

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of the Eligibility of:

Claimant,

And

San Diego Regional Center,

Service Agency.

OAH No. 2014051144

DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California (OAH), heard this matter in San Diego, California, on October 8, 2014, and December 8, 2014.

Ron House, Attorney at Law, represented San Diego Regional Center (SDRC).

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

Claimant's request to submit additional evidence was granted, and a second day of hearing was scheduled to take place on December 8, 2014. (Official Notice is taken of the order setting the second day of hearing.) Less than one hour before the second day of hearing was to begin, claimant's mother sent an e-mail to SDRC advising that she "will not be attending the meeting this morning due to a change in my schedule for the week." She asked if they could "possibly reschedule." (Her e-mail was marked and received as Exhibit 10.) Claimant's mother did not contact OAH. SDRC objected to continuing the matter and requested that the hearing proceed. Claimant's request to reschedule was deemed a request for continuance. It was denied as untimely and for failure to establish good cause. Moreover, the sole issue for the second day of hearing

was to be SDRC's response to the new exhibits submitted by claimant (received as Exhibits 8 and 9) and SDRC's witness was present and testified about those new exhibits.

On December 8, 2014, the matter was submitted.

## ISSUE

Is claimant eligible for regional center services under the Lanterman Act as a result of a diagnosis of autism spectrum disorder or intellectual disability?<sup>1</sup>

## FACTUAL FINDINGS

### JURISDICTIONAL MATTERS

1. On May 1, 2014, SDRC notified claimant that he was not eligible for regional center services.
2. On May 19, 2014, claimant's mother filed a fair hearing request appealing that decision, and this hearing ensued.

### DIAGNOSTIC CRITERIA FOR AUTISM SPECTRUM DISORDER

3. 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 include persistent deficits in social communication and social interaction across multiple contexts; restricted, repetitive

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<sup>1</sup> *The Diagnostic and Statistical Manual of Mental Disorders, fifth edition (DSM-5)* uses the term Intellectual Disability or Intellectual Developmental Disorder in place of the formerly used term, "Mental Retardation." The two terms are used interchangeably in this decision as both terms are contained in regional center documents. The *DSM-5* also uses the terminology "Autism Spectrum Disorder" to include the diagnoses formerly called Autistic Disorder.

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 the eligibility criterion of autism.

#### DIAGNOSTIC CRITERIA FOR INTELLECTUAL DISABILITY

4. The *DSM-5* also contains the diagnostic criteria used for intellectual disability. Three diagnostic criteria must be met: deficits in intellectual functions, deficits in adaptive functioning, and the onset of these deficits during the developmental period. An individual must have a *DSM-5* diagnosis of intellectual disability to qualify for regional center services under the eligibility criterion of mental retardation. Intellectual functioning is typically measured using intelligence tests. Individuals with intellectual disability typically have intelligent quotient (I.Q.) scores in the 65-75 range.

#### EVIDENCE PRESENTED AT HEARING

5. Claimant is a seven-year-old male. He asserted he was eligible for services on the basis of autism or mental retardation. Claimant requested that SDRC re-evaluate him to determine eligibility.

6. The SDRC intake team reviewed various records and assessed claimant. During the social assessment, claimant's speech was noted to be "very clear," "flowing" and "relaxed." He spoke in "full sentences using a variety of words" and had "clear articulation." His mother reported that claimant had an excellent vocabulary. Claimant has local family with whom he has regular contact, and he interacts every day with two friends at school.

7. Claimant's school records noted that he qualified for special education services on the basis of speech and language impairment. Claimant demonstrated "expressive or receptive language disorder which results in a language disorder." He previously met the criteria for a Specific Learning Disability because he demonstrated a "severe discrepancy between intellectual ability and achievement in the areas of written expression, basic reading skills, reading comprehension, and math calculation." Claimant was also noted to have a "significant history of defiant, and at times, aggressive behavior." Behavior assessments noted that claimant would benefit from a behavior support plan and met the criteria under the Education Code for emotional disturbance. Claimant was noted to be cooperative and eager during testing. He established a rapport "relatively easily" with the examiners and was friendly and responded when addressed. However, other records documented claimant's outbursts and failure to cooperate with his aide and/or teacher. Cognitive tests scores were in the average range. Nothing in claimant's education records demonstrated that he was eligible for regional center services.

8. Claimant's medical records documented that he was a "healthy male child" with "speech delay." These records did not establish eligibility for regional center services.

9. Claimant's psychological records documented that claimant has two friends at school with whom he interacts and that he "plays with relatives all the time." Claimant will "initiate group interactions at times," and he "will share with others apparently according to his mood." Claimant has a large imagination and plays with toys. He is able to pretend play but has trouble differentiating reality from fantasy. He is able to show his mother items he likes and is able to talk about them. He was social with the examiner and was able to interact without difficulty. Claimant's intellectual skills varied significantly depending on the type of task required of him. Based upon claimant's test results, the examiner opined that claimant did not meet the criteria for

autism spectrum disorder, but it would be wise to continue monitoring him for a possible PDD-NOS diagnosis in the future. Nothing in these records established eligibility for regional center services.

10. A letter from claimant's treating family therapist, a licensed marriage and family therapist, summarized the therapist's clinical observations. The therapist wrote that "the letter will focus on my observations relating to [claimant's] behavior specific to symptoms that he presents along the autism spectrum or the spectrum of pervasive developmental disorders." The therapist listed observations of behaviors that "indicate a diagnosis of a pervasive developmental disorder" and he suggested "additional assessments to rule out the diagnosis of a pervasive developmental disorder as he also presents with a diagnosis of Disruptive Behavior Disorder." The therapist wrote that the additional assessments should be conducted by "professionals and/or agencies that are capable of providing such services . . . ."

11. Claimant's September 2014 Individualized Education Program (IEP) noted his primary disability was Specific Learning Disability and his secondary disability was Speech or Language Impairment. The IEP noted claimant's strengths to be that he "likes to play soccer, play on the play structure, and pretend games with friends. He has several friends in the classroom and asks to work in groups when he has a chance." Claimant "is able to ask questions and make comments during instruction that are directly related to a teacher's question or comment." Nothing in these records established eligibility for regional center services.

12. Harry Eisner, Ph.D., SDRC Coordinator of Psychological Services, testified about his team's review of all available records and the team's determination that claimant did not qualify for services. Dr. Eisner provided a very thorough and detailed explanation of claimant's records, credibly explaining why claimant did not qualify for regional center services. His testimony was extremely persuasive and demonstrated that he had performed a very careful analysis of claimant's records and was intimately

familiar with them. Dr. Eisner explained that no treaters had ever diagnosed claimant with a developmental disability and nothing in his records demonstrated that claimant qualified for regional center services. Moreover, claimant's therapist recommended that "professionals" perform an evaluation to determine if claimant has autism or pervasive development disorder. Dr. Eisner testified that SDRC is the agency tasked to perform such assessments, and its professionals determined claimant was not eligible. Dr. Eisner noted that the newly introduced IEP contained several entries regarding claimant's social skills that would lead away from a diagnosis of autism. Nothing in the newly introduced records changed SDRC's opinion regarding eligibility, and in fact, further supported SDRC's determination that claimant was ineligible.

13. Claimant's mother testified about claimant's many behavioral issues, noting they have been increasing. Claimant's behaviors are being addressed with programs at school, but he continues to act out, which she believes is because of his developmental disability. Although claimant's mother's testimony was passionate and sincere, it did not establish eligibility for services.

## 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 states:

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 follows:

"Developmental disability" means a disability which originates before an individual attains age 18, continues, or can be expected to continue indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include

mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

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

(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. 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. The Lanterman Act and the applicable regulations set forth criteria that a claimant must meet in order to qualify for regional center services. None of the documents introduced in this hearing demonstrated that claimant has a diagnosis of autism spectrum disorder or intellectual disability. The burden was on claimant to establish his eligibility for regional center services. As claimant introduced no evidence demonstrating that he is eligible to receive regional center services, his appeal of SDRC's determination that he is ineligible to receive services must be denied.

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#### ORDER

Claimant's appeal from the San Diego Regional Center's determination that he is not eligible for regional center services and supports is denied.

DATED: December 29, 2014

\_\_\_\_\_/s/\_\_\_\_

MARY AGNES MATYSZEWSKI

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.**