

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,
v.
INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2017040375

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter in San Bernardino, California, on August 22, 2017.

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

Claimant's mother appeared on behalf of claimant, who was not present.

The matter was submitted on August 22, 2017.

ISSUE

Is claimant eligible for regional center services under the Lanterman Act under the category of Autism Spectrum Disorder (autism) or Intellectual Disability?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. On March 21, 2017, IRC notified claimant, a 21-year-old woman, that she was not eligible for regional center services because the records she provided to IRC did not establish that she 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 as an individual with an intellectual disability.

2. On March 27, 2017, claimant, through her mother, filed a fair hearing request appealing IRC's determination.

3. On April 11, 2017, IRC representatives and claimant's mother attended an informal telephonic meeting to discuss claimant's fair hearing request and IRC's eligibility determination. Following the informal meeting, IRC adhered to its original determination that claimant was not eligible for regional center services. IRC sent claimant's mother a letter memorializing their conclusion that stated:

I explained that the records IRC received [show] a history of mental health issues, and that mental health issues do not qualify for regional center services. I also explained that there are notations regarding PDD¹ and Autism, but there are no records or assessments to show how the diagnosis was made. The other issue is that the school district has served [claimant] under Emotional Disturbance and not Autism. I asked if you had any records from the school or other source that shows the testing that was done to determine a

¹ Pervasive Developmental Disorder was a disorder that fell outside the scope of autism under the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders Fourth Edition. When the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders Fifth Edition (DSM-5) updated the DSM-4 in 2013, it eliminated PDD as a disorder. Even prior to the update, a diagnosis of PDD did not qualify a person for regional center services.

diagnosis of PDD NOS or Autism Spectrum Disorder. You stated that you were going to try and find records and send them to me.

4. The matter was originally set for hearing on May 17, 2017. The parties agreed to continue the matter so claimant's mother could search for medical records that supported a diagnosis of PDD or autism.

DIAGNOSTIC CRITERIA FOR AUTISM

5. 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.

DIAGNOSTIC CRITERIA FOR INTELLECTUAL DISABILITY

6. The DSM-5 contains the diagnostic criteria used to diagnose intellectual disability. Intellectual disability is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. Three diagnostic criteria must be met in order to receive a diagnosis of intellectual disability: Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience; deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social

responsibility; and, the onset of these deficits must have occurred during the developmental period. Intellectual functioning is typically measured using intelligence tests. Individuals with an intellectual disability typically have intelligent quotient (IQ) scores at or below the 65-75 range.

The essential features of intellectual disability are deficits in general mental abilities and impairment in everyday adaptive functioning, as compared to an individual's age, gender, and socio-culturally matched peers.

EVIDENCE PRESENTED AT HEARING

7. Paul Greenwald, Ph.D., 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 and intellectual disability under the DSM-5 and the Lanterman Act. Dr. Greenwald testified about his reassessment of claimant. The following is a summary of his testimony.

8. Dr. Greenwald reviewed a 2017 Individualized Education Plan (IEP); an IEP from 2012; a letter from one of claimant's teachers dated April 14, 2014; a letter from Paul Wittenberg, Ph.D., dated March 30, 2014; a neuropsychological report dated July 19, 2011; a psychosocial update dated January 31, 2014; a psychosocial update dated November 21, 2012; an undated annual behavioral health assessment and service plan; an annual behavioral health update and review dated May 17, 2010; a psychiatric evaluation dated January 12, 2012; and various progress notes from Mountain Health and Wellness.

9. Claimant's 2012 IEP showed that her primary eligibility for special education services was under the category of "Emotional Disability" and "Other Health Impairment." Claimant's 2014, IEP showed that her primary eligibility for special education services was under the category of "Emotional Disturbance." The records also reflected that claimant had diagnoses of Bipolar Disorder, Attention Deficit Hyperactivity Disorder (ADHD), and PDD. However, neither IEP stated where those diagnoses originated or what testing was completed and by whom.

10. A March 30, 2016, letter from Paul Wittenberg, Ph.D., stated claimant "was seen in psychotherapy" from age 5 to 10. Dr. Wittenberg characterized her as emotionally unstable, and noted she had a diagnosis of ADHD. Dr. Wittenberg opined that claimant's condition would deteriorate as she grows older. The letter did not state claimant had an intellectual disability or autism. Dr. Greenwald said the letter did not contain anything that showed claimant qualified for regional center services.

11. The 2011 neuropsychological report showed diagnoses of Cognitive Disorder, PDD (current and by history), Bipolar Disorder (by history), ADHD (current and by history), and "educational problems." Dr. Greenwald noted that the battery of tests given to claimant were not tests one would give for autism, nor did anything in the report show claimant had autism. The only test given to assess cognitive abilities was the Wechsler Adult Intelligence Scale- Fourth Edition (WISC-4). Dr. Greenwald said that the WISC 4 is actually for children, so he did not know why the test was described as the test for adults. Nonetheless, claimant's scores on the WISC-4 were varied and not commensurate with a person who suffered from an intellectual disability. Claimant's results also showed she had academic abilities that ranged from the low average to average, which is typically higher than a person with intellectual disability would have. Dr. Greenwald finally explained that a person with ADHD and mental health problems, as well as a person taking powerful psychiatric medications like claimant was taking at

the time, would show scattered scores such as those achieved by claimant. Dr. Greenwald concluded that nothing in the neuropsychological report showed claimant had autism or an intellectual disability.

12. The 2012 psychosocial update showed claimant had diagnoses of autism and Mood Disorder. However, the update did not state where those diagnoses were obtained, how they were obtained, or by whom. It also showed that claimant was hospitalized in ninth grade for a psychotic break, aggressiveness, auditory and visual hallucinations, and temper tantrums. The 2014 psychosocial update was similar to the 2012 update, and showed claimant had diagnoses of autism and Mood Disorder. However, this update also did not state where those diagnoses were obtained, how they were obtained, or by whom. Both updates showed claimant was taking very powerful psychotropic medications designed specifically to combat psychiatric problems. Psychiatric problems do not qualify a person for regional center services.

13. Dr. Greenwald reviewed all the behavioral health records provided and said there was nothing in any of the reports showing claimant had autism or an intellectual disability. To the contrary, the reports showed claimant suffered from emotional issues, serious behavioral issues, and social problems. Dr. Greenwald said that the report stated claimant's biological parents had problems with drugs, alcohol, and anger, and at one point, claimant was removed from the home due to a domestic abuse incident. He said that if claimant experienced such behavior, it could possibly explain some of claimant's social problems.

CLAIMANT'S MOTHER'S TESTIMONY

14. Claimant's mother said claimant has been with her and her husband since she was 10-months old. They adopted claimant when she turned five years old after reunification efforts with claimant's biological parents failed. Claimant's mother said she provided all the medical records she could obtain relating to claimant and that she did

not know who diagnosed claimant with autism or how the diagnosis of autism ended up in claimant's records. She expressed her frustration because she assumes at some point someone must have tested claimant for autism, but she simply does not know who. Claimant's mother's testimony was sincere, contrite and credible. She clearly wants the best for her daughter.

CLAIMANT'S RECORDS

15. A review of claimant's records revealed no testing for autism, and no diagnosis of an intellectual disability. Consistent with Dr. Greenwald's conclusion, claimant's records show a long consistent history of mental health problems.

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 and the standard is a preponderance of the evidence. (Evid. Code, §§ 115, 500.)

STATUTORY AUTHORITY

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

3. 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. (*Ibid.*)

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

(a) "Developmental Disability" means a disability that is attributable to mental retardation², 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."

5. 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.

CONCLUSION

6. The burden was on claimant to establish her eligibility for regional center services. The records submitted by claimant show a history of mental health issues, and contain diagnoses of Bipolar Disorder, ADHD, Mood Disorder, Emotional Disturbance, and Cognitive Disorder, among other things. Although there are a few notations

indicating claimant was diagnosed, by history, with PDD and autism, the records are devoid of any evidence showing testing for PDD or autism. Similarly, as Dr. Greenwald explained, claimant's records do not show she has an intellectual disability. Although her cognitive abilities range from low average to average, the variance among the test results are inconsistent with a person who has an intellectual disability. Dr. Greenwald's expert testimony that claimant did not qualify for regional center services was credible and unrebutted. The records supported his conclusion. Accordingly, claimant is not eligible for regional center services under the Lanterman Act.

ORDER

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

DATED: August 25, 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.