

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. 2016100020

REVISED DECISION¹

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on May 31, 2017.

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

Peter Attwood, Advocate, appeared on behalf of claimant, who was not present.

The matter was submitted on May 31, 2017.

¹ On June 12, 2017, IRC requested the following changes to the decision: that claimant's age be changed from 13 years old to 8 years old on page 2, and that the order be changed to reflect "he" instead of "she." The changes are clerical errors and do not change the substance of the decision, so they were made accordingly.

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 reassessment completed by IRC?

FACTUAL FINDINGS

DIAGNOSTIC CRITERIA FOR AUTISM SPECTRUM DISORDER

1. 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.

BACKGROUND

2. Claimant is an 8-year-old male.

3. Claimant received early start services until age 3. In August 2010, when claimant was receiving early start services and almost 2 years old, Sandra Brooks, Ph.d., Staff Psychologist, conducted a psychological assessment of claimant. Dr. Brooks concluded claimant showed a number of emerging social skills and was able to use gestures and vocalize his needs. Claimant was also able to engage in "pretend play." Claimant's mother, however, expressed a concern of some behaviors she felt were

autistic-like (i.e. limited socialization, repetitive body movements, and failure to respond to his name on a consistent basis). Nonetheless, Dr. Brooks felt a diagnosis of autism was not appropriate given claimant's young age and recommended he be re-assessed closer to age 3.

4. Paul Greenwald, Ph.D., is a Staff Psychologist for IRC. He conducted an assessment of claimant on June 21, 2011, just before claimant's third birthday. Dr. Greenwald reviewed claimant's previous records, including school records and regional center records. He conducted a full analysis of claimant's developmental and medical history. Dr. Greenwald used the following assessments: the Wechsler Primary and Preschool Scale of Intelligence- 3rd edition (WPPSI-3); Autism Diagnostic Observation Schedule Module 1 (ADOS); Autism Diagnostic Interview; Children's Autism Rating Scale – 2nd edition (CARS-2); and the Vineland II Adaptive Behavior Scale.

On the CARS-2, claimant's overall score showed he screened as mild to moderate for autism. Claimant's scores on the WPPSI-3 showed varied cognitive abilities. Claimant's score on the ADOS showed he did not meet the cutoff for autism but did have a score consistent with autism spectrum criteria.² His scores on other assessments varied. Dr. Greenwald did note claimant's overactive and excited behavior. Overall, Dr. Greenwald concluded that claimant qualified for regional center services under a diagnosis of autism but recommended he be re-assessed on his fourth birthday.

5. Following claimant's eligibility determination, he began receiving applied behavioral analysis and respite.

² The DSM-4, and not the DSM-5, was in effect at the time Dr. Greenwald completed his assessment. Thus, some disorders, such as Pervasive Development Disorder and Asperger's Syndrome, were not included in a diagnosis of autism, as they are now under the DSM-5.

6. Claimant receives special education services. However, he has never been served under a diagnosis of autistic-like behavior. Claimant's school district completed an assessment several days after Dr. Greenwald, on July 13, 2011. The school psychologist utilized multiple measures, including the CARS-2. Claimant's score on the CARS-2 showed he was in the "unlikely" range for autism. No other assessments utilized by the school psychologist showed claimant was autistic or exhibited autistic-like behaviors. The school psychologist concluded claimant did not exhibit autistic-like behaviors and was thus not eligible for special education services under a diagnosis of autism utilizing Education Code criteria, but should be served under the category of speech and language impairment.

7. Claimant was served in special education under the criteria of speech and language impairment following the 2011 assessment. Claimant's most recent Individualized Education Program Plan (IEP) completed in November 2015, showed he is served under a diagnosis of "other health impairment" based on a medical diagnosis of Attention Deficit Disorder (ADD). The IEP indicated that claimant's ADD "adversely impacts his progress in the general education setting due to inattentiveness and lack of focus." The IEP also noted claimant enjoys talking and interacting with classmates and shows appropriate social/emotional reciprocity. Similarly, an IEP amendment stated claimant is "very verbal and expressive across the school setting . . . very social and participates in group activities with the class." The IEP amendment also documented claimant's inattention and distraction problems.

8. IRC Staff Psychologist Ruth Stacy, Psy.D., conducted a psychological reassessment of claimant on July 7, 2016. In addition to the above-referenced information, she reviewed additional assessments that had been completed. Based on her overall comprehensive reassessment and review of previous assessments and school

records, Dr. Stacy concluded that claimant no longer met the diagnostic criteria for autism, rendering him ineligible for regional center services.

9. On September 19, 2016, IRC notified claimant that he was no longer qualified for regional center services under the Lanterman Act. Claimant timely filed a fair hearing request; this hearing ensued.

EVIDENCE PRESENTED BY IRC

10. Dr. Stacy 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.

Regarding the July 13, 2011, assessment completed by claimant's school psychologist, Dr. Stacy explained that claimant's daily living and socialization scores were not within the range of what would be considered "substantially disabled" to render a person with autism eligible for regional center services. She also noted that claimant's scores in the areas of daily living and socialization actually increased from what was existent in prior records, also undercutting a claim of substantial disability.

Regarding a September 14, 2011, assessment completed by Rady's Children Center, Dr. Stacy explained that, although overall the assessment concluded claimant had autism according to his score on the ADOS-2, claimant's verbal abilities were within

the average range (claimant's receptive and expressive language skills were within the average range).

Regarding an assessment completed in April and May 2015 by Timothy Gunn, Psy.D., Dr. Stacy explained that although Dr. Gunn found claimant eligible due to autism, he also noted that claimant was unlikely to meet the criteria for autism in the future (as he developed). Claimant's score on the ADOS-2 fell within the range for autism. Claimant's score on the Gilliam Asperger's Disorder Scale (GADS), however, was inconsistent with autism. The GADS is a rating test where claimant's teacher and claimant's mother completed the rating scale. The score resulting from claimant's mother's evaluation showed a likelihood of Asperger's Syndrome. The score resulting from claimant's teacher's evaluation showed that Asperger's Syndrome was unlikely. Moreover, Dr. Gunn's conclusion stated claimant was "far less symptomatic and function[ed] very highly. . . ." So, although Dr. Gunn's results placed claimant within the range for a diagnosis of autism, Dr. Gunn hypothesized claimant's diagnosis would eventually change to Social Pragmatic Communication Disorder. Dr. Gunn also pointed out that claimant met the criteria for Attention Deficit Hyperactivity Disorder (ADHD). Dr. Gunn concluded that claimant's ADHD was the primary factor affecting his abilities in the classroom. Dr. Gunn also concluded claimant was performing "relatively well as it pertains to his [academic] achievement" In reviewing Dr. Gunn's report, Dr. Stacy noted claimant's learning and mobility were not impaired; his receptive and expressive language were not impaired; his learning ability was not impaired; and his self-care skills were above average.

Dr. Stacy reviewed a report completed in November 2015, when claimant was seven years old. This report was completed six months following Dr. Gunn's assessment. Dr. Stacy noted that claimant's expressive and receptive language scores fell within the average range; his language structure fell within the average range; his test scores

relating to spoken language were solidly within the average range, with the exception of one domain; his pragmatic language skills were within normal limits; and his classroom and social skills, with the exception of personal interaction, fell within the average range. Overall, the examiner concluded claimant exhibited a disorder in the area of pragmatics, but did not conclude claimant had autism.

Dr. Stacy assessed claimant on July 7, 2016. She utilized the following assessments: ADOS-2; Childhood Autism Rating Scale – Second Edition, High Functioning Version (CARS-2-HF); Vineland Adaptive Behavior Scales; diagnostic interviews, observations, and also reviewed claimant's file.

11. Claimant's ADOS score was 1, which showed minimal to non-spectrum range. His score on the CARS-2-HF was 21.5, which showed minimal to no symptoms. These two assessments, taken together, are main indicators that claimant does not have autism. On the Vineland, claimant's scores were above the score level that would normally be considered substantially disabled. Dr. Stacy noted claimant was not taking his ADHD medications during the assessment. She found him to be interactive, instigating interaction, doing things to get attention, making appropriate social overtures, pointing, etc. In other words, claimant exhibited a level of social awareness not typical of children with autism. She concluded claimant did not meet the criteria under the DSM-5 for autism and was not substantially disabled. She diagnosed him, as he had been diagnosed in the past, with ADHD.

12. Michelle Lindholm, Ph.D., BCBA-D, a Staff Psychologist at IRC, testified on behalf of IRC. Dr. Lindholm observed claimant in his classroom on November 30, 2016. She testified that claimant was readily engaged with his teachers and other adults. He played appropriately and exhibited appropriate social interaction with other children. Claimant initiated play with other children as well. Dr. Lindholm did observe claimant to be fidgeting at times, and noted he was inattentive and tended to be hyperactive. Her

report was consistent with her testimony. She concurred with Dr. Stacy's determination that claimant did not have autism, and recommended claimant seek treatment to address his problems with hyperactivity and inattentiveness.

EVIDENCE PRESENTED BY CLAIMANT

13. Claimant's mother testified she believes claimant has autism. She said claimant is a loving child but has many issues. Claimant is in a general education setting with modifications. She has put him in after school programs. She has seen progress over his academic life but believes he still needs help.

She explained that when claimant was young he would "connect" things. Anything, trains, shoes, cars, etc. He would not play like a normal child. Claimant would spin a lot as well. She said during ABA training she learned how to break the connecting behavior so claimant does not do that anymore. She said he is still interested, however, in things that spin and will also engage in spinning behavior.

Claimant's mother testified claimant will not soil his pants at school but at night and in the evening he will sometimes go to the bathroom in his pants. She said he gets embarrassed and will sometimes hide the pull-up she makes him wear. Claimant will not always dress himself and will only take a shower when directed. Claimant's mother said the only way she can get claimant to sleep is by giving him melatonin.

Claimant's mother stated several times during her testimony that claimant is not "severely handicapped but he does struggle." She said it is difficult on the family and respite is the "only way" they can deal with all of his behaviors.

Claimant's mother believes all of the progress claimant has made was a direct result of the IRC services. She said by the time Dr. Greenwald saw claimant in 2011, claimant had already improved. She believes claimant would have been much worse had they not had help.

Claimant's mother said claimant does interact with his friends but does not understand sarcasm and does not understand when some kids do not want to play with him. She said they always have to have the house dark because light upsets claimant. Loud noises used to bother claimant but they do not bother him anymore unless it is a loud noise as a result of a crowd.

Claimant recently received counseling in school in April 2017; the counseling made a huge difference for claimant. Prior to the counseling, claimant would get out of school and just want to be left alone. The counseling changed that behavior.

Claimant's mother said she does not think he has ADD or ADHD and he does not need medication. He has been off of his medication since January and his teacher said she has not been having problems like she was having before. Although claimant will still yell once in a while or bang on a table, a "fidget spinner" helps keep him focused. Claimant's mother said they have tried many things to keep claimant focused – small settings, behavioral plans, teachers coming to him in the classroom rather than him switching classrooms, etc. She believes he has done better but there are still struggles to keep him focused.

Claimant's mother has two other children that are diagnosed with autism and an older son with mild intellectual disability. She did not want claimant to be labeled she just "wanted him to be normal" but he was not. She did a lot of research and she feels autism explains all that she has observed.

14. Claimant's mother provided several medical records but no expert was called to testify regarding their content. Thus, the records constitute administrative hearsay and cannot be used to make a finding of fact.

15. A September 30, 2011, occupational therapy assessment, also administrative hearsay, did not conclude claimant was autistic. Rather, the conclusion drawn from the assessment was that claimant had a speech and language impairment.

This conclusion supplements or explains other documents and testimony by Dr. Stacy that claimant was served in special education under the category of speech and language impairment.

16. Claimant' most recent IEP, dated November 8, 2016, also administrative hearsay, supplemented and explained claimant's current eligibility for special education services under the category of other health impairment. Like claimant's 2015 IEP, the school attributes claimant's difficulties to ADD. Nothing in the 2015 IEP suggests claimant meets the criteria for autism under the DSM-5.

17. A May 23, 2017, IEP Team Amendment's Page, similarly does not suggest claimant meets the criteria for autism under the DSM-5. The notes indicate claimant sometimes has yelling outbursts, but overall, his behaviors have improved since he stopped taking ADHD medications in January. The notes indicate claimant understands tone and sarcasm appropriate for his age. The notes indicate claimant benefits from shortened assignments and breaks, and overall, is able to complete the work given to him.

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.)

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 retardation³, 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:

³ 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.

- (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's representative argued that the issue is whether Dr. Greenwald's 2011 assessment finding claimant eligible for regional center services *was* clearly erroneous.

Whether Dr. Greenwald was erroneous in his assessment, however, is not the issue. 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. In other words, the issue is

not whether a diagnosis made in the past was correct; but rather, given how claimant *currently* presents, would that same diagnosis be given today?

Although some psychological records indicated claimant did meet the criteria for autism, the results were varied, at best. Claimant has never been served in special education under the category of autism. Claimant has a medical diagnosis of ADD and ADHD. Dr. Gunn's 2015 report stated claimant's ADHD was the primary factor affecting claimant's ability to focus. Claimant's mother believes claimant has autism; but she also testified he is not significantly disabled, rather, he struggles. Dr. Stacy's comprehensive reassessment showed that, not only does claimant not meet the diagnosis for autism under the DSM-5, he is also far from being considered substantially disabled. Dr. Stacy also pointed to Dr. Gunn's report, which showed claimant did not have significant functional limitations in three or more major life areas, as required by the California Code of Regulations, for a finding of substantial disability. Similarly, Dr. Lindholm's observations of claimant show that claimant's current behaviors are inconsistent with the DSM-5 diagnostic criteria for autism.

In order for claimant to remain eligible for regional center services, he must not only have a diagnosis of autism; he must also be substantially disabled. On this record, even if one were to give claimant the benefit of the doubt, ignore the weight of the evidence, and find claimant did meet the DSM-5 criteria for autism, there is no evidence that claimant is substantially disabled. So, whether claimant is or is not autistic, he still would not qualify for regional center services.

Accordingly, the prior determination that claimant was eligible for regional center services under a diagnosis of autism is clearly erroneous, in light of Dr. Stacy and Dr. Lindholm's comprehensive reassessment. 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: June 13, 2017

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.