

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

v.

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2016101022

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter in San Bernardino, California, on February 28, 2017.

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

Claimant's aunt represented claimant, who was not present.

The matter was submitted on February 28, 2017.

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 seven-year-old girl who lives with her aunt, who is in the process of adopting her. Claimant has an extensive history with the Department of Children and Family Services, due to being removed from the home of her biological parents. Claimant's past records show difficulties with social interaction, emotions, and aggressive behavior. However, none of the records show a history of autism.

2. On September 20, 2016, IRC sent a Notice of Proposed Action notifying claimant that she 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 October 20, 2016, claimant's aunt filed a fair hearing request contesting IRC's decision.

4. In November 2016, claimant's aunt and IRC staff attended an informal meeting to discuss claimant's eligibility. Following discussions and review of claimant's records, IRC adhered to its determination that claimant was not eligible for regional center services under a diagnosis of autism.

5. On December 1, 2016, IRC sent claimant's aunt a letter, in preparation for a December 8, 2016, hearing, which contained the exhibits it intended to present. Claimant's aunt did not object to the letter and did not notify anyone that the exhibits were not enclosed. Ultimately, the hearing was continued to February 28, 2017, because claimant's aunt wanted to have claimant assessed for autism.

6. Other than the records originally provided to IRC, claimant's aunt did not provide any additional records concerning claimant being diagnosed with autism.

7. At the commencement of the hearing, claimant's aunt said she had not received the exhibits presented by IRC. The exhibits were reviewed, and it was noted that all of the exhibits were documents provided to IRC by claimant's aunt, as well as applicable law, and the fair hearing request filed by claimant's aunt. Claimant's aunt was given an opportunity during her testimony to review the documents and ask questions concerning the documents. Thus, the documents were not excluded.

DIAGNOSTIC CRITERIA FOR AUTISM

8. The DSM-5 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

9. Veronica Ramirez, Psy.D., a staff psychologist for IRC, testified at the hearing. Dr. Ramirez has been a staff psychologist for one year, and worked for one year prior to that as a psychological assistant at IRC. She explained that the position of a psychological assistant is the same as a staff psychologist, except a psychological assistant is supervised by a staff psychologist. Her duties include assessing potential clients for eligibility under the Lanterman Act, in conjunction with the diagnostic criteria set forth in the DSM-5.

10. Dr. Ramirez reviewed the following documents: Two individualized education plans (IEP's) from 2015 and 2016, and a supplemental IEP from 2016; a

November 8, 2013, psychological evaluation completed by Roberto de Candia, Ph.D., when claimant was four years old; a psycho-educational evaluation completed by claimant's school psychologist on August 20, 2014; a report by Victoria Menchaca, Ph.D., dated March 15, 2016, which contained summaries of history and findings but no assessment data or evidence supporting conclusions; and a psychoeducational assessment completed by claimant's school psychologist on September 6, 2016. Dr. Ramirez also reviewed a psychological assessment completed by IRC on November 8, 2014, which concluded claimant did not have autism.

Dr. Ramirez correctly pointed out that claimant receives special education services under a diagnoses of speech and language disorder. None of the school records, including the IEPs and psychological assessments or evaluations, diagnosed claimant with autism.

Regarding IRC's 2014 evaluation, Dr. Ramirez explained that the staff psychologist who completed the assessment administered multiple tests typically used to diagnose autism, including the "gold standard" for diagnosing autism, the Autism Diagnostic Observation Scale (ADOS). Dr. Ramirez noted that claimant was well below the cutoff for autism on the ADOS, and her behaviors during the assessment were inconsistent with autism. For example, Dr. Ramirez pointed out that claimant was able to show social emotional reciprocity, respond to commands, and exhibit proper emotion such as smiling when appropriate. Claimant also did not show any evidence of repetitive or stereotypical behavior, which is a hallmark of autism. Dr. Ramirez testified that IRC's 2014 evaluation also documented claimant's difficult history due to her separation from her biological parents, and referenced that incident as a trauma in claimant's life. She opined that, in addition to the speech and language disorder, this traumatic event could explain claimant's social and emotional difficulties.

Dr. Ramirez described claimant's most recent psycho-educational evaluation from September 2016 as very comprehensive, and noted that as in all the others, the evaluator concluded claimant did not have autism. Rather, the evaluator attributed claimant's speech and language delays as related to her English language development.¹ Claimant's nonverbal intelligence was found to be in the borderline range and her verbal abilities were borderline. The ADOS was administered, and just as in 2014, claimant did not meet the cutoff for autism. Dr. Ramirez also said the report documenting the assessment did not contain evidence of autistic behaviors. The report showed claimant was very aware during the assessment, displayed appropriate facial gestures and expressions, and exhibited appropriate emotions. These behaviors were all inconsistent with autism. Finally, claimant's scores on the Vineland, which is a report completed by claimant's teacher and claimant's caregiver, had inconsistent results. For example, claimant's teacher showed claimant's adaptive functioning as much higher than the adaptive functioning reported by claimant's aunt. Dr. Ramirez explained that, in a child with autism, such inconsistent results indicate something other than autism; in other words, a child with autism would have consistent scores in adaptive functioning across multiple contexts.

The only report that came close to showing a possibility of an autism diagnosis was the report completed by Dr. Menchaca in March 2016. This report showed a diagnosis of Pervasive Development Disorder and Selective Mutism. However, as Dr. Ramirez pointed out, the report did not show any formal testing that was completed, and did not contain the names of any assessments that might have been administered. Instead, the report appeared to be a summary of other reports and conclusions drawn based on those summaries. Dr. Ramirez also noted that the report was completed in

¹ Claimant lives in a household where Spanish and English are spoken.

2016, when the DSM-5 was already in use. The DSM-5 does not contain "Pervasive Development Disorder" as a valid diagnosis. Thus, to the extent any assessments were given, claimant was evaluated using the DSM-4, an improper diagnostic tool at that time.

Dr. Ramirez concluded claimant's records did not show she has autism and thus, claimant was ineligible for regional center services.

EVIDENCE PRESENTED ON BEHALF OF CLAIMANT

11. Claimant's aunt testified that she believes claimant has autism. She said claimant is not social. Claimant is very aggressive. She has many sensory issues. Claimant constantly rocks back and forth and can become fixated on certain objects. When speaking sometimes, claimant will refer to herself in the third person, indicating deficits in the ability to communicate. Claimant's aunt explained that she has known claimant since she was born and claimant has always had these unusual behaviors. Claimant's aunt described claimant as a very lonely child.

12. Flora Martinez, a family friend, also testified. She concurred with claimant's aunt's assessment of claimant's typical behaviors and noted that "other professionals" have diagnosed claimant with autism.

13. Claimant's aunt did not present any documentary evidence at the hearing.

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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.

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5. California Code of Regulations, title 17, section 54000 provides:
 - (a) "Developmental Disability" means a disability that is attributable to mental retardation,² 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 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.

- (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 she is eligible for regional center services. Dr. Ramirez's testimony, which included a comprehensive review of the detailed school and psychological records provided to IRC by claimant, established that claimant does not meet the diagnostic criteria for autism under the DSM-5. Even if claimant did have autism, none of the evidence showed claimant has significant functional limitations in receptive and expressive language, learning, self-care, mobility, or 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: March 2, 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.