

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

v.

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2016090578

DECISION

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

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

Brian Allen, Educational Advocate, represented claimant. Neither Mr. Allen, claimant, nor anyone on behalf of claimant, appeared at the hearing.

The matter was submitted on November 3, 2016.

ISSUE

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

## FACTUAL FINDINGS

### PROCEDURAL HISTORY

1. Claimant is a six-year-old boy who lives with his mother.
2. On September 2, 2016, IRC sent a Notice of Proposed Action notifying claimant that he was not eligible for regional center services because the records claimant 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 needs as an individual with an intellectual disability.
3. On September 13, 2016, claimant's authorized representative, Brian Allen, filed a fair hearing request on claimant's behalf. The fair hearing request stated that claimant's reason for requesting a fair hearing was because claimant was found "ineligible for regional center services after an assessment." Regarding what was needed to resolve the complaint, Mr. Allen wrote, "Inland Regional Center should be ordered and agree to deem claimant eligible under the category of autism for regional center services."
4. On September 16, 2016, OAH sent a Notice of Hearing to IRC and Mr. Allen, notifying both of the date and time of the hearing. The Notice of Hearing further provided the following instructions with respect to a continuance:

A continuance of this hearing may be granted only for good cause as defined by law. (Welf. & Inst. Code, § 4712, subd.

(a.) A continuance request must be made to OAH. The request should be in writing and a copy sent to the other party. The request may be mailed, or faxed to OAH at (916)376-6318. If time does not permit a written request, you

may request a continuance by telephone. The San Diego OAH telephone number is (619)525-4475. A continuance may require you to waive statutory timelines for the hearing and decision. A waiver form is available from OAH, the OAH website, or your service agency.

5. A finding is made that service of the Notice of Hearing was proper.

6. An informal meeting was held telephonically between IRC and Mr. Allen on October 13, 2016, concerning claimant's fair hearing request. IRC adhered to its determination that claimant was not eligible for regional center services under a diagnosis of autism, but noted that that claimant's psychological assessment contained evidence of seizures, and thus, IRC could conduct a separate medical evaluation for purposes of determining eligibility under another category. Claimant's mother refused a medical assessment. The informal meeting letter also reminded Mr. Allen of the previously set date and time of the hearing.

7. On October 13, 2016, Ms. Pierce sent Mr. Allen an e-mail containing a continuance form indicating that IRC would agree to a continuance. Thus, at that point, it was incumbent upon Mr. Allen to timely sign the motion, file the motion with OAH, and provide a copy of the completed motion to Ms. Pierce.

8. Between October 13, 2016, and October 31, 2016, several e-mail communications were sent by Ms. Pierce to Mr. Allen asking him if he planned on filing a motion to continue the hearing. Mr. Allen did not respond.

9. On October 28, 2016, Sherry Fontaine from IRC contacted Mr. Allen to ask if the hearing was going to go forward and reminded him that he needed to file a motion to continue if he wanted to continue the hearing. Mr. Allen asked Ms. Fontaine for a motion to continue form. Ms. Fontaine noted that the form had been previously

provided to him. Mr. Allen told Ms. Fontaine that he had not checked his e-mail and had been very busy.

10. On October 31, 2016, Mr. Allen called Ms. Pierce and asked her for the motion to continue form. Ms. Pierce e-mailed Mr. Allen the same motion to continue form she had previously provided to him on October 13, 2016, and also included a blank form.

11. On November 3, 2016, the hearing was called at the noticed time. Mr. Allen did not appear. Ms. Pierce testified regarding the above-referenced procedural history and provided e-mail documentation and exhibits supporting the above-referenced communications. As of November 3, 2016, Ms. Pierce had not heard from Mr. Allen regarding a continuance, had not received a motion to continue, and had not received any information as to whether claimant's mother would consent to the medical assessment IRC stated it would be willing to do.

12. A review of OAH's practice management system at the time of the hearing did not reveal that any motion to continue had been received by OAH prior to the hearing.

13. IRC indicated it desired to proceed with the hearing on the basis of autism, as stated in the fair hearing request, and that any medical assessment that may or may not be conducted in the future was not relevant to the determination of autism.

14. Two attempts were made to contact Mr. Allen and claimant's mother from the hearing room. Mr. Allen's office cell phone voicemail indicated that the mailbox was "full" and there was no answer at his office. Claimant's mother's phone would not connect and simply provided a statement saying "calls cannot be accepted at this time."

15. The hearing in this matter relates to autism. The medical assessment, which was refused by claimant's mother, is not relevant to the determination of whether claimant qualifies for regional center services under a diagnosis of autism. Thus, that a

medical assessment for seizure disorder may be conducted at some point in the future does not establish good cause under Welfare and Institutions Code section 4712, subdivision (a), to continue the hearing.

16. Moreover, the procedural history as noted above clearly indicated that Mr. Allen had almost a month to file the motion to continue with OAH, but chose not to do so until the day before the hearing. Apparently, on November 2, 2016, the day before the hearing and unbeknownst to IRC, Mr. Allen sent to OAH the motion to continue form that Ms. Pierce had e-mailed him on October 13, 2016. Due to the untimeliness of the motion, it was not actually received by OAH until the day after the hearing and no ruling was made on the motion prior to the hearing. Moreover, although the fax cover sheet that accompanied the motion indicated that a signed copy of the motion to continue was sent to IRC, IRC did not receive a copy of the motion. The procedural history did not demonstrate that Mr. Allen's failure to file a motion to continue for almost a month was the result of mistake, inadvertence, or excusable neglect.

17. On this record, claimant's motion to continue the administrative hearing was denied due to being untimely and not establishing good cause. It is the administrative law judge's duty – and his or her duty alone – to determine what constitutes good cause to continue the hearing. A party filing a motion to continue must file the document, as the instructions in the notice of hearing provide, with OAH. **Until a ruling has been made** on the motion, the hearing proceeds as scheduled. Mr. Allen is well-versed in regional center matters and has filed motions to continue hearings in the past. The notice of hearing contains the requirements for filing a motion to continue under Welfare and Institutions Code section 4512. Thus, there was no legitimate reason for delaying the filing of the motion for a month, filing it the day before the hearing, and then failing to show up at the hearing at the properly noticed date and time absent a judicial determination on the merits of the motion. Indeed, Mr. Allen could have called

OAH to ensure his motion was received and to inquire as to how to proceed, if he was unsure how to do so. He did not.

18. Moreover, had this motion been timely received, for the reasons discussed above, it would still have been denied for a lack of good cause. The medical assessment contemplated by the parties is separate and apart from claimant's fair hearing request regarding autism, and to date, claimant's mother has not agreed to permit the medical assessment.

19. Following the denial of claimant's motion to continue, the hearing ensued.

#### DIAGNOSTIC CRITERIA FOR AUTISM

20. The DSM-5 also identifies criteria for the diagnosis of autism. 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

21. Ruth Stacy, Psy.D., testified on behalf of IRC. Dr. Stacy is a staff psychologist at IRC. She has also held positions at IRC such as Senior Intake Counselor and Senior Consumer Services Coordinator. She has been involved in assessing individuals who desire to obtain IRC services for over 27 years. In addition to her doctorate degree in psychology, she also holds a Master of Arts in Counseling Psychology, a Master of Arts in Sociology, and a Bachelor of Arts in Psychology and

Sociology. She has also had training from Western Psychological Services in the administration of the Autism Diagnostic Observation Scale (ADOS) and training from IRC in the administration of the Autism Diagnostic Interview (ADIR). Dr. Stacy qualifies as an expert in the diagnosis of autism and in the assessment of individuals for IRC services.

22. On September 1, 2016, Dr. Stacy completed a psychological assessment of claimant. Dr. Stacy reviewed records provided by claimant prior to conducting her assessment, but did not find any diagnosis of autism. Dr. Stacy noted that claimant was being served by his school district for autism according to his 2015 individualized education plan, but that the school's criteria qualifies a person for autism based on "autistic-like" behavior which is not the same criteria used in the DSM-5. The 2015 IEP also qualified claimant for special education services under the category of "other health impairment."

Dr. Stacy administered the Wechsler Scale of Intelligence for Children, Fifth Edition (WISC-5), which tests a person's abilities in verbal comprehension, visual and spatial reasoning, fluid reasoning, working memory, and processing speed. Dr. Stacy noted claimant's abilities across the multiple subtests yielded an overall result within the average range. Claimant's full scale IQ score was also in the average range. In other words, the WISC-5 did not show claimant had characteristics of autism.

Dr. Stacy administered the Childhood Autism Rating Scale, Second Edition. (CARS-2). The CARS-2 results showed claimant had minimal or no symptoms of autism.

Dr. Stacy administered the ADOS-2, which is a standardized, comprehensive assessment used to elicit social interactions and communication behaviors. Claimant scored well below the cutoff for autism.

Dr. Stacy administered the Vineland Adaptive Behavior Scales, Second Edition (Vineland-2) which is an interview-based assessment that assesses a person's communication skills, daily living skills, socialization skills, and motor skills. All of

claimant's scores were above the level to qualify as a substantially handicapping condition. Thus, even if he did have autism, he did not meet the substantial handicap requirement as required by the DSM-5.

Dr. Stacy observed claimant to have effective verbal and nonverbal communication skills. Claimant made frequent attempts to get her attention. He exhibited good eye contact and his speech was accompanied by appropriate changes in eye gazes or facial expressions. Claimant exhibited social awareness. Claimant did not exhibit any repetitive or stereotyped behaviors of concern. Claimant exhibited imagination and creativity during structured activities in the assessment and during free play time.

Based on her comprehensive assessment, Dr. Stacy concluded the following:

[Claimant] does not meet criteria for a diagnosis of autism. He uses social communication effectively, both verbally and nonverbally. In addition, his communication skills are in the adequate range of adaptive functioning. [Claimant's] interactions with others are socially awkward or socially inappropriate at times; however he is socially aware, he plays with others, he exhibits shared enjoyment with others, he engages in attention seeking behavior, he engages in imaginative and creative pretend play. [Claimant's] history and behavioral characteristics do not support a diagnosis of autism.

Dr. Stacy concluded claimant did not have autism. Her diagnostic impressions were that claimant had Attention Deficit Hyperactivity Disorder, Tourette's Disorder, and possibly, Oppositional Defiant Disorder. She recommended claimant seek further



assessment for those conditions, as none of them qualify a person for regional center 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 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.

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 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.

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

(a) “Developmental Disability” means a disability that is attributable to mental retardation,<sup>1</sup> 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;

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<sup>1</sup> 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.

- (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. Claimant had the burden to establish by a preponderance of the evidence that he is eligible for regional center services. Dr. Stacy's comprehensive psychological assessment, which included several different measures that tested claimant across

multiple areas, demonstrated claimant did not meet the diagnostic criteria for autism. Claimant also did not exhibit the characteristic features of autism in that he did not engage in repetitive or stereotyped behavioral patterns or activities. Finally, even if claimant did have autism, his results on the Vineland-2, combined with Dr. Stacy's own clinical observations, demonstrated claimant does not have significant functional limitations in any of the following areas: receptive and expressive language, learning, self-care, mobility, and self-direction. Accordingly, claimant is not eligible for regional center services under the category of autism.

## ORDER

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

DATED: November 15, 2016

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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.**