BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Continuing Eligibility of: CLAIMANT, and INLAND REGIONAL CENTER, Service Agency.	OAH No. 2016060270

DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California (OAH), heard this matter in San Bernardino, California, on August 31, 2016.

Claimant's mother represented claimant who was present at the fair hearing. She was assisted by her husband, claimant's father.[1]

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

The matter was submitted on August 31, 2016.

[1] Claimant's parents are his adoptive mother and father; any references in the records relating to prenatal drug use and mental illness refer to claimant's biological parents.

ISSUES

(1) Is IRC's previous determination that claimant was eligible for regional center services under the Lanterman Act based on a diagnosis of intellectual disability "clearly erroneous"?

(2) Is claimant eligible for services under a diagnosis of cerebral palsy that constitutes a substantial disability?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. On May 18, 2016, IRC notified claimant that he was no longer eligible for regional center services.

2. On May 25, 2016, claimant's mother filed a fair hearing request appealing that decision. The matter was noticed for hearing, continued to allow additional time for further testing and a medical assessment, and heard on August 31, 2016.

DIAGNOSTIC CRITERIA FOR INTELLECTUAL DISABILITY

3. The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, (DSM-5) 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. Intellectual functioning is typically measured using intelligence tests. Individuals with intellectual disability typically have IQ scores in the 65-75 range.

DOCUMENTS INTRODUCED AT HEARING

4. Claimant is currently five years, nine months old. IRC originally found him eligible for regional center services in 2013 based upon a diagnosis of intellectual

disability. Claimant contends he still has that diagnosis. In addition, he now asserts that he is also eligible for services based on a diagnosis of cerebral palsy that is a substantial handicap.

5. On September 11, 2013, when claimant was two years, 10 months, and four days old, Michelle Lindholm, Ph.D., an IRC clinical psychologist, performed a psychological assessment of claimant and authored a report. Dr. Lindholm outlined the testing she performed and the background information she obtained. She noted that claimant lost focus a few times during the testing but was easily redirected. Based upon her testing, Dr. Lindholm opined that claimant "met eligibility criteria under the diagnosis of mild mental retardation/intellectual disability; however, due to some inattentiveness, caution should be made in establishing this diagnosis as stable and unchanging. Reassessment in one year is recommended." Dr. Lindholm noted that claimant's adaptive skills were "in the mildly delayed range." In her summary she wrote: "Due to some inattention during testing caution is used in making a definitive diagnosis and his growth will be monitored and reassessed in one year at [IRC]." Dr. Lindholm documented the positive and proactive role claimant's parents take, noting that he is "clearly benefiting from the learning strategies and techniques being utilized within their home environment." Dr. Lindholm's diagnostic impressions were: Axis I: communication disorder deferred to school district; Axis II: mild mental retardation/intellectual disability; Axis III: deferred to medical specialist."

6. The October 23, 2013, Early Childhood Assessment Report prepared by claimant's school district noted that the reason for the evaluation was: "Re-evaluation is necessary as [claimant] received early intervention services through [IRC]." The health summary noted that claimant received physical therapy through IRC and that there were concerns due to his delays in gross motor development and his frequent falls in the past. However, claimant had made progress in his physical therapy and was now able to

run, climb and ascend steps. Past testing documented delays in claimant's development, motor skills and behavior. The parents' report of his delays was documented. Claimant's test results noted significant delays in his speech and language skills that adversely affected his educational performance. Consideration for a preschool special day class program was recommended with related services to be discussed at the Individualized Education Program (IEP) meeting.

7. The November 4, 2013, IEP from claimant's school district identified his primary disability as "speech or language impairment"; his secondary disability was identified as "none." The report noted that his parent rated claimant as having "Hyperactivity, Aggression, Externalizing Problems, Attention Problems, Behavioral Symptoms Index, Adaptability, Functional Communication and Adaptive Skills in the clinically significant problem range. Depression and Social Skills were rated in the at risk range." The health portion of the IEP noted that claimant was diagnosed with plagiocephaly (flat head syndrome, a condition characterized by an asymmetrical distortion (flattening of one side) of the skull caused by remaining in the supine position for too long). He was followed by a pulmonologist for asthma and eczema, underwent ear to surgery for the placement of tubes, and had been evaluated by a pediatric neurologist in May 2013 for possible seizures. Claimant's two EEGs were normal and he was scheduled for an MRI in November 2013. Claimant's daily living skills noted that he could take off his shoes, feed himself, undo shoelaces, zippers and Velcro, and could take off a pullover T-shirt without help. Claimant was receiving physical therapy funded by IRC.

The IEP noted that claimant would benefit from goals in the area of communication. The special education service options considered were a general education class with related services and a separate classroom with special academic instruction for the majority of the day. Claimant was provided language, speech and

behavior intervention services. In the notes section, the IEP documented that the school psychologist reviewed the results of the evaluation performed. Claimant's parents rated his physical skills in the average range, they rated his cognitive communication adaptive skills in the below average range, and his social emotional skills as delayed.

The occupational therapist reviewed the results of the Occupational Therapy Evaluation. Claimant did not demonstrate evidence of tactile defensiveness. He was able to track smoothly across the midline in all directions. He was able to manipulate moderately resistive materials and his grasp pattern was mature. His pencil grasp was adequate. His grasp of scissors was age-appropriate. He was able to accurately cut paper at the age-appropriate level. The occupational therapist concluded that skilled occupational therapy services were not indicated.

The speech therapist reviewed the results of the speech and language evaluation. Claimant's overall speech was 50 to 60 percent intelligible. His scores fell in the below average range. He demonstrated delays in pragmatic language secondary to delays in receptive and expressive language. The speech therapist opined that claimant met the criteria for eligibility for special education services under speech/language impairment.

8. Claimant's November 30, 2015, IRC Individual Program Plan (IPP) documented the services he was receiving and his abilities. Claimant was verbal and mobile. He required assistance to administer medication to control his asthma. He was toilet trained but required assistance with personal hygiene and dressing. His attention span was between three and five minutes on preferred activities. He communicated with simple sentences. Claimant participated in family outings but would wander away or go with strangers. He was enrolled in elementary school and eligible for an extended school year program. The IPP documented the services he was receiving in school, including speech therapy. His parents reported that he displayed challenging behaviors daily including crying, yelling, and tantrums. He was not aggressive and did not destroy

property. He was described as a very active and curious young boy who liked to explore but was not aware of potential dangers in his environment.

9. IRC's Client Development Evaluation Report (CDER) measures various skills that are rated on a 1 to 5 scale, with 5 being the highest score. Claimant's November 30, 2015, CDER noted that claimant's score for practical independence was 4.80, his personal/social skills score was 2.00, his challenging behaviors score was 3.67, and his integration level was 3.67. No testimony about this report was offered at hearing.

10. A psychological assessment performed on May 15, 2016, by Veronica Ramirez, Psy.D., an IRC clinical psychologist, noted that claimant was referred by the interdisciplinary eligibility review team to determine if he continued to meet eligibility criteria for regional center services. The report noted Dr. Lindholm's recommendation in her 2013 report that claimant be retested within a year to confirm the intellectual disability diagnosis. Dr. Ramirez administered testing, conducted a parent interview, made observations and reviewed claimant's file. On the intellectual functioning testing she noted that claimant's full-scale IQ score of 79 was in the borderline range; his verbal comprehension score of 83 was in the low average range; his fluid reasoning score of 72 and his nonverbal score of 73, were both within the borderline range.

When comparing his scores to those received in 2013, Dr. Ramirez noted that claimant had made progress from presenting in 2013 with an IQ in the mildly deficient range to now presenting with an IQ in the borderline/low average range. Claimant's current scores were not indicative of an individual with an intellectual disability. Claimant's adaptive functioning scores were consistent with his presentation on the day of assessment. Tests measuring his adaptive skill areas noted functioning in the mildly delayed range. Based upon the mother's concern, claimant was also informally assessed for autism spectrum disorder, but Dr. Ramirez did not find sufficient features to warrant an autism spectrum disorder diagnosis. Claimant presented as "a social little boy with

the ability to share enjoyment, joint reference and displayed social reciprocity." Dr. Ramirez concluded that claimant did not meet the criteria for regional center services under the categories of intellectual disability, autism spectrum disorder, or a disorder similar to intellectual disability that requires treatment similar to one with an intellectual disability (Fifth Category). She recommended that claimant continue to work with his school to address his communication needs and to explore appropriate social/recreational activities to address those issues.

11. Claimant's June 8, 2016, IEP again documented that his primary disability was speech or language impairment. Claimant's improvements in communication were noted. His motor skills were listed as excellent. His social/emotional/behavioral skills had improved and he was identified as "a good leader." Mild hearing loss was noted, as were his food allergies. Claimant's daily living skills at school were noted to be independent, but his parent reported that he cannot independently dress himself at home. He was scheduled to undergo a sleep study for obstructive sleep apnea. Claimant was noted to have met all of the goals outlined in his prior IEP. In his 2016 IEP, a new goal of self-regulation and reading was added. Claimant would now be going to his home school for special education services.

12. On June 16, 2016, claimant underwent a sleep study. Nothing in that report introduced at hearing demonstrated that claimant was eligible for regional center services.

13. On June 29, 2016, Borhaan Ahmad, M.D., an IRC medical consultant, performed a medical evaluation to determine whether claimant had cerebral palsy that was substantially disabling. Dr. Ahmad documented claimant's birth, developmental, and past medical history, including his past diagnoses of diplegic spastic cerebral palsy, plagiocephaly and left-sided hearing loss. Dr. Ahmad performed a physical and neurological examination. Dr. Ahmad's impression was that claimant had a history of

spastic diplegic cerebral palsy per his neurologist's 2014 report but that he was not substantially affected by cerebral palsy. Based upon his findings, Dr. Ahmad determined that claimant was not eligible for regional center services under a diagnosis of cerebral palsy.

WITNESS TESTIMONY INTRODUCED AT HEARING

14. Dr. Lindholm testified consistent with her original report, explaining that in 2013 she determined claimant was eligible for regional center services under a diagnosis of intellectual disability, but that she cautioned that his low scores might be due to his inattention. This was why she recommended retesting claimant in one year. Dr. Lindholm explained at hearing how the retesting demonstrated that claimant was no longer eligible for regional center services under a diagnosis of intellectual disability. Dr. Lindholm explained that the assistance claimant has been receiving helped him address his earlier delays and that none of his cognitive test scores indicated that he now has a qualifying intellectual disability. Dr. Lindholm opined that claimant is no longer eligible for services.

15. Linh Tieu, D.O., an IRC medical consultant, reviewed the documents and testified in this hearing. Dr. Tieu is an attending physician at Loma Linda University Children's Hospital. Dr. Tieu testified that claimant was not eligible for regional center services under the cerebral palsy category based on the records she reviewed. She explained that although claimant was previously diagnosed with cerebral palsy, nothing about that diagnosis indicated that claimant had a disabling condition, making him ineligible for regional center services.

16. Claimant's parents testified about claimant's many physical limitations and behavioral issues. They described how at school he received more than just speech and language services; he also received occupational and physical therapy services to address his motor skills. They described how claimant still falls when walking, requires

assistance with bathing, personal hygiene, and dressing. He still has bathroom accidents. They have been told he has a heavy trunk because of his cerebral palsy and they are concerned that many of his motor skill limitations are due to that condition. They described his inattention, failure to follow directions, the need to repeat directions to him multiple times, his lack of safety awareness, and his inability to control himself. They described how he pulls threads until he destroys items. They have also learned from claimant's biological relatives that claimant suffers from many of the same conditions as his biological parents.

Claimant's parents' testimony about claimant's behaviors was heartfelt and sincere. However, the behaviors they described sounded more like claimant is a child with attention deficit and hyperactivity disorder, not one suffering from an intellectual disability. That impression was supported by Dr. Lindholm's opinions and the records. Claimant's parents' testimony did not establish that claimant is still eligible for regional center services under a diagnosis of intellectual disability or that he is eligible for services under a diagnosis of cerebral palsy that is a substantial handicapping condition.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. In a proceeding to determine whether or not the previous determination that an individual has a developmental disability was erroneous, the burden of proof is on the regional center to establish that the individual is no longer eligible for services. 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 that "[a]n 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 disablin*g* 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. Welfare and Institutions Code section 4643.5, subdivision (b), 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, 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.

7. 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

8. The Lanterman Act and the applicable regulations set forth criteria that a claimant must meet in order to qualify for regional center services. Welfare and Institutions Code section 4643.5, subdivision (b), authorizes the regional center to reassess clients to determine if a diagnosis previously made is currently correct. That is to say, the issue is not whether a diagnosis made in the past was correct, it is assumed to be correct; but rather, the issue is: given how the client currently presents, would that diagnosis be given today? Although Dr. Lindholm diagnosed claimant in 2013 as having an intellectual disability, she cautioned that his scores might be affected by his inattention and she recommended reassessment in one year. Thereafter, in 2016 when IRC reassessed claimant, his scores were no longer in the intellectual disability range, thereby making him no longer eligible for regional center services based upon a diagnosis of intellectual disability.

Alternatively, IRC reassessed claimant to determine whether or not he would be eligible for services based upon a diagnosis of cerebral palsy that was a substantial handicapping condition. Following that assessment, IRC determined that claimant was not eligible for regional center services under that diagnosis, either.

No evidence refuted regional center's current determination that claimant is no longer eligible for regional center services. As such, claimant's appeal must be denied.

ORDER

Claimant's appeal from the Inland Regional Center's determination that he is no longer eligible for regional center services and supports is denied. Claimant is ineligible for regional center services and supports under the Lanterman Developmental Disabilities Services Act.

DATED: September 7, 2016

_____/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.