BEFORE THE
OFFICE OF ADMINSITRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

And

INLAND REGIONAL CENTER, Service Agency

OAH No. 2018120916

DECISION

Alan R. Alvord, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on August 19 and October 5, 2020, by video conference due to the ongoing public health emergency.

Keri Neal, Fair Hearing Representative, Inland Regional Center, represented the service agency.

Mark Woodsmall, Esq., Woodsmall Law Group, represented claimant.

Oral and documentary evidence was received. The record was held open at the parties' request to submit closing briefs. The record was closed and the matter submitted for decision on October 23, 2020.

ISSUES AND SUMMARY

Does claimant qualify for regional center services under the categories of autism spectrum disorder and/or epilepsy?

Based on the evidence presented, claimant qualifies for regional center services based on autism spectrum disorder. The evidence did not support a finding of eligibility based on epilepsy.

FACTUAL FINDINGS

Background

1. Claimant is a 14-year-old female. This is her second request to be eligible for regional center services.

PREVIOUS REQUEST FOR SERVICES

2. Claimant's mother (mother) sought regional center services for claimant in 2017. The service agency conducted a records review and a psychological assessment, then denied her application. Claimant appealed that decision. The Office of Administrative Hearings conducted the hearing on June 5, 2017. At that hearing, claimant's mother requested a continuance because she had not yet retained an attorney. The administrative law judge denied the continuance request as untimely. The administrative law judge gave claimant's mother time to prepare for the hearing that day, and the hearing went forward. OAH issued a decision finding that claimant did not meet her burden of proving she qualified for regional center services and denied the appeal.

CURRENT REQUEST FOR SERVICES

3. Claimant again requested regional center services on September 1, 2018, based on new information, and asserted eligibility based on autism spectrum disorder and epilepsy. The service agency issued its notice of proposed action denying eligibility on November 9, 2018. Claimant filed a request for fair hearing on December 8, 2018. This hearing followed that request after several continuances were granted for good cause.

Diagnostic Criteria and Eligibility Requirements Based on Autism Spectrum Disorder

4. 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 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 this category.

5. In addition to an autism spectrum disorder diagnosis, regional center eligibility requires evidence of a substantial disability, defined in regulations as a major impairment in cognitive and/or social functioning and significant functional limitations in three or more areas of major life activity.

Claimant's Family and Medical History

6. Claimant's biological mother gave birth to her at age 16 with no documented prenatal care. At the age of one and one-half, claimant went to live with the family that adopted her at age four. She began displaying behavior problems and difficulties with school at six years old. She has been seen by mental health professionals since age six. She carries diagnoses of autism spectrum disorder, attention deficit hyperactivity disorder (ADHD), disruptive behavior disorder NOS, anxiety disorder NOS, and trichotillomania (compulsive hair-pulling).

7. Claimant began having seizures in 2017. Mother reports that claimant often falls when she has seizures. She has broken her ankles or been in a cast more than 20 times. She is currently being evaluated by a neurologist for epilepsy. As of the date of the hearing in this case, claimant had an appointment scheduled for overnight seizure assessment.

Educational and Psychological Evaluations

8. In March of 2012, when claimant was six years old, Wylie Center for Children, Youth & Families issued a letter stating that claimant had been seen in the clinic for nine sessions. She displayed physically aggressive behavior (hitting, kicking, biting, and spitting). She was non-compliant with directives when she began at the clinic. She was diagnosed with disruptive behavior disorder. The clinic established goals to decrease physical and verbal aggression and non-compliance. The therapist noted that claimant showed aversion to various textures and sounds, rocking, avoiding eye contact, difficulty with transitions, and that she "likes to be squeezed hard." The clinic referred claimant to Inland Regional Center for an autism spectrum disorder

evaluation. At the present hearing, there was no evidence concerning the outcome of that referral.

9. In May 2016, a staff psychiatrist at the county department of mental health indicated psychiatric diagnoses of ADHD disruptive behavior disorder NOS, trichotillomania, and anxiety disorder NOS. The psychiatrist also recommended further testing for an autism spectrum disorder.

10. Claimant was diagnosed in 2016 (at 10 years old) with autism spectrum disorder. After that diagnosis, the family's health insurance approved coverage for applied behavioral analysis (ABA) training. She began receiving ABA services in August 2016, and continues to receive, and benefit from, ABA services. Victor Cordova, Psy.D., and Timothy Gunn, Psy.D., issued the 2016 assessment.

Drs. Cordova and Gunn used the Autism Diagnostic Observation Schedule (ADOS-2), module 3, and the Gilliam Asperger's Disorder Scale (GADS), among other measures. Claimant's score on the ADOS-2 placed her on the low end of the autism spectrum range. The GADS score, based on parent report, identified a high probability for Asperger's disorder. What was previously known as Asperger's disorder is now included within autism spectrum disorder. The evaluators did not assess claimant's adaptive skills.

11. At age 11, in 2017, the school district performed a comprehensive psychoeducational evaluation that included a review of records, family, medical, developmental, and educational histories, interviews with parent, teacher, and claimant, cognitive, achievement, language, adaptive behavior, autism spectrum disorder, social and emotional assessments. Claimant's cognitive/intellectual function was in the low-average range. Adaptive skills measured in the low-average to average

range. There was a discrepancy between the parent report of claimant's adaptive skills and the teacher's report. Parent reported claimant's adaptive skills in the low range. Teacher's report placed her adaptive abilities in the low average range. The report also showed a discrepancy between the parent and teacher scores on the Gilliam Autism Rating Scale (GARS-3). Teacher's evaluation was scored as "autism unlikely" and mother's was scored as "autism very likely."

The evaluator concluded "[a]lthough [claimant] has a diagnosis of Autism, her behaviors and academic progress do not appear to be impacted by Autism. It appears that many of the behaviors that are impacting [claimant's] educational performance are due to Emotional Disturbance." The evaluator determined that claimant was not eligible for special education services based on autism spectrum disorder but was eligible based on emotional disturbance.

12. In March 2017, at age 11, the service agency evaluated claimant for eligibility. Ruth Stacy, Psy.D., staff psychologist at Inland Regional Center, conducted a psychological assessment that included a records review, interviews with claimant and her mother, and psychological testing. In this evaluation, the ADOS-2, module 3, measured claimant as "Non-Spectrum." Dr. Stacy used the Vineland Adaptive Behavior Scales - Third Edition (Vineland-3) to assess claimant's adaptive skills. Her composite score was measured in the moderately low range.

Dr. Stacy summarized her diagnostic impressions: ADHD, disruptive behavior disorder NOS, trichotillomania, anxiety disorder NOS. She concluded claimant did not qualify for regional center services. The service agency multi-disciplinary eligibility team agreed, and claimant was deemed ineligible for regional center services. Claimant's mother appealed this decision. The outcome of that case is discussed above.

13. In February 2018 the school district's individualized education plan (IEP) team met and reviewed claimant's history and assessments. The team concluded that, although she presents with features of autism spectrum disorder and emotional disturbance, autism spectrum disorder was the primary factor. The report noted that the emotional issues claimant has can be attributed to ADHD, seizures, and being on the autism spectrum rather than a true emotional disturbance.

14. Aaron Smith, Psy.D., issued an independent educational evaluation report in February 2018 based on assessments conducted over two days in October 2017. Dr. Smith administered the ADOS-2, module 3, among other instruments. Claimant's results did not meet diagnostic criteria for autism spectrum disorder. Dr. Smith noted that claimant did not engage in spontaneous imaginative play and seemed embarrassed to play with the toys. He also noted symptoms and concerns of autism spectrum disorder.

15. In 2019, Dr. Cordova (one of the doctors who evaluated claimant in 2016) again evaluated claimant. The battery of tests Dr. Cordova used included the ADOS-2, module 4. Dr. Cordova concluded that claimant met the DSM-5 diagnostic criteria for autism spectrum disorder.

Applied Behavioral Analysis Services

16. After she was diagnosed with autism spectrum disorder, claimant began receiving ABA services. In February 2017, the ABA provider issued a report identifying target behaviors and goals. The report shows targeted behaviors and measured baseline function. The target behaviors included responding to name with eye contact (baseline 30 percent), following compliance related directives (baseline 10 percent), tolerating unexpected changes (baseline 10 percent), responding to greetings

(baseline 30 percent), initiating greetings with others (baseline 10 percent), toileting (baseline 75 percent), self-care brushing teeth and hand washing (baseline 30 percent). The goals were set for compliance at 90 percent across multiple sessions with different family and staff.

Reconciling the Evidence

AUTISM SPECTRUM DISORDER

17. The record shows significant evidence of behaviors and challenges that are consistent with characteristics of autism spectrum disorder. From the age of six, claimant had difficulty with transitions, isolated from others, was averse to various textures and sounds, avoided eye contact, and liked to be squeezed. The records show signs of rocking from an early age. She has received clinical diagnoses of autism spectrum disorder on at least three occasions. Once from her school district and twice from independent clinical assessments. Other assessments did not lead to the autism spectrum diagnosis but noted autistic-like behaviors.

18. One school district in 2017 conducted an assessment and concluded her behaviors that impact academic performance are due to emotional disturbance. Another school district in 2018 reached the opposite conclusion – her emotional problems are more related to autism spectrum disorder than emotional disturbance. Two psychological reports found she is not on the spectrum, two reports found that she is. These disparities highlight the difficulty even highly trained professionals have in finding a single cause of troubling behaviors when there can be multiple clinical explanations. One stark example of this arises with various clinical professionals' interpretation of claimant's compulsive hair pulling. Some see it as consistent with the

repetitive, stereotypic behaviors often associated with autism spectrum disorder, others see it as evidence of a different psychiatric disorder.

19. Claimant presented a challenging diagnostic case for the professionals. The overlay of autistic symptoms and emotional or psychiatric issues makes it difficult for even the best trained professionals applying their best clinical judgment to identify one single cause.

20. Dr. Cordova spent three to four hours assessing claimant in 2016 and another two days with her in 2019. In his hearing testimony, he cogently explained the basis for his conclusions that claimant is on the autism spectrum. Much was made at the hearing about his decision to use module 4 of the ADOS instrument instead of module 3. Module 4 is designed for adolescents age 16 and up. Dr. Cordova explained that he chose module 4 because prior testing indicated claimant had difficulty with imaginative play, a more prominent feature of the module 3 instrument. He therefore felt module 4 would provide a better assessment of her current functioning. Based on the evidence, Dr. Cordova's choice of ADOS module 4 was an appropriate exercise of clinical judgment when testing claimant. It did not render his findings invalid.

21. The regional center witnesses emphasized the records showing more pronounced evidence of emotional disturbance or psychiatric issues, while minimizing records that contained more evidence supporting autism spectrum disorder. This choice is understandable given claimant's complex array of challenges, along with the fact that many other professionals have reached opposite conclusions about whether claimant is on the spectrum. Dr. Stacy spent less time with claimant. Her interview of mother was done in claimant's presence and she refused to interview mother separately. As mother explained in her testimony at the hearing, she was reluctant to disclose in front of claimant her concerns about claimant's adaptive skills. She was

understandably concerned this would negatively impact claimant's progress. At the hearing, Dr. Stacy's testimony did not strongly support her findings. Her testimony was more focused on criticizing Dr. Cordova and downplaying mother's reports. She did not persuasively support her opinion that claimant's symptoms are better explained by mental health issues.

22. Dr. Cordova's opinions diagnosing claimant with autism spectrum disorder were better supported by the evidence than Dr. Stacy's opinion that she does not fit that diagnosis. A preponderance of the evidence established a diagnosis of autism spectrum disorder is appropriate.

23. The evidence established that claimant's handicapping conditions are not solely related to psychiatric disorders or learning disabilities and are not solely physical in nature.

EPILEPSY

24. The record revealed a significant concern with seizures. However, at this time, there is no clinical diagnosis of epilepsy. There was some evidence that claimant's seizures may be contributing to some of her adaptive skill and mobility deficits.

25. Claimant's mother testified that she is scheduled for a comprehensive seizure disorder evaluation soon. The evidence presented in this case was not sufficient to establish regional center eligibility based on epilepsy.

SUBSTANTIAL DISABILITY

26. The evidence established the claimant has substantial disabilities in three or more major life areas.

27. The functional behavioral assessment completed in 2017 found objective evidence that claimant has substantial difficulty with the self-care associated with toileting, brushing her teeth and washing her hands. A 2018 assessment using the Roll Evaluation of Activities of Life found significant weaknesses in toileting, and an overall score in the 4th percentile. This evidence establishes a substantial disability in this area.

28. The evidence showed that claimant's autism spectrum disorder contributes to significant functional disabilities in learning and self-direction. The school records show that, while she generally has low-average cognitive abilities, she continues to struggle with learning. Her disability in self-direction led her into a dangerous situation where she was victimized on the internet. The incident required law enforcement involvement. As a result of that incident, claimant has been prohibited from using the internet or social media. Her lack of safety awareness as she enters her teen years is a source of great concern for her family. Claimant's autism spectrum disorder causes her significant functional disabilities in learning and self-direction.

29. The evidence showed that claimant's autism spectrum disorder contributes to significant functional disabilities in independent living. The record shows she has significant difficulty following a list of household chores, getting self-ready for school, making simple purchases, preparing food safely, and following safety and stranger-awareness rules.

LEGAL CONCLUSIONS

1. In a fair hearing 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; 500.)

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.
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> [¶] . . . [¶]
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> 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 retardation,[1] 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.
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> (b) The Developmental Disability shall:
>
> (1) Originate before age eighteen;

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[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.

(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.

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.

6. The evidence established that claimant's substantial disabilities are caused by autism spectrum disorder.

7. The evidence did not establish at this time that her substantial disabilities are caused by epilepsy.

ORDER

Claimant is eligible for regional center services based on a diagnosis of autism spectrum disorder. Claimant's appeal is granted.

DATE: November 6, 2020

ALAN R. ALVORD
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 90 days.