

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request
of:

CLAIMANT,

v.

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2016040689

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter in San Bernardino, California, on October 3, 2016.

Stephanie Zermeño, Consumer Services Representative, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

Claimant's mother appeared on behalf of claimant, who was present.

The matter was submitted on October 3, 2016.

ISSUE

Is claimant eligible for regional center services under the Lanterman Act based on a diagnosis of Autism Spectrum Disorder (autism)?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. On March 25, 2016, following a review of records provided by claimant, IRC notified claimant, a 27-year old man, that he was not eligible for regional center services because the records provided to IRC did not establish that he 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 as an individual with an intellectual disability.

2. Claimant, with the assistance of his mother/authorized representative, filed a fair hearing request on April 8, 2016. Claimant's fair hearing request detailed claimant's mother's concerns about needing intervention in order to allow claimant to stay in her home. The fair hearing request stated that claimant had a history of developmental disabilities prior to the age of 18, and was unable to care for himself without guidance. The fair hearing request also stated claimant used to participate in an adult day program in another state prior to claimant's mother being relocated to California and a similar program is needed.

3. On April 20, 2016, claimant's mother and IRC representatives met telephonically to discuss claimant's fair hearing request. IRC memorialized the discussion that took place during the informal meeting and concluded that claimant did not qualify for regional center services. In the April 26, 2016, informal meeting letter, IRC explained the basis for its ineligibility determination as follows:

[T]he records from Dr. Ongjcoco, Jr., from Pinehurst, North Carolina, first note a history of Asperger's Disorder and a history of Pervasive Developmental Disorder, as well as various mental health diagnoses. The records then change

the history of diagnoses to a diagnosis of Autism Spectrum Disorder, Level One. It appears that no testing was completed specific to Autism Spectrum Disorder, rather[,] the diagnosis was changed as a result of the DSM changing to the 5th edition. Dr. Ongjoco, Jr. also state[d] that [claimant] is bright and engageable and spontaneous without being euphoric throughout the record. . . . At this time, IRC is standing by its decision that [claimant] is not eligible for regional center services. . . .

DIAGNOSTIC CRITERIA FOR AUTISM SPECTRUM DISORDER

4. 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 to qualify for regional center services under autism.

EVIDENCE PRESENTED BY IRC

5. IRC reviewed and considered 34 different reports and assessments provided by claimant prior to the hearing, dating between 1994, when claimant was seven years old, and 2015, when claimant was 26 years old. At the hearing, claimant's mother produced additional records. Ruth Stacy, Psy.D., testified on behalf of IRC. She

reviewed the additional records provided by claimant's mother at the hearing and noted that it did not change her conclusion that claimant was ineligible for IRC services under the Lanterman Act.

Dr. Stacy testified that claimant's records documented an extensive history of Attention Deficit Hyperactivity Disorder (ADHD), Oppositional Defiance Disorder, Pervasive Developmental Disorder – NOS (PDD-NOS), and Mood Disorder. Nowhere in the records was a diagnostic conclusion of autism based on a comprehensive assessment that one would expect to see in order to make such a diagnosis.

Dr. Stacy testified that claimant's behaviors detailed in the various records were inconsistent with behaviors that one would expect to see exhibited by a person with autism. Specifically, claimant's behavior was always purposeful and socially directed. For example, in one of the earliest reports when claimant was five years old, claimant shared, took turns, sought attention, and used silliness as a way to gain attention. Similarly, in a series of reports completed by Rodolfo de los Santos Ongjcoco, Jr., M.D. (Dr. Ongjcoco), beginning in 2015, Dr. Ongjcoco described claimant as bright, engageable, and spontaneous. Dr. Stacy noted that Dr. Ongjcoco's reports of claimant's behavior are not consistent with the DSM-5 criteria for autism.

Further, Dr. Stacy observed that claimant's adaptive and cognitive skills fluctuated over time and were very unstable. She explained that with a developmental disability like autism, adaptive and cognitive skills tend to remain consistent over time; fluctuations like those exhibited in claimant's records are more indicative of a mental health disorder than a developmental disability.

As claimant aged, the diagnoses of ADHD, Oppositional Defiance Disorder, Mood Disorder, and PDD-NOS remained. A January 12, 1998, discharge summary added phonological disorder. Also as claimant aged, his outbursts and violent/aggressive behaviors worsened. An activities therapy discharge summary dated February 18, 1998,

described claimant as someone who could establish a rapport with another person but in order to do so, it required patience, time, and energy. The discharge summary noted claimant responded best to structure and interaction with adults. The discharge summary also noted that claimant's behaviors fluctuated relative to changes in his medication. Over time, claimant has been on countless anti-psychotic medications and medications to control hyperactive behavior.

There is no mention of autism or Asperger's Disorder in claimant's records prior to claimant's initial evaluation by Dr. Ongjcoco on June 2, 2015. In that report, Dr. Ongjcoco reported that claimant had a "history" of Asperger's Syndrome but did not indicate where he obtained that information. Dr. Ongjcoco's report did not indicate whether he did any testing to verify a diagnosis of Asperger's Syndrome. In short, as Dr. Stacy explained, it is unknown where or how this historical diagnosis was reached. An October 27, 2015, report completed by Dr. Ongjcoco changed the diagnosis of Asperger's Disorder to Autism Spectrum Disorder, Level 1. However, as Dr. Stacy pointed out, again, there was no testing or no explanation as to why the diagnosis was changed or how Dr. Ongjcoco arrived at this conclusion. The final, and most recent, report submitted by claimant, dated December 22, 2015, and authored by Dr. Ongjcoco, added a diagnosis of Bipolar Disorder. Again, as with all other reports authored by Dr. Ongjcoco, the description of claimant's behaviors in the June, October, and December reports, were all inconsistent with a diagnosis of autism.

Claimant testified at the hearing. After claimant testified, Dr. Stacy added that claimant did not show the characteristics of autism in his speech – claimant was able to effectively explain himself; respond to questions appropriately; refrain from using stereotypical, repetitive, or overly formal speech; and communicate his ideas quite well. Dr. Stacy also referred back to the December 22, 2015, report by Dr. Ongjcoco, wherein claimant described his impending move to California and the need to research the

various bus routes and various things he will have to learn once he arrived in California. Dr. Stacy explained that a person with autism would not normally exhibit this kind of self-direction. Claimant's mother testified that the only reason claimant brought up his impending move and the bus routes is because she keeps his life structured and had actually discussed the impending changes with him. Dr. Stacy responded that even so, a person with autism – even with stimulation from a caregiver or other person trying to maintain structure and stimulate self-direction – a person with autism would not exhibit this kind of awareness.

Dr. Stacy concluded, based on the voluminous reports provided by claimant prior to the hearing, the new reports provided by claimant at the hearing, and claimant's testimony, that the evidence did not show claimant had autism and he was therefore ineligible for IRC services under the Lanterman Act.

EVIDENCE PRESENTED BY CLAIMANT

Claimant's Testimony

6. During the entirety of the hearing, claimant sat next to his mother, quietly. He did not move or fidget. He did not show any expression. He did not show any repetitive movements or behaviors. As the hearing ensued, and more detailed discussion regarding claimant took place, claimant became fidgety and agitated. He turned his chair away from the table and stared at the wall. As claimant's mother became increasingly emotional, claimant's facial expressions changed, indicating he was particularly sensitive to his mother's emotions. When engaged in questioning by the administrative law judge, claimant was quiet, polite, and focused. He listened intently, and responded appropriately, albeit slowly. He exhibited the appropriate emotion based on discussions (i.e. a smile when something was funny, seriousness when something was serious, and no particular expression when the questioning was neutral). Overall,

claimant was a very pleasant, bright, young man who could clearly articulate his ideas, thoughts, and feelings.

7. Claimant was asked if there was anything he wanted to say, and his testimony is summarized as follows:

Claimant responded by saying that he first wanted to tell everyone how he was feeling. He explained that, sitting in the hearing, it made him feel like he was being "picked apart" and that it was "not even worth trying to fight it."

Claimant says that his own senses sometimes go "haywire" and they "amplify" whatever he is feeling to where he has no control. For example, claimant said someone could be talking to him in a normal voice but to him, it sounds like the person is screaming.

Claimant explained that he has always had issues with textures and had it not been for the assistance he has had in past programs, he did not feel he would be able to talk to us today.

Claimant said to imagine how difficult it would be for someone who has a significant disability and needs help but cannot find help – he said he would normally be crying right now but over time he has had a more difficult time crying.

Claimant explained how he felt in his younger years. Claimant said when he was younger, he would get overwhelmed to a point where he would black out and start pulling his hair out to the point of having bald spots. He would head butt everything – glass, the floor, the wall – to the point of injury. Claimant testified that he did not ever have suicidal thoughts but that these behaviors would be brought on for "little" and "big" reasons - from something as simple as a noise he did not like to something more complex like a statement he did not understand.

Claimant said that he lived in a therapeutic foster home when he was in North Carolina, and group homes on and off between the ages of 13 and 21. He said he had friends, but only a few.

At present, claimant has some friends at the card shop. He currently is going to a day program at Rehab Innovations, which is a group therapy for people who have addictive disorders. He said it is not structured but he enjoys going because it gives him time to spend with people who seem to be able to relate to him. Claimant said he "loves" going to this program because he likes the personalities of the people in attendance. Claimant stated he has one friend at the program.

Claimant explained that he has always been very in touch with his emotions and always knew he was "different." He said when he is at home his mom takes care of him, so he has difficulties when his mother's stress levels go up. He said when that happens, he doesn't understand what he did wrong and it affects him a lot because he does not understand what he is feeling.

Claimant testified that the process was frustrating because he knows he needs help but all the places that he and his mother have tried will not take him because of his "past diagnosis." Claimant said he knows he needs a psychiatrist because he needs someone to talk to. He said he needs help with learning social skills because he often tends to "get in people's faces without realizing that [he] is in their space."

Testimony Of Claimant's Mother

8. Claimant's mother testified that she moved to California in January 2016. Prior to moving to California she was in Arizona and North Carolina. She stated, like California, Arizona did not consider PDD-NOS or any of the other things in claimant's records as something for which they could provide services. She was not permitted to have claimant in the home provided to her by her employer, so she put him on a plane

and he went into a group home in North Carolina. Claimant has also lived in a nursing facility.

Claimant's mother noted that claimant has been diagnosed with PDD-NOS since he was about four and a half years old. She said she was initially resistant to the diagnosis but she knew something was wrong. When claimant was seven months old, she could hear him in his crib at night banging his head around. This continued as he grew up. They had to pad everything because claimant would injure himself.

Prior to age two, claimant received speech therapy and physical therapy. Claimant would often walk on his toes. When he was three years old, claimant began play therapy. About that same time, doctors began trying claimant on different ADHD medications. At some point, she believes claimant was tested for autism; it simply is not in the records.

Claimant currently takes mood stabilizers and anti-psychotic medications.

During his youth, claimant would focus intently on certain things like dinosaurs. Now, he focuses intently on a card game. He recently switched his focus to a different card game. Claimant's mother said claimant becomes so obsessed with the game that he will not eat. Thus, claimant has always had unusual fixations, they simply change over time.

Claimant's mother testified that claimant has no spontaneity and no self-direction. She must manipulate him to do things. She said when claimant has his "meltdowns" she gets very worn down. Claimant's mother stated that she always has to be functioning at a high level because when she slows down claimant does not do as well. Regarding claimant's learning ability, he does learn but he is slow.

Regarding claimant's receptive and expressive language, claimant's mother testified that it is not as bad as it used to be but his perception is different than others. If he perceives something wrong, he will head butt himself, "rip" at the walls, and has even

tried to strangle himself. Claimant has inordinate responses to everyday situations. Claimant's mother explained that on a recent occasion, she told claimant something that he perceived to be her telling him to get out of her house. Claimant, without shoes, left the house.

Regarding claimant's ability to care for himself, he will only usually do so if she tells claimant to do it. Claimant has gone several weeks without brushing his teeth.

Claimant's mother testified that, because of claimant's disorder, he is not economically self-sufficient and therefore has no capacity for independent living. She is seeking IRC services so she can place claimant in a structured day program because he tends to do much better with a routine.

Claimant's mother was emotional at times, and her frustration with the system evident. Claimant's mother's testimony was credible, heartfelt, and sincere.

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. 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.

3. 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. (*Ibid.*)

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

- (a) "Developmental Disability" means a disability that is attributable to mental retardation,¹ 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

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.

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

5. 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.

6. Welfare and Institutions Code section 4642 requires a regional center to perform "initial intake and assessment services" for "any person believed to have a developmental disability."

7. Welfare and Institutions Code section 4643, subdivision (a), provides: "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"

EVALUATION

8. Claimant had the burden to establish eligibility for regional center services. None of the documents introduced in this hearing established by a preponderance of the evidence that claimant has autism. Indeed, the documents showed quite the contrary; they appeared to establish that claimant suffers from ADHD, Oppositional Defiant Disorder, and Mood Disorder, PDD-NOS, among other things. None of these afflictions qualify a person for services under the Lanterman Act.

None of claimant's records prior to 2015 list a diagnosis of autism – and even though there is a note of a "historical" diagnosis of Asperger's Disorder in June 2015, that document did not contain any testing or evaluations to explain how that diagnosis was reached or from what the diagnosis was obtained. The diagnosis was carried over to two subsequent reports authored by Dr. Ongjoco, and changed to autism, without any objective testing data. Further, given claimant's other diagnoses over the years, and evidence of behaviors wholly inconsistent with a diagnosis of autism, a preponderance

of the evidence did not establish claimant has autism using the DSM-5 criteria. Put another way, while some behaviors claimant exhibited over time are manifestations of autism, they are also attributable, as Dr. Stacy explained, to claimant's other diagnoses of PDD-NOS, Mood Disorder, Bipolar Disorder, Oppositional Defiant Disorder, and ADHD. Most important, what was notably missing from all the records detailing the last 20 years of claimant's life were the central features of autism according to the DSM-5: *persistent* deficits in social communication and social interaction across multiple contexts and restricted repetitive and stereotyped patterns of behavior, interests, or activities.

Claimant's mother's love for her son was evident and her desire to find services for him sincere. Claimant's mother clearly wants the best for her son and is working hard to ensure he has every opportunity to succeed in his life. Her testimony regarding claimant's difficulties and her challenges in managing his behavior was credible. However, on this record, the weight of the evidence did not establish that claimant meets the diagnostic criteria for autism under the DSM-5. Accordingly, claimant is not eligible for regional center services.

ORDER

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

DATED: October 12, 2016

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.