

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. 2017120980

DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California (OAH), heard this matter in San Bernardino, California, on February 1, 2018.

Claimant's mother, represented claimant who was present. A Spanish language interpreter translated the proceedings.

Jennifer Cummings, Program Manager, Fair Hearings and Legal Appeals, represented Inland Regional Center (IRC).

The matter was submitted on February 1, 2018.

ISSUE

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

## FACTUAL FINDINGS

### JURISDICTIONAL MATTERS

1. On November 14, 2017, IRC notified claimant that he was not eligible for regional center services.

2. On December 10, 2017, claimant's mother 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)*, identified 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.

### EVIDENCE PRESENTED AT HEARING

4. Claimant is a nine-year-old male. He asserted he was eligible for services on the basis of autism spectrum disorder. His two siblings have that diagnosis and are regional center clients.

5. Ruth Stacy, Psy.D., is a staff psychologist at IRC who conducts assessments to determine eligibility. She reviewed the records introduced at this hearing, as well as the additional records claimant produced at the hearing, and explained why she did not

find claimant eligible for regional center services. Her testimony was credible, persuasive, and supported by the records.

6. Dr. Stacy explained that claimant first applied for IRC services in 2013. A social assessment was performed and he was scheduled to undergo a medical/psychological evaluation but he did not follow up with that evaluation. After that evaluation was rescheduled twice, and IRC's efforts to contact claimant were unsuccessful as the phone numbers on file were disconnected, his case was inactivated. In 2017, claimant's mother contacted IRC and requested the matter be reactivated. She supplied new information in support of the claim for eligibility. Dr. Stacy testified that the new records did not warrant IRC performing an assessment and demonstrated that claimant was not eligible for services. Dr. Stacy testified about the various records that supported her opinion.

7. A September 21, 2012, Psychoeducational Study performed by claimant's school district when he was three years, 11 months old, was done when claimant's mother expressed concern about his "difficulties with speaking." The areas of suspected disability were speech and language impairment, intellectual disability and autistic-like behaviors. The assessments administered were the Developmental Assessment of Young Children Cognitive Subtest; Play-Based Assessment; Gilliam Autism Rating Scale - Second Edition (GARS-2) (which was completed through an interview with claimant's mother); Vineland Adaptive Behavior Scales, Second Edition; and a parent interview. The Cognitive Subtest revealed a score that was significantly below average. During the Play-Based Assessment claimant had difficulty following directions although he was observed smiling and waving. On the GARS-2, claimant's mother's responses resulted in a probability of autism score of "very likely" but the report noted that claimant has older siblings at home who were autistic and he may simply be imitating their behavior. Claimant scored in the low range of adaptive behavior on the Vineland. The Speech and Language Assessment portion of Psychoeducational Study noted that claimant "was a

cute little boy who was interested in the toys and manipulatives. He pretended to blow a toy horn and to comb his hair. [Claimant] clapped to show enjoyment. He was very active and went quickly from one toy to another." The evaluator noted that it was difficult to get his attention back to the task and he had "primary language" with an interpreter being used for the assessment.

The summary portion of the Psychoeducational Study noted that although claimant's cognitive subtest was significantly below average, it was negatively impacted by his limited language, attention span, and imaginary play skills. The report contained the following: "Additional cognitive assessments should be conducted in the future as [claimant] grows older, in an effort to substantiate or to gain a more accurate cognitive score." Claimant exhibited a significant disorder in the areas of receptive and expressive language. At that time, claimant did appear to meet the criteria for intellectual disability, but it was difficult to determine if his autistic-like behaviors that his mother reported were due to his exposure to his siblings, and the assessor deferred eligibility based on autistic-like behaviors until claimant could be exposed to a structured, academic setting.

Dr. Stacy testified that the Play-Based Assessment summary in the report would cut against an autism diagnosis as it documented claimant's possession of social reciprocal skills that are not typical of individuals with autism. She also testified that her review of the report noted that the claimant would be receiving special education services due to intellectual disability and speech and language delays, with a note that it was unclear how valid the cognitive tests were given his language delays.

8. A January 31, 2013, Individualized Education Plan (IEP) noted that claimant's primary disability for services was intellectual disability and his secondary disability was speech and language impairment.

9. IRC's June 20, 2013, Social Assessment noted that communication was an area of significant need for claimant. He primarily communicated through gestures. He became easily distracted and had difficulty following directions or commands, requiring

constant redirection. His mother reported hyperactivity and difficulty staying on task. She reported that claimant was very curious and acted "without measuring the possible dangers." He was not aggressive. He was generally happy and sweet, but when frustrated he could become so mad that he "bites himself hard making marks on his lips or body." He would also throw things when upset. During the interview, claimant was observed to babble or use words that did not necessarily identify the objects he wanted or was using. He was also observed to hum children's songs and was very happy while doing this. His mother reported that he plays well with his siblings and other children. He can play with other children but gets mad when they take his things and will leave the group. He can mimic behaviors like dancing or actions, but he does not mimic words. His mother also reported that he will line up his toys and become upset if his siblings mess up his organization of toys.

Dr. Stacy testified that her review of this assessment demonstrated that claimant was able to play with others, got mad when they took his toys and would quit playing in the group, which demonstrated a social reciprocity and social awareness that is not indicative of autism. He also used gestures to communicate and became frustrated when he was unable to communicate, again behaviors that would contradict a diagnosis of autism. Dr. Stacy testified that lining up toys is not, in and of itself, indicative of autism.

10. Claimant's April 19, 2017, IEP documented that his primary disability for special education services was "speech or language impairment" and his secondary disability was "none." The IEP noted that over time, with additional assessments and observations, the school district had ruled out intellectual disability and had no concerns that claimant was displaying autistic-like behaviors. In the social/emotional/behavioral portion of the report, the following was noted: "[Claimant] follows all classroom and playground rules. [Claimant] is well-liked by everyone. He is respectful to adults. [Claimant] plays on the playground with general [education] students." Dr. Stacy

explained that this finding would argue against an autism diagnosis because claimant is exhibiting social skills that are not seen in individuals who have autism. In addition, the health section of the IEP noted that claimant takes medication for attention deficit hyperactivity disorder (ADHD) which Dr. Stacy testified was noted throughout all of the records and that children with that diagnosis will have impaired social skills because of their hyperactivity and inattention.

Dr. Stacy testified that eligibility for special education services are contained within Title 5 of the regulations, which are much "looser" than the Title 17 regulations that control regional center eligibility for services. She explained that even though it is easier for school districts to provide services under an autism eligibility finding, claimant's school district did not find him to qualify under that category, lending further support to her opinion that he does not have autism spectrum disorder. Dr. Stacy testified that there was no indication in the 2017 IEP that autism was even an issue for claimant.

11. An August 28, 2017, Riverside University Health System Behavioral Health Initial Assessment/Care Plan noted that claimant was diagnosed with ADHD, combined type and Pervasive Developmental Disorder (PDD), unspecified. Dr. Stacy testified that PDD is a diagnosis given when individuals display characteristics of autism but do not exhibit enough characteristics to lead to a diagnosis of autism spectrum disorder. The report further noted that "[Claimant] symptoms of inattention, hyperactivity-impulsivity, often makes mistakes in school, difficulty sustaining attention in tasks, easily distracted, disruptive behavior, explosive irritation, impulsive, does not seem to listen when spoken to directly, difficulty organizing tasks and avoids tasks that require sustained mental effort, impair family and academic functioning [*sic*]." Dr. Stacy testified that these are classic symptoms of ADHD, but nothing in that description would support a diagnosis of autism spectrum disorder or PDD.

12. At the hearing claimant produced a May 25, 2017, Riverside University Health System-Behavioral Health Treatment Extension/Change Request that contained a diagnosis of ADHD and autistic disorder. The document noted goals to eliminate biting himself and anger outbursts and to work on building communication skills. Dr. Stacy testified that there was nothing in the document to indicate that any testing had been performed to reach an autistic disorder diagnosis and nothing in the document changed Dr. Stacy's opinions. In addition, although no one discussed it at the hearing, the document noted that claimant was currently not taking any medications, which would contradict his April 2017 IEP and the July 25, 2017, report noted below in Factual Finding 13, that noted he was taking Adderall, calling the accuracy of this report into question. Alternatively, if he were not taking his medication, his ADHD symptoms would not be under control.

13. At the hearing claimant produced a July 25, 2017, Riverside University Health System Behavioral Health Initial Assessment/Care Plan that contained a diagnosis of ADHD and autism spectrum disorder with accompanying language impairment. The "Presenting Problems Clinical Symptomatology" were:

Often fails to give attention to details, difficulty sustaining attention, does not seem to listen when spoken to directly, does not follow through on instructions, fails to finish work, difficulty organizing tasks/activities, reluctant to engage in task that requires mental effort, loses things necessary for task, easily distracted by extraneous stimuli, forgetful in daily activities; taps hands, leaves seat in situation when remaining seating is expected, often "on the go," blurts out an answers [*sic*], difficulty waiting his turn, interrupts others; deficit and nonverbal communicative behavior (speech difficulties),

deficits in developing, maintaining, understanding relationships, repetitive motor movements, insisted on inflexible routines, explosive irritation (with verbal aggression or tantrums). All over 6 months duration.

The document noted that claimant takes 5 mg of Adderall once a day. He was in a third grade special education class and was performing "below average." His strengths were his curiosity with his toys and his love for his siblings. Again, Dr. Stacy testified that there was no testing noted in the document to support the autism spectrum disorder diagnosis and the symptoms described supported the ADHD diagnosis, not an autism diagnosis.

14. At the hearing claimant produced a November 16, 2017, Speech/Language Evaluation performed by claimant's school district. The report noted:

[Claimant] was attentive and cooperated well during testing. He indicated that he speaks Spanish to both of his parents and he speaks English to his siblings and friends in the neighborhood and school. [Claimant] watches television in both languages. English is the language of his academic instruction. He indicated that preferred [sic] to speak English and demonstrated this as all of his spontaneous communication with the examiner was conducted in English. When the examiner spoke to [claimant] in Spanish, he tried responding in Spanish but after two words or so he would switch over to English.

The testing demonstrated that English is now claimant's dominant language. He demonstrated a strong preference for English. His receptive vocabulary skills were within



normal limits. He worked with consistent effort and was compliant to all requests. He responded to praise for his efforts by smiling and readily beginning new tasks. Expressive language was an area of concern and he had difficulty with articulation. The Pragmatics/Observations section of the report stated:

[Claimant] was observed in his classroom during poem presentation time. He sat quietly during the other student's turns, and he clapped for every person. He told a few of the students, "you can do it," and he was so encouraging to everyone. When it was his turn to present his poem, he stood with confidence in front of the classroom. He presented with great eye contact and a loud voice, he knew his entire poem, and he was the only one in his class to earn an 0+ (Outstanding) on his presentation.

[Claimant] is a helpful and kind student. He interacts with his peers, and he is included in activities and games. He is respectful of the school rules and of his teachers and peers. Pragmatics is not an area of concern.

The report concluded that claimant met specific eligibility criteria for speech/language impairment in the areas articulation, expressive language, and receptive language pursuant to Title 5 regulations.

15. Claimant also produced a December 15, 2017, Behavioral Observations/Interviews Assessment completed by his school district as part of his triennial evaluation. The section of the report, entitled Previous Assessments, documented various testing performed. A March 2015 Psychoeducational Assessment resulted in Intellectual Disability being removed as claimant's primary disability for

services and a finding that he was eligible to continue receiving special education services for Speech and Language Impairment. Dr. Stacy noted that the reports of the scores from the various cognitive testing performed indicated that claimant scored above the Intellectual Disability range and had a great variance in some of his subtests. Claimant's scores on the Childhood Autism Rating Scale 2 Standard Version Test indicated "minimal to no symptoms level of behaviors related to autism spectrum disorder [*sic*]." His scores on the Social Responsiveness Scale - Second Edition demonstrated that claimant "**does not** demonstrate behaviors which are generally associated with clinically significant autism spectrum disorders." (Emphasis in original.) Dr. Stacy testified that claimant's Vineland Adaptive Behavior scores were in the adequate range with his socialization domain falling within the above average range demonstrating that he has overall good social skills.

The report contained a lengthy observations discussion that Dr. Stacy testified demonstrated that claimant has good social skills, is friendly, has a good social awareness and has no behavioral issues in the classroom. Dr. Stacy explained that those findings would cut against a diagnosis of autism spectrum disorder. In addition, the summary section of the report noted that claimant did not have a significant discrepancy between his intellectual disability and his academic achievement, which indicated that he "did not meet the testing component of the eligibility criteria for the state of California as a student with a Specific Learning Disability." He did not have deficits in his adaptive behavior and therefore he "did not meet the criteria according to the California Education Code for Intellectual Disability." In addition, he did not demonstrate autistic-like behaviors that might impede his ability to learn either through testing or during observations and interviews, displaying typical social interactions with both peers and adults. Therefore, he "did not meet the criteria for the category of characteristics of autism according to the California Education Code." Claimant also did not meet the criteria for Other Health Impairment. As a result, "[claimant] may not

require special education services. His cooperative behavior and other factors suggest that the testing results are reliable and valid.” Dr. Stacy testified that this report further supported her opinion that claimant does not have autism.

16. Claimant’s mother testified about her son’s condition, explaining that he is “in his own world” and she often has to call out to him repeatedly to get his attention. He will walk ahead, he plays with his hands, and he ignores the entire world. He is always holding his hand up and smelling it, even though his hand is clean. In a store, he will pace back and forth, and when she calls to him he does not listen. Her testimony was credible and sincere. However, it did not establish eligibility for regional center services. Moreover, her description was at odds with the reports of the school officials who described a well-behaved student who was social and well-liked by peers.

## LEGAL CONCLUSIONS

### BURDEN AND STANDARD 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 of proof 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 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. 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,<sup>1</sup> 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

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<sup>1</sup> The regulations still use the term "mental retardation," instead of the term "Intellectual Disability."

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. None of the documents introduced in this hearing demonstrated that claimant has a diagnosis of autistic spectrum disorder. Although claimant does have ADHD and impaired speech and language, those are not qualifying diagnoses. Even though claimant's initial school records noted that his mother reported autistic-like behaviors, the school never qualified claimant for special education services based on that category. Even if it had, a school providing services to a student under an autism disability is insufficient to establish eligibility for regional center services. Schools are governed by California Code of Regulations, Title 5 and regional centers are governed by California Code of Regulations, Title 17. Title 17 eligibility requirements for services are much more stringent than those of Title 5.

Moreover, the Riverside University documents that did contain a "diagnosis" of autism spectrum disorder contained no testing or explanation to support that "diagnosis." There was also no explanation given for the discrepancy between claimant's behavior as reported by his mother and his behavior as documented in his school records, and it was not established that Riverside University was provided with claimant's school records, calling into question the "diagnoses" listed therein. At this hearing claimant sat quietly and was attentive to the proceedings. His behavior was



more akin to that as reflected in his school records and not that as reported by his mother in the Riverside University records, calling them even further into question.

Claimant had the burden of establishing his eligibility for regional center services. As claimant introduced no reliable evidence demonstrating that he was eligible to receive regional center services, his appeal of IRC's determination that he was ineligible to receive services must be denied.

## ORDER

Claimant's appeal from Inland Regional Center's determination that he is not eligible for regional center services and supports is denied. Claimant is ineligible for regional center services and supports under the Lanterman Developmental Disabilities Services Act.

DATED: February 14, 2018

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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.**