

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2018030749

DECISION

On November 14, 2018, Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California.

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

Claimant is eight years old and is represented by his mother. No one appeared at the hearing on claimant's behalf.

Oral and documentary evidence was introduced, and the matter was submitted on November 14, 2018.

ISSUE

Is claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) on the basis of a diagnosis of autism spectrum disorder (ASD)?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. On March 1, 2018, IRC notified claimant that he was not eligible for regional center services based on a review of his records because he does not have a disability that qualifies him to receive such services.

2. On March 14, 2018, claimant's mother filed a fair hearing request (request) appealing IRC's decision. The request challenged IRC's determination that claimant was not eligible for regional center services based on a substantial handicap as a result of ASD. The Request asserted that claimant was eligible for regional center services and that claimant "has autism."

3. This matter was set for hearing on October 9, 2018, at 10:00 a.m. The Notice of Hearing was mailed to the address provided by claimant's mother in the Request for Fair Hearing form filed with IRC.

4. On September 18, 2018, an Order Granting Continuance of the Hearing was issued based upon claimant's request due to a family emergency causing claimant's representative to be out of town for several weeks. The order set the hearing date for November 14, 2018, at 10:00 a.m. The order was mailed to the address provided by claimant's mother in the Request for Fair Hearing form.

5. On November 14, 2018, Administrative Law Judge Debra D. Nye-Perkins called the case for hearing. Ms. Zermeño represented IRC. No one appeared at the hearing on behalf of claimant. After waiting 30 minutes beyond the time when the hearing was set to commence, the case was heard without a representative for claimant present.

6. The burden rests on claimant to establish by a preponderance of the evidence that he suffers from a qualifying, substantial developmental disability. (Evid. Code, § 115.) By failing to appear, claimant failed to establish his eligibility.

7. Additionally, the burden is on claimant to diligently prosecute his appeal/fair hearing request. Claimant and his representative were properly notified of the date, time and place of hearing and failed to appear for the hearing. Consequently, claimant is deemed to have abandoned his appeal/fair hearing request. Despite claimant's failure to appear at the hearing, IRC presented evidence at the hearing regarding its denial of claimant's request for services.

DIAGNOSTIC CRITERIA FOR ASD

8. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5) identifies criteria for the diagnosis of ASD. 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 ASD to qualify for regional center services under autism.

TESTIMONY OF SANDRA BROOKS, PH.D.

9. Dr. Sandra Brooks received her Ph.D. in Clinical Psychology from Loma Linda University in 2006. Dr. Brooks has worked as a staff psychologist at IRC for about 11 years. Her duties include reviewing records and conducting evaluations to assist the multidisciplinary team to determine if potential clients are eligible for service.

10. Dr. Brooks reviewed claimant's records in this matter and also conducted an in-person assessment of claimant on August 16, 2018. Dr. Brooks explained that in order to be eligible for regional center services under the Lanterman Act, claimant must have a developmental disability of autism, epilepsy, cerebral palsy, intellectual disability,

or a disabling condition found to be closely related to intellectual disability or to require treatment similar to that for individuals with an intellectual disability (fifth category) originating before claimant attains 18 years of age and that continues, or is expected to continue, indefinitely and constitutes a substantial disability for claimant. Dr. Brooks explained that in order to determine whether a diagnosis of a developmental disability is substantially handicapping so as to qualify for services from IRC, there must be significant functional limitations in at least three of the seven life activities listed in California Code of Regulations, section 54001, which are "self-care," "receptive and expressive language," "learning," "mobility," "self-direction," "capacity for independent living," and "economic self-sufficiency." She stated that because claimant is only eight years old, the life activities "capacity for independent living" and "economic self-sufficiency," do not apply.

11. Dr. Brooks testified that ASD is a developmental disability with typical symptoms including repetitive behaviors, sensory issues, and communication problems, and is diagnosed through use of criteria as outlined in the DSM-5. Additionally, she stated that Attention Deficit Hyperactivity Disorder (ADHD) is a disorder involving deficits in attention, or hyperactivity, or both. ADHD is not a qualifying diagnosis to receive regional center services.

12. As part of her assessment of claimant, Dr. Brooks reviewed an Individualized Education Program (IEP) dated February 3, 2017, from the Moreno Valley Unified School District where claimant attended school. She testified that the IEP document indicated claimant received special education services under the categories of specific learning disability and speech and language impairment, but not under a diagnosis of autism. Dr. Brooks noted the IEP document showed the school district made a team determination that claimant was not eligible for special education services under the category of autism "as behavioral indicators suggestive of autism are mild (if

present at all) within the school environment.” Dr. Brooks explained that the school district criteria for providing special education services for autism are far less strict than the criteria for receiving services from the regional center because the school district could provide special education services if claimant displayed “autistic-like” behaviors, i.e., it is not necessary that the child meet the full criteria for a diagnosis of autism. Even in light of those more relaxed standards the school district did not find claimant eligible for special education services under a category of autism.

13. Also, Dr. Brooks reviewed a Psychoeducational Report from the Moreno Valley Unified School District which was prepared in connection with an evaluation of claimant on October 17, 2017. Dr. Brooks stated that this report also supports IRC’s conclusion that claimant is not eligible for services under a diagnosis of autism. Specifically, evaluators noted claimant’s teachers believed he did not need special education services and his behavior was equivalent to that of his peers. The evaluators also found claimant to be animated and expressive in speech, which are characteristics inconsistent with a diagnosis of ASD. Dr. Brooks noted that the evaluators administered the Autism Diagnostic Observation Schedule 2 (ADOS-2) test to claimant and the results showed he fell at the cut-off limit for ASD but was not clearly autistic. Dr. Brooks noted that the evaluator stated that claimant was rushing through tasks because he was distracted by food, which likely indicates claimant was distracted. As a result, the evaluators felt that the ADOS-2 was not accurate, particularly because claimant fit into the school environment. Additionally, the Autism Spectrum Rating Scales (ASRS) given by the evaluators to claimant’s teacher showed claimant falls in the average range, and he did not demonstrate behaviors characteristic of autism in the classroom. The evaluators concluded that claimant did not meet the diagnostic criteria for autism.

14. Dr. Brooks further testified she reviewed medical records from Brad Strumwasser, M.D., a developmental pediatrician, regarding claimant, as well as records

from Virginia Sullivan, Ph.D., a psychologist, who performed her own evaluation of claimant and reported her results to Dr. Strumwasser. Dr. Strumwasser made his own observations of claimant. Dr. Brooks noted Dr. Strumwasser observed claimant playing with his toys, responding to his father by seeking eye contact, responding to directions and his name, and not demonstrating any ticks or other unusual behavior. Dr. Brooks noted that those behaviors were inconsistent with a diagnosis of autism. Dr. Brooks also stated that Dr. Sullivan evaluated claimant using the ADOS-2, the Childhood Autism Rating Scale, Second edition (CARS-2), and the Kaufman Brief Intelligence Test Second Edition (KBIT-2). The results of those tests indicated claimant did not have a diagnosis of autism. Additionally, the results of the KBIT-2 show that claimant has an intelligence quotient (IQ) in the low average range. A medical report from 2017 from Dr. Strumwasser showed a summary of observations made by Dr. Strumwasser in a chart form compared to reports from claimant's parents. Dr. Brooks noted that the chart showed a substantial difference between what the parents reported and what Dr. Strumwasser observed. The impressions given by Dr. Strumwasser in his report were: "anxiety, sleeping difficulties, autism spectrum disorder." Dr. Brooks testified she disagreed with Dr. Strumwasser's conclusion that claimant should be diagnosed with ASD because the diagnosis was contrary to the findings of Dr. Sullivan and contrary to Dr. Strumwasser's earlier observations.

15. Dr. Brooks also reviewed prior assessments performed on claimant by IRC for a determination of eligibility for services. She stated claimant participated in the Early Start program at IRC and was re-evaluated at age two on November 14, 2012, by Dr. Brooks, who found him to no longer be eligible for services under any diagnosis. Dr. Brooks stated she reviewed medical records and documents at that time to make that determination. Additionally, Dr. Brooks reviewed an assessment dated February 28, 2017, completed by Dr. Ruth Stacy, a psychologist at IRC, for a determination of whether

claimant was eligible for regional center services. She noted that Dr. Stacy only reviewed documents for her determination that claimant was not eligible for services. However, the documents Dr. Stacy reviewed were an October 17, 2016, psycho-evaluation assessment where claimant was tested for ASD but did not meet the criteria for that diagnosis and documents from his school reflecting that he did not qualify for special education services under the category of autism.

16. Dr. Brooks conducted her own assessment of claimant on August 16, 2018, in order to determine claimant's eligibility for regional center services. Dr. Brooks administered to claimant the ADOS-2, the CARS-2, and the Vineland Adaptive Behavior Scales Third Edition (Vineland) as part of her evaluation; she also interviewed claimant's parents and observed claimant. Dr. Brooks testified that the results of the Vineland showed that claimant had adaptive skills in the moderately low to borderline range, which does not reflect a substantial deficit in adaptive functioning. Additionally, the results of the ADOS-2 and CARS-2 tests, as well as Dr. Brooks's observations, show that claimant does not have autism. Dr. Brooks's diagnostic impressions were that ADHD should be ruled out as claimant is easily distracted, and a language disorder should also be ruled out. However, neither of those conditions would qualify claimant for regional center services. Dr. Brooks testified that her review of all the records and her own assessment show that claimant does not meet eligibility criteria for regional center services under any diagnosis, particularly not autism, and he that has no substantially disabling condition as a result of any such diagnosis.

LEGAL CONCLUSIONS

THE BURDEN AND STANDARD OF PROOF

1. In a proceeding to determine whether an individual is eligible for regional center services, the burden of proof is on the claimant to establish that he or she has a

qualifying diagnosis. The standard of proof required is preponderance of the evidence. (Evid. Code, § 115.)

2. A preponderance of the evidence means that the evidence on one side outweighs or is more than the evidence on the other side, not necessarily in number of witnesses or quantity, but in its persuasive effect on those to whom it is addressed. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

THE LANTERMAN ACT

3. Pursuant to the Lanterman Act (Welf. & Inst. Code, § 4500, et seq.), the State of California accepts responsibility for persons with developmental disabilities. The purpose of the Act is to rectify the problem of inadequate treatment and services for the developmentally disabled and to enable developmentally disabled individuals to lead independent and productive lives in the least restrictive setting possible. (Welf. & Inst. Code, §§ 4501, 4502; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) The Lanterman Act is a remedial statute; as such it must be interpreted broadly. (*California State Restaurant Association v. Whitlow* (1976) 58 Cal.App.3d 340, 347.)

4. An applicant is eligible for services under the Lanterman Act if he or she can establish that he or she is suffering from a substantial disability that is attributable to intellectual disability, cerebral palsy, epilepsy, autism, or what is referred to as the fifth category – a disabling condition closely related to intellectual disability or requiring treatment similar to that required for intellectually disabled individuals. (Welf. & Inst. Code, § 4512, subd. (a).) A qualifying condition must also start before the age 18 and be expected to continue indefinitely. (Welf. & Inst. Code, § 4512.)

5. California Code of Regulations, title 17, section 54000, also defines “developmental disability” and the nature of the disability that must be present before an individual is found eligible for regional center services. It states:

(a) Developmental Disability means a disability that is attributable to mental retardation¹, 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

¹ 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.

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. A regional center is required to perform initial intake and assessment services for "any person believed to have a developmental disability." (Welf. & Inst. Code, § 4642.) "Assessment may include collection and review of available historical diagnostic data, provision or procurement of necessary tests and evaluations, and summarization of developmental levels and service needs...." (Welf. & Inst. Code, § 4643, subd. (a).) To determine if an individual has a qualifying developmental disability, "the regional center may consider evaluations and tests ... that have been performed by, and are available from, other sources." (Welf. & Inst. Code, § 4643, subd. (b).)

7. California Code of Regulations, title 5, section 3030, provides the eligibility criteria for special education services required under the California Education Code. The criteria for special education eligibility are not the same as the eligibility criteria for regional center services found in the Lanterman Act. That a school providing services to

a student under an autism disability is insufficient to establish eligibility for regional center services. 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.

8. Welfare and Institutions Code section 4512, subdivision (l), provides:

Substantial disability” means the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

- (1) Self-care.
- (2) Receptive and expressive language.
- (3) Learning.
- (4) Mobility.
- (5) Self-direction.
- (6) Capacity for independent living.
- (7) Economic self-sufficiency.

Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.

California Code of Regulations, title 17, section 54001, subdivision (a), also defines “substantial disability” and requires “the existence of significant functional

limitations, as determined by the regional center, in three or more of the ... areas of major life activity" listed above.

EVALUATION

9. The information contained in claimant's records reviewed by IRC, as well as Dr. Brooks's evaluation of claimant, did not show by a preponderance of the evidence that claimant suffers from a qualifying developmental disability, including ASD. Claimant failed to appear and present any evidence to support his contention that he is eligible for regional center services. The evidence presented by IRC established that claimant does not have a condition that makes him eligible for regional center services. Therefore, claimant failed to meet his burden of proof to establish that he is eligible to receive services under the Lanterman Act based on any substantially disabling diagnosis, particularly ASD.

ORDER

Claimant's appeal from IRC's determination that he is not eligible for regional center services and supports is denied.

DATED: November 29, 2018

DEBRA D. NYE-PERKINS

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.