow* (1976) 58 Cal.App.3d 340, 347.)

4. An applicant is eligible for services under the Lanterman Act if he or she can establish that he or she is suffering from a substantial disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or what is referred to as the fifth category – a disabling condition closely related to mental retardation or requiring treatment similar to that required for mentally retarded 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. California Code of Regulations, title 17, section 54000, defines "developmental disability" and the nature of the disability that must be present before an individual is found eligible for regional center services. It states:

(a) Developmental Disability means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation."

6. When an individual is found to have a developmental disability as defined under the Lanterman Act, the State of California, through a regional center, accepts

responsibility for providing services and supports to that person to support his or her integration into the mainstream life of the community. (Welf. & Inst. Code, § 4501.)

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

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

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.

EVALUATION

Claimant's mother wants IRC to conduct a formal intake and assessment of claimant to determine what is wrong with him. A regional center is required to perform initial intake and assessment services for "any person believed to have a developmental disability." (Welf. & Inst. Code, § 4642.) IRC correctly determined, as Dr. Greenwald credibly explained, that an intake assessment was not required to assess claimant for mental retardation because claimant's IEP and psychological assessments show that he has a special learning disability in expressive language and not mental retardation. A learning disability does not constitute a developmental disability pursuant to California Code of Regulations, title 17, section 54000, subdivision (b)(2).

IRC is also not required to conduct a formal intake and assessment of claimant to determine whether he qualifies under the Fifth Category for services. Claimant's IEP and psychological assessments do not suggest that his learning disability is "closely related", or "similar", to mental retardation, or that his learning disability requires "treatment similar to that required for mentally retarded individuals." (Cal. Code. Regs., tit. 17, § 54000; Welf. & Inst. Code, § 4512).

IRC is, however, required to conduct a formal intake and assessment of claimant to determine whether he qualifies for services under the autism category. Dr. Dickson-Gillepsie found that claimant has a number of symptoms typical of pervasive developmental disorders. These included odd stereotypical behaviors; sensitivity to loud noises; stress reaction when he experiences changes in his daily routine; difficulty imitating; social aloofness; and very minimal initiation of social interaction. She, however, withheld a formal diagnosis. Her conclusions in this regard are sufficient to require regional center to provide intake services and perform a comprehensive assessment, including appropriate testing.

The Diagnostic and Statistical Manual of Mental Disorders, 5th edition (DSM-V), section 299.00, Autism Spectrum Disorder, summarizes the features of Autism Spectrum Disorder. To diagnose Autism Spectrum Disorder, an individual must have persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently, or by history: (1) deficits in social-emotional reciprocity, (2) deficits in nonverbal communication behaviors used for social interaction, and (3) deficits in developing, maintaining, and understanding relationships. The individual must also have restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following, currently or by history: (1) stereotyped or repetitive motor movement, use of objects or speech, (2) insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal

behavior, (3) highly restricted, fixated interests that are abnormal in intensity or focus, and/or (4) hyper- or hypo-reactivity to sensory input or unusual interest in sensory aspects of the environment. In addition, symptoms must be present in the early developmental period and must cause clinically significant impairment in social, occupational, or other important areas of current functioning.

As documented in claimant's IEP and psychological assessments, claimant has displayed a number of behaviors consistent with an autism spectrum disorder, as identified in the DSM-V: deficits in social communication and interaction; deficits in developing and maintaining relationships; strict adherence to routines; and hyper-reactivity to sensory input. Dr. Dickson-Gillepsie noted that claimant displayed odd stereotypical behaviors; sensitivity to loud noises; stress reaction when he experienced changes in his daily routine; he had difficulty imitating; and he was socially aloof and had very minimal initiation of social interaction. The Diagnostic Center noted that while claimant had highly social behaviors, he was also socially unaware and struggled to read and interpret social cues, and he had little regard for the interest or participation of others. Notably, the Diagnostic Center commented that claimant's limited social skills could be a barrier to successful social interactions, particularly with peers.

Claimant's mother emphasized her son's hyper-reactivity to loud noises. She noted that he will scream when she runs a household appliance and he has difficulty attending school assemblies due to the noise.

Dr. Greenwald's testimony that the record clearly shows that claimant does not have autism and that, therefore, intake assessment is not warrant is not persuasive. Dr. Greenwald acknowledged that claimant had the symptomology of autism, but he attributed these symptoms to a psychiatric condition caused by early childhood trauma. Dr. Greenwald did not diagnose claimant with this disorder, however. He said only that it was a possible cause of the symptomology. Further, in his testimony, Dr. Greenwald also

did not address salient information contained in the Diagnostic Center's report that claimant's limited social skills could be a barrier to his ability to maintain social relationships.

ORDER

Claimant's appeal from Inland Regional Center's determination that it will not provide intake services, including performing an assessment, based upon claimant's assertion that he has autism, is granted. Inland Regional Center will perform initial intake and assessment services of claimant to determine whether he qualifies for regional center services under the autism category.

//

//

Claimant's appeal from Inland Regional Center's determination that it will not provide intake services, including performing an assessment, based upon claimant's assertion that he has mental retardation, or that he qualifies for services for a disabling condition closely related to mental retardation or that requires treatment similar to that required for individuals with mental retardation, is denied.

DATED: November 17, 2014.

_____

ABRAHAM M. LEVY

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.