

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Eligibility of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2017010706

DECISION

Mary Agnes Matyszewski, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on March 8, 2017, and in Temecula, California, on May 1, 2017.

Theresa Sester, a non-attorney advocate, represented claimant, who did not appear. Claimant's parents attended both days of hearing.

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

The matter was submitted on May 1, 2017.

ISSUE

Is claimant eligible for regional center services under the Lanterman Act as a result of a diagnosis of autism spectrum disorder that constitutes a substantial disability?

SUMMARY OF DECISION

The reliable evidence established that claimant has autism spectrum disorder that constitutes a substantial disability. IRC's assertion to the contrary was not persuasive. The evidence established that IRC's expert used incorrect test modules, did not follow test protocols, performed a cursory review of claimant's records, and failed to consider relevant information. In contrast, claimant's experts performed a thorough and detailed evaluation, offered convincing testimony about the multiple standardized test errors IRC's expert made and the protocols he violated. Moreover, IRC's expert's corrections to his report, as well as his statements contained in his report, demonstrated the incorrect assumptions he made. In total, claimant's evidence that he had autism spectrum disorder that constitutes a substantial disability was far more persuasive and reliable than IRC's evidence to the contrary.

ORDER COMPELLING PRODUCTION

On April 6, 2017, ALJ Matyszewski issued an Order granting claimant's motion to compel production of the assessment protocols used for the following tests administered to claimant: Autism Diagnostic Observation Schedule (ADOS-2); Childhood Autism Rating Scale (CARS 2-ST), and Vineland II Behavior Scales (Vineland); as well as ordering IRC to produce all documents, notes, assessment reports, diagnostic material, medical records, assessments and/or diagnostic protocols, e-mails, inter-agency records, communication logs or intake records related to claimant. IRC produced those documents, many of which were introduced at the second day of hearing and used by claimant's test protocol expert as part of her critique of IRC's evaluation. Those documents and that expert's testimony regarding them, raised several concerns about the standardized tests IRC administered to claimant, as noted more fully below.

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. On December 28, 2016, IRC notified claimant that he was not eligible for regional center services.
2. On January 23, 2016, claimant's parents filed a fair hearing request appealing that decision and this hearing ensued.

DIAGNOSTIC CRITERIA FOR AUTISM SPECTRUM DISORDER

3. 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 include persistent deficits in social communication and social interaction across multiple contexts; restricted, repetitive 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.

BACKGROUND

4. Claimant is a 6-year-old male. He asserted he was eligible for services on the basis of autism spectrum disorder. Claimant introduced records from his treating therapist, Donna Lindley, MA, LMFT, and his neuropsychologist, Tanya Mesirow, Psy.D., as well as other records in support of his position. Thereafter, IRC assessed claimant and denied his request for services, finding he did not have autistic spectrum disorder.

IRC'S ASSESSMENT

5. Margarita Gonzalez performed the IRC social assessment and testified in this hearing. She acknowledged that her handwritten notes, which were produced in discovery, contained information that was not transposed to her final, typed social assessment dated November 7, 2016. The information she left off her typed report contained additional information that supported claimant's position. Both the typed and the handwritten social assessment documented claimant's issues with activities of daily living and his challenging behaviors. Ms. Gonzalez acknowledged that reports from claimant's treatment providers were not referenced, possibly because they were not yet available to IRC when she typed her report. Ms. Gonzales also admitted that, although there were signatures from all members of the IRC evaluation team on the documents regarding the evaluation team meeting, not all members were present at the meeting.

Nothing in Ms. Gonzalez's social assessment definitively ruled out autism spectrum disorder.

6. Paul Greenwald, Ph.D., IRC Staff Psychologist, performed a psychological assessment on December 28, 2016, authored a report, and testified in this proceeding. Dr. Greenwald opined that although claimant's ADOS-2 scores demonstrated a low level of autistic spectrum disorder symptoms, many of his Vineland scores were moderately low or adequate, and his CARS-2 had several scores in the mild to moderate ranges; therefore, claimant did not meet "the critical cut off criteria" consistent with autistic spectrum disorder. As such, claimant did not qualify for regional center services.

Dr. Greenwald was asked about errors in his report. He admitted that his original report contained the wrong date of his assessment. Thereafter, he corrected other "typos" in his report while testifying. He corrected his report on page 5, under the Assessment Results, noting that the comparison score should be "3" not "6." He explained that a score of 6 indicated moderate to severe autism, 3 indicated mild

autism. Dr. Greenwald acknowledged that he made errors in each of his two diagnostic impressions. His diagnostic impression of "Rule Out Attention Deficit Hyper Activity Disorder (ADHD)" was incorrect because Dr. Mesirow had already diagnosed claimant with ADHD. Dr. Greenwald acknowledged that this made his recommendation to rule it out redundant. Dr. Greenwald further acknowledged that his other diagnostic impression, "313.89, Rule Out Obsessive-Compulsive Disorder (ODD)," was erroneous because he listed the wrong diagnostic code and the wrong initials for OCD.

When asked about the documents he had reviewed, Dr. Greenwald could not recall whether he reviewed Ms. Lindley's reports or claimant's school records. He admitted he had no way to determine if he had reviewed them because he does not cite all documents he reviews in his reports. Dr. Greenwald selects the ADOS-2 module he uses depending on the child's age; here he chose one for children between the ages of two and 16 years old. He acknowledged that claimant had "precocious language" and used phrase speech, but testified that the ADOS-2 "says nothing about [the test subject] being verbally fluent." At no time did Dr. Greenwald indicate that he used a Spanish-language form during his evaluation of claimant, a fact claimant only learned when the test protocols were produced. Dr. Greenwald's use of this ADOS-2 module and the Spanish-language form is addressed below.

Dr. Greenwald testified that he disagreed with Dr. Mesirow's opinions as follows: he did not believe that she is as experienced as he is to diagnose autism spectrum disorders; he disagreed with the rating scale she used as he thought it had limited reliability; he found that her narrative speculated that claimant had an "emotional disability"; he thought her narrative made it difficult from his understanding of how autism spectrum disorder presents to find that claimant had that condition; and he questioned the references in her report to the parents' statements.

Dr. Greenwald testified that he had no experience with some of the testing Dr. Mesirow administered and, although he did not criticize the tests administered, he explained that they were not tests that IRC uses to evaluate claimants for eligibility. He asserted that the ADOS-2 is the "gold standard" and was not administered by Dr. Mesirow. Dr. Greenwald acknowledged that he did not administer an IQ test to claimant because he relied on the IQ scores achieved from the one given by Dr. Mesirow. Dr. Greenwald further acknowledged that he performed his assessment and administered all of his tests on the same day, with his entire evaluation lasting between two and three hours; whereas Dr. Mesirow performed her evaluation and administered her tests over four separate days.

In his summary, Dr. Greenwald wrote that Dr. Mesirow's autism spectrum disorder diagnosis was "based on GARS-II (Gilliam Autism Rating Scale) results suggesting a 'Very Likely' probability for the disorder." When questioned as to whether he believed that the GARS II results were the sole basis of her opinion, Dr. Greenwald testified that it was the only test on which she based her diagnosis, but noted he did cite her observations in his report. As clearly demonstrated by Dr. Mesirow's report, and more fully explained below, this test was not the sole basis for her diagnosis; rather, it was but one of several factors on which she relied to form her opinion.

As noted below, Dr. Greenwald's testimony was not persuasive.

CLAIMANT'S RECORDS AND ASSESSMENTS

7. Daily "Grow and Glow" reports from claimant's daycare documented his strengths and areas that needed improvement. Nothing in those reports ruled out a diagnosis of autism spectrum disorder.

8. Claimant's junior kindergarten report card for the 2015-16 school year noted that he met expectations or was approaching proficiency in several areas. Nothing in that report card ruled out a diagnosis of autism spectrum disorder.

9. Claimant's occupational therapy records documented his sensory processing issues, motor coordination and fine motor skills issues, his lack of self-care, chewing and swallowing difficulties, extreme reactions, poor safety awareness, flapping, distractibility, frustration, and difficulty completing activities of daily living. These records supported his claim that he had autism spectrum disorder as they contained demonstrated that claimant exhibited behaviors and conditions consistent with that diagnosis.

10. Ashley Saffel, who provided ABA behavioral therapy to claimant, testified about his substantial disabilities and his presenting conditions. Her testimony demonstrated that claimant exhibited behaviors consistent with an autism spectrum disorder diagnosis.

11. Donna Lindley, MA, LMFT, of Novell & Novell Counseling Services, began treating claimant on July 25, 2015. Claimant's parents described his tantrums, meltdowns, and several behaviors he was exhibiting. They were trying to figure out what was happening with him. Ms. Lindley's records documented claimant's behaviors, her differential diagnoses, and the multiple assessments she performed during her office visits with claimant. After Ms. Lindley began treating claimant, she suspected that claimant suffered from autism spectrum disorder. She recommended that claimant be evaluated by a neuropsychologist.

12. Tanya Mesirow, Psy.D., performed a neuropsychological evaluation, evaluating claimant over four days. Claimant's mother testified that she was given several recommendations for neuropsychologists and chose Dr. Mesirow because her schedule was the most convenient. Dr. Mesirow authored a report regarding her evaluation and testified in this hearing consistent with her report.

Dr. Mesirow administered numerous tests, took an extensive history, and made behavioral observations. She administered the Gilliam Autism Rating Scale to claimant's

parents, the results of which supported her opinions that claimant demonstrated many signs and symptoms of autism spectrum disorder. Dr. Mesirow opined that claimant “demonstrates persistent deficits in social communication and interaction, as well as restricted, repetitive patterns of behavior, interests or activities that cause impairment in daily functioning.” Dr. Mesirow diagnosed claimant with autism spectrum disorder without intellectual impairment and attention deficit/hyperactivity disorder, combined presentation. Dr. Mesirow made several recommendations to address claimant’s needs.

Dr. Mesirow’s testimony confirmed the thoroughness of her evaluation, the numerous documents she reviewed and persons she interviewed to reach her opinions, and her rationale behind choosing the tests she administered. Her testimony also demonstrated that she was well-qualified to review the tests administered by Dr. Greenwald and to render opinions regarding his evaluation. Dr. Mesirow’s testimony established that claimant is eligible for regional center services because he has autism spectrum disorder that is a substantially disabling condition. Dr. Mesirow identified claimant’s many substantial disabilities.

CLAIMANT’S STANDARDIZED TESTING EXPERT

13. Claimant retained Imari Nicoloff, Ph.D., to render opinions regarding whether the assessments administered by IRC were valid. Dr. Nicoloff specializes in standardized testing, helping to standardize and norm psychological tests administered to individuals. As her testimony established, she “tests the tests.” Dr. Nicoloff has received extensive training from the creators of standardized tests, such as Pearson, has performed hundreds of assessments regarding standardized protocols, has provided training regarding administering and scoring standardized tests, and understands the importance of standardized testing. Based upon her review of the test protocols and assessment IRC was ordered to produce, Dr. Nicoloff was critical of many of the tests Dr. Greenwald administered. Dr. Nicoloff’s testimony raised grave concerns regarding the

reliability of Dr. Greenwald's selection of the tests administered, his choice of modules used, his test-giving and scoring methods, and cast serious doubt on his opinions.

Dr. Nicoloff testified that the Vineland II survey forms Dr. Greenwald used to evaluate claimant were in Spanish, something highly unusual because claimant, his parents, and Dr. Greenwald all spoke English. Dr. Nicoloff could think of no conceivable reason why a Spanish language form would have been used. At no time did Dr. Greenwald indicate that he used a Spanish-language form during his evaluation or provide an explanation for his use of this form. Moreover, no evidence was introduced regarding his ability to translate English to Spanish. As Dr. Nicoloff credibly explained, even if he could, because of nuances and subtleties between languages, using a different language test version from the language spoken by the test taker, renders the results invalid.

Additionally, Dr. Nicoloff had other criticisms of how the Vineland II was used. In the lower right-hand corner of the Vineland II survey document, where the raw score information should have been provided, the boxes were all blank. More concerning was how the test scores were calculated. The questions on the survey are broken up by age groups, with each question being scored a 0, 1 or 2, with 2 being the highest score. If answers for the child can be provided in his or her appropriate age group, those answers should be utilized; if not, the test giver drops down to the next lower age group to complete the answers in that section. However, here, Dr. Greenwald recorded answers in several different age group categories, thereby increasing claimant's test score results. Dr. Nicoloff testified that this was improper and something that should not be done based upon the training she received from Pearson, the creators of the Vineland II test.

Dr. Nicoloff was also "very familiar" with the ADOS-2 that Dr. Greenwald administered, having received specific training from that test's creator and having administered it herself "hundreds of times." Dr. Nicoloff did not believe that the ADOS-2

was administered properly to claimant because of the module Dr. Greenwald selected. As claimant's available records clearly documented, claimant has fluid speech. However, Dr. Greenwald administered the ADOS-2 module for phrase speech. Doing this would have inflated claimant's test scores thereby making him appear more capable and less autistic.¹ As both Dr. Nicoloff's testimony and the protocols established, Dr. Greenwald's assertion that ADOS "says nothing about [the test subject] being verbally fluent" was incorrect. Accordingly, Dr. Nicoloff opined that the ADOS-2 scores obtained by Dr. Greenwald were not reliable. Dr. Nicoloff acknowledged that Dr. Mesirov did not perform the ADOS, the "gold standard," explaining that the test refers to itself as the gold standard in its literature but she is not sure who decided that the test is the gold standard. However, even if it is the gold standard, it still needs to be administered appropriately, and Dr. Greenwald did not properly administer it to claimant.

Dr. Nicoloff was also critical of the CARS-2-ST Dr. Greenwald administered because he should have used the HF (high functioning) and not the ST (standard) version given claimant's skill level as documented in his records. Dr. Nicoloff noted that there was sufficient information in the documents to advise Dr. Greenwald of claimant's high functioning levels. Again, because Dr. Greenwald used an "easier version" of the test, the ST, claimant's scores were inflated. Dr. Nicoloff analogized using the ST and not the HF to giving a child who has mastered the alphabet and is just beginning to recognize sight words, a test about the alphabet. As she explained, because the child

¹ IRC misunderstood this testimony to mean that claimant would have scored lower thereby making him less likely to be autistic; however, the "inflated score" testimony meant that his scores were "inflated" in the sense that he actually was autistic but his scores did not demonstrate that fact, as he scored better because the wrong module was administered.

has already mastered the alphabet, he will do really well on an alphabet test; but because the child is just beginning to recognize sight words, he will not perform as well on a sight words test. However, the sight words test is the appropriate one to administer to that child because of the child's skill level. Using a sight words test will accurately record the child's level of development and skills. In this case, because of claimant's high level of functioning, the HF (high functioning) and not the ST (standard) test was the appropriate one to administer. Dr. Nicoloff testified that Dr. Greenwald's use of the ST, the easier test module, improperly inflated claimant's test scores making him appear more capable than what his true scores would show had he been given the HF module of the test.

Dr. Nicoloff was also familiar with the GARS test administered by Dr. Mesirow. She testified that the "Very Likely" scores that claimant received on that test indicated that it was more likely than not that he has autism.

CLAIMANT'S MOTHER'S TESTIMONY

14. Claimant's mother presented as a credible, reliable witness. She testified about claimant's behaviors, conditions, and treatment. She recalled claimant's treating physician telling her years ago, "We know there is something wrong, but we don't know how to help you." She described her frustration seeking treatment for claimant's behaviors and how Ms. Lindley suspected autism. Ms. Lindley referred them for a neuropsychological evaluation and they eventually selected Dr. Mesirow as her schedule was the most convenient.

Claimant's mother also introduced the e-mail she created after Dr. Greenwald's IRC evaluation to document what transpired. That e-mail suggested a less than thorough evaluation was performed. She also described her surprise with Dr. Greenwald's evaluation because he performed it while she was present which affected claimant's responses. For example, her presence resulted in her prompting claimant

during responses which Dr. Greenwald incorrectly recorded as claimant engaging in dialogue. Claimant's mother was also concerned by Dr. Greenwald's use of numerous personal photographs and YouTube videos during the assessment, something she had not experienced before during claimant's other evaluations. She also felt during Dr. Greenwald's evaluation that portions of the tests and questions were being skipped; at other times she was not sure what questions were being asked. Claimant's mother's testimony regarding her observations of Dr. Greenwald's assessment was disconcerting.

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 states:

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 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 intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability, but shall not include other handicapping conditions that are solely physical in nature.

5. 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.
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 qualify for regional center services. Claimant's records, including the neuropsychological evaluation performed by Dr. Mesirow, clearly established that he has autism spectrum disorder that constitutes a substantial disability for him.

There were several concerns raised regarding Dr. Greenwald's assessment and testimony. Despite his downplaying the errors he corrected in his report, those corrections undermined his opinions and supported claimant's assertion that he was careless when performing his evaluation. He also incorrectly assumed, as he wrote in his report, that the GARS was the sole basis for Dr. Mesirow's opinion. As the evidence clearly established, it was but one factor. Dr. Nicoloff's testimony regarding the standardized testing errors established that the test scores Dr. Greenwald obtained were not reliable. As such, IRC's assessment performed by Dr. Greenwald and his opinions were given no weight, for the numerous reasons cited above. The reliable evidence presented at this hearing established that claimant is eligible for regional center services and his appeal shall be granted.

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ORDER

Claimant's appeal from Inland Regional Center's determination that he is not eligible for regional center services and supports is granted. Claimant is eligible for regional center services and supports under the Lanterman Developmental Disabilities Services Act because he has a diagnosis of autistic spectrum disorder that constitutes a substantial disability.

DATED: May 12, 2017

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.