BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Continuing Eligibility of: CLAIMANT, v. INLAND REGIONAL CENTER, Service Agency.	OAH No. 2016061259

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter in San Bernardino, California, on September 13, 2016.

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

There was no appearance on behalf of claimant.

The matter was submitted on September 13, 2016.

ISSUE

Is IRC's previous determination that claimant was eligible for regional center services under the Lanterman Act based on a diagnosis of autism "clearly erroneous" today in light of the comprehensive re-assessment completed by IRC?

FACTUAL FINDINGS

BACKGROUND

1. Claimant is a six year old male and has been receiving IRC services based on a diagnosis of autism since he was three years old. According to claimant's records, he also received Early Start services prior to the age of three.

2. Claimant was also receiving special education services from his school district based on a primary diagnosis of autism and a secondary diagnosis of speech and language impairment until June 2016. At that time, claimant's school notified claimant that he would no longer be receiving special education services because he no longer met the criteria for autism.

3. On June 8, 2016, IRC notified claimant that he was no longer qualified for regional center services under the Lanterman Act. Claimant filed a fair hearing request on June 21, 2016, requesting claimant be re-assessed by IRC and diagnosed with autism so he would continue to eligible for regional center services.

4. On June 28, 2016, IRC representatives and claimant's mother attended an informal meeting. IRC agreed to re-assess claimant.

5. IRC Staff Psychologist Paul Greenwald, Ph. D., conducted a psychological re-assessment of claimant on July 25, 2016. Based on the overall comprehensive reassessment, Dr. Greenwald concluded that claimant no longer met the diagnostic criteria for autism.

6. On the date of the hearing, claimant's mother sent an e-mail to IRC stating that she would not be attending the hearing because it would be "more anguishing" to attend than the "actual benefits that can come of it." Claimant's mother also called OAH and stated she would not be attending the hearing. OAH advised claimant's mother that, in order to avoid a default decision, she needed to attend the hearing or file

something in writing withdrawing the fair hearing request. Claimant's mother did not do either.

7. After waiting approximately one hour and attempting to contact claimant's mother from the hearing room, to no avail, the case was called and IRC established that proper service had been effectuated on claimant. IRC elected to proceed with a prove-up hearing.

DIAGNOSTIC CRITERIA FOR AUTISM SPECTRUM DISORDER

8. 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 AT HEARING

9. Dr. Greenwald has been a licensed psychologist since 1987. He is licensed in California and Florida. He has been a staff psychologist at IRC since 2008. Dr. Greenwald has extensive experience in conducting psychological assessments of children and adults suspected of having developmental disabilities that may qualify them for regional center services. He also supervises psychological assistants who conduct similar assessments. Dr. Greenwald is an expert in the field of psychology, as it relates to the diagnosis of autism under the DSM-5 and Lanterman Act.

10. Dr. Greenwald reviewed and considered the following documents in claimant's file: claimant's February 10, 2016, individualized education program data summary (IEP); a psycho-educational assessment report dated January 19, 2016; and a letter written by Edward Curry, M.D., dated April 28, 2016.

11. Dr. Greenwald conducted an assessment on claimant on July 25, 2016. Dr. Greenwald observed claimant in a clinical setting; conducted the Autism Diagnostic Observation Schedule (ADOS-2) test; and rated claimant on the Child Autism Rating Scale, Second Edition (CARS2-ST). The ADOS-2 is a standardized, comprehensive assessment measure for diagnosing autism. The ADOS-2 consists of semi-structured play activities that provide contexts for observing real time behaviors critical to determining autism in the diagnostically critical areas of social affect and restricted/repetitive behavior. According to Dr. Greenwald, it is the "gold standard" instrument for assessing children with autism. Dr. Greenwald concluded the following:

> Regarding the question of [autism], [Claimant's] ADOS-2 Diagnostic Algorithm's Total Score did not meet full cutoff criterion consistent with [autism]but did approach the criterion reflecting autistic-like features that do not meet [autism] criterion regarding extent and symptom severity. Consistent with this distinction, the ADOS-2 Comparison Score reflects a minimal level of autism related symptoms.
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> Limitations and anomalies in [claimant's] ADOS protocol proved mild in diagnostically critical areas of reciprocal social communication and interaction. He played miniature pool cooperatively with examiner during the ADOS Joint Interactive Play activity. [Claimant] readily waited to take

> turns and even reminded the examiner when it was his turn to play. He also followed examiner's example to imitate using cue chalk, holding and aiming the pool cue, and breaking the racked billiard balls . . . . Well integrated and coordinated eye contact (joint referencing) proved consistent and [claimant] also recognized examiner's subtle gaze and head movements reflecting robust joint attention. . . . [Claimant] displayed no specific sensory anomalies as he did not stare at overhead lights, cover ears to ambient sounds, or scrutinize details of toys. [Claimant] also did not use stereotyped (scripted, echoed, or neologistic) words or phrases, nor hand and finger mannerisms often observed among children on the autism spectrum. . . .
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> Dr. Greenwald's diagnostic impression was that claimant suffered from language/articulation disorder by looking at his history and social (pragmatic) communication disorder. He recommended claimant continue speech and language interventions addressing deficits in receptive/expressive language, articulation, as well as pragmatic (social) communication per Language Disorder/Social Communication Disorder diagnoses.

12. Dr. Greenwald's testimony supported the conclusions and diagnostic impressions he reached in his report. Dr. Greenwald testified that claimant had scores on the ADOS-2 and CARS2-ST that were average and within normal ranges, although some

scores fell below average. Claimant's score on the ADOS-2 was a seven; for a child to have autism, the score must not fall below a nine.

13. The CARS2-ST helps identify children with autism and determine symptom severity through quantifiable ratings based on direct observation. It has proven effective in discriminating between children with autism and those with cognitive deficits, and in distinguishing mild to moderate from severe autism. On the CARS2-ST, claimant scored a 25.5. According to Dr. Greenwald, a child with even mild autism should not score lower than a 30.

14. Dr. Greenwald explained that often young children who suffer from other disorders (like speech and language impairments, attention deficit hyperactivity disorder, depression, sensory disorders, and anxiety) have symptoms that may also look like autism. Even where these children may have mild autism, it is not uncommon for them to improve with time due to intensive interventions through the school system and/or regional centers. Oftentimes, when they improve, they no longer meet the diagnostic criteria for autism under the DSM-5.

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THE JANUARY 19, 2016, PSYCHO-EDUCATIONAL ASSESSMENT

15. The psycho-educational assessment report dated January 19, 2016, completed by School Psychologist Kimberly Spitz, was consistent with Dr. Greenwald's findings. Multiple cognitive and intelligence tests were given to claimant. Most of claimant's scores were in the average range on each assessment, and his academic achievement scores were within the normal range as compared to children the same age. Claimant's social and communication skills were determined to be within normal limits compared to other children his age. Ms. Spitz concluded claimant did not meet the criteria to receive special education services based on a diagnosis of autism.

THE APRIL 28, 2016, LETTER FROM DR. CURRY

16. The April 28, 2016, letter from Dr. Curry stated the following:

> [Claimant] is a 6 year old who has been followed in Kaiser Fontana Autism Clinic Since 2012. [Claimant] was . . . diagnosed with Autism Spectrum Disorder in 2012. [Claimant] has been receiving intensive ABA, Speech Therapy (ST), and Occupational Therapy (OT) for the past 4 years. With those therapies [claimant] has improved but he still has deficits in social interactions, fixations, and sensory issues. [Kaiser] will continue to provide ongoing ABA, ST, and OT. Ryan's diagnosis of Autism Spectrum Disorder remains even with his improvement. [Claimant's] IEP should reflect his ASD diagnosis. He needs to have educational services which can provide additional accommodations and support.

The letter from Dr. Curry did not contain any supporting documentation explaining why he believed claimant still met the criteria for autism, whether the diagnosis was based on the DSM-5 criteria, or if any recent re-assessments had been conducted to support his conclusions. The letter also appeared to have been written to claimant's school in order to get the school to continue to provide special education services, and not to regional center, focusing on the Lanterman Act criterion.

LEGAL CONCLUSIONS

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

2. Welfare and Institutions Code section 4643.5, subdivision (b), provides:

> 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.

3. In a proceeding to determine whether a previous determination that an individual has a developmental disability "is clearly 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.) Thus, IRC has the burden to establish by a preponderance of the evidence that its previous eligibility determination "is clearly erroneous."

4. Welfare and Institutions Code section 4512, subdivision (a), defines developmental disability as a disability that originates before an individual attains 18 years of age; continues, or can be expected to continue, indefinitely; and constitutes a substantial disability for that individual. A developmental disability also 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.*)

5. 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

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[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.

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 be eligible 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? Dr. Greenwald completed a comprehensive assessment of claimant on July 25, 2016, that yielded scores on the ADOS-2 and CARS2-ST placing claimant outside the score range to be considered autistic. He also personally evaluated claimant and concluded he did not exhibit behaviors that would lead to an autism diagnosis. The assessments conducted by claimant's school psychologist on January 19, 2016, also placed claimant outside the range for a diagnosis of autism. Dr. Greenwald did not dispute that claimant may have had a diagnosis of autism in the past. However, Dr. Greenwald's comprehensive re-assessment, and that of claimant's school psychologist, established that, after almost three years of ongoing regional center services and school-based interventions, claimant no longer meets the DSM-5 diagnostic criteria for autism. Nobody appeared on behalf of claimant to produce evidence to contradict that conclusion.

The prior determination that claimant was eligible for regional center services under a diagnosis of autism is therefore clearly erroneous, in light of Dr. Greenwald's

comprehensive re-assessment. As a result, claimant is no longer eligible for regional center services under the Lanterman Act.

ORDER

Claimant's appeal from the Inland Regional Center's determination that he is no longer eligible for regional center services is denied.

DATED: September 19, 2016

_____/s/_____

KIMBERLY J. BELVEDERE

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety days.