

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

CLAIMANT

v.

INLAND REGIONAL CENTER, Service Agency

OAH No. 2020020399

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on September 10, 2020.¹

¹ In light of the President's declaration of a national emergency over the COVID-19 pandemic; the Governor's proclamation of a State of Emergency and Executive Orders N-25-20, N-33-20 and N-63-20 pertaining to the pandemic; the declarations of county and city public health emergencies throughout the State; the directives from state and local officials to ensure social distancing and sheltering-in-place; and in order to protect the health and safety of all public and OAH personnel, this matter was heard telephonically.

Keri Neal, Fair Hearings Representative, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

Claimant's mother represented claimant.

Oral and documentary evidence was received. The record was closed and the matter submitted for decision on September 10, 2020.

ISSUE

Is claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) under the category of Autism Spectrum Disorder (autism)?

FACTUAL FINDINGS

Background

1. On December 18, 2019, following claimant's mother's request that claimant, an 11-year-old-boy, be made eligible for regional center services under the category of autism, a multidisciplinary team at IRC comprised of a psychologist, a medical doctor, and a program manager concluded claimant was not eligible for regional center services.

2. On December 20, 2019, IRC sent claimant's mother a Notice of Proposed Action stating that claimant did not qualify for regional center services under the Lanterman Act because the records submitted by claimant's mother did not show claimant had a substantial disability as a result of autism, intellectual disability,

cerebral palsy, epilepsy, or a condition that is closely related to an intellectual disability or requires treatment similar to a person with an intellectual disability (fifth category).

3. On January 14, 2020, claimant's mother filed a Fair Hearing Request challenging IRC's eligibility determination.

4. Following an informal meeting held between the parties on February 24, 2020, IRC adhered to the determination that claimant was not eligible for regional center services.

5. On June 18, 2020, a second review of claimant's records was completed by a multidisciplinary eligibility team at IRC comprised of Dr. Greenwald, a program manager, and a medical doctor. The multidisciplinary team concluded that claimant was not eligible for regional center services.

Diagnostic Criteria for Autism

6. The *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5) identifies criteria for the diagnosis of autism. The diagnostic criteria include 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 to qualify for regional center services under the category of autism.

Evidence Presented by IRC

7. Dr. Greenwald received his Ph.D. from the California School of Professional Psychology in 1987. He is licensed in California and Florida. He has been a staff psychologist at IRC since 2008 and has served in a variety of capacities for different facilities throughout his career. 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 under the DSM-5 and the Lanterman Act.

Dr. Greenwald testified about the records provided by claimant's mother. The following is a summary of Dr. Greenwald's testimony and the documents provided.

Dr. Greenwald reviewed the following documents: a psychological assessment completed by the Inland Empire Autism Center dated January 15, 2018; a psychoeducational report completed by claimant's school district on December 18, 2018; an Individualized Education Program dated January 9, 2019; an After Visit Summary from David Joshua Michelson, M.D. dated October 15, 2019; a letter from Kenneth Monte, D.O., dated November 12, 2019; a letter from David Michelson, M.D. dated November 27, 2019; a letter from David Michaelson, M.D., dated March 2, 2020; and a letter from Kenneth Monte, D.O., dated March 10, 2020.

JANUARY 15, 2018, PSYCHOLOGICAL ASSESSMENT

8. At the time of this assessment, claimant was eight years old. He was referred to the Inland Empire Autism Center because of concerns regarding cognitive abilities, sensory processing problems, and behavioral problems. Claimant's parents

reported claimant had problems with self-care, put things in his mouth, overeats often, and engages in hyperactive behavior. Claimant's mother reported claimant is isolated and aggressive at school. He prefers to be on his own. Claimant becomes obsessed with things and it is difficult to pull him away from his fixated interests. Claimant also makes repetitive noises and repeats dialogue at times.

During the evaluation, claimant was attentive to the evaluator. He answered questions and smiled. He followed directions and engaged in imaginary play in an appropriate manner. He did not exhibit any fixations or sensory problems. Claimant tried to leave the room on multiple occasions and had to be redirected. Claimant did ring a bell on and off throughout the assessment. The assessor administered the Developmental Profile 3 (DP3), although no raw data was provided. The DP3 showed claimant's cognitive functioning was in the average range. No other measures were administered and there was no actual testing for autism because of the lack of diagnostic features of autism. Ultimately, the assessor concluded claimant should seek screening for "other disorders" to explain claimant's behaviors and suggested possibly obtaining a full cognitive assessment to ensure claimant did not meet the criteria for intellectual disability.

Dr. Greenwald explained that being attentive and receptive to the evaluator, and showing emotional cues appropriately such as smiling, is not indicative of autism. Further, there was no concern in the conclusion of autism; rather, the recommendation was simply to seek additional cognitive testing to rule-out intellectual disability. This assessment does not show claimant meets the diagnostic criteria for autism under the DSM-5 or that he has a substantial disability as a result of autism.

DECEMBER 18, 2018, PSYCHOEDUCATIONAL REPORT

9. On December 18, 2018, claimant's school district completed a psychoeducational report to determine claimant's eligibility for special education and also because of claimant's parents' report of poor behavior. Claimant's mother reported to the school that claimant had a diagnosis of autism and Attention Deficit Hyperactivity Disorder (ADHD) but did not state where those diagnoses were obtained. The following measures were used to assess claimant: the Kaufman Assessment Battery for Children, Second Edition (KABC-2); The Kaufman Test of Educational Achievement (KTEA); the Comprehensive Test of Psychological Awareness, Second Edition (CTPA-2); the Development Test of Visual Motor Integration, Sixth Edition (DTVMI-6); the Behavior Assessment for Children, third Edition (BASC-3); and the Adaptive Behavior Assessment System, third Edition (ABAS-3).

The KABC-2 is an individually administered measure of the processing and cognitive abilities for children aged three to 18. Overall, when combining all the scores achieved on various subsets, claimant's cognitive abilities fell within the average range. His full-scale IQ score was 101, which is also well within the average range of intellectual abilities.

The KTEA is an individually administered test of academic achievement in reading, math, written language, and oral language. Notably, claimant's scores showed that in all areas, he is performing in the average range, and at the expected level for his age.

The CTPA-2 is a comprehensive instrument designed to assess phonological awareness, phonological memory, and rapid naming. The instrument is designed to identify individuals between the ages of four and 24 who may benefit from certain

instructional activities to enhance their phonological skills. This assessment requires sustained attention by the individual being examined in order to reach valid conclusions. On this assessment, claimant's scores were scattered, showing poor to very poor skills in phonological awareness, but superior skills in the area of rapid naming. The assessor noted that the assessment may underrepresent claimant's true abilities, however, because of claimant's inability to maintain focused attention during the assessment.

The TAPS-3 is designed to assess a person's processing of auditory information. Sustained attention is required in order to obtain a true representation of a person's processing ability. Claimant scored in the low average range with respect to his ability to process information, but the assessor again noted this may underrepresent claimant's true abilities because of claimant's inability to maintain focused attention during the assessment.

The DTVM-6 is a measure of the integration among sensory inputs and motor integration on structured tasks. A person can have well-developed visual skills and motor skills, but be unable to integrate the two. On this assessment, claimant scored in the low average range.

The BASC-3 is an assessment designed to identify at risk behaviors. It involves providing documents to individuals such as parents and teachers and having them identify problem behaviors such as hyperactivity, aggression, anxiety, depression, somatization, attention problems, learning problems, adaptability, social skills, and many more. Overall, claimant's mother's perception of claimant's behaviors in certain areas were markedly different and inconsistent from claimant's teacher's perceptions. For example, claimant's mother reported claimant had problems adapting to certain activities, while claimant's teacher indicated claimant's ability to adapt was average.

Claimant's mother reported claimant is hyperactive and aggressive, while claimant's teacher perceived most of claimant's overall behaviors to be average (i.e. not clinically significant or at risk). Claimant's mother perceived significant problems with claimant's activities of daily living, while again, claimant's teacher reported no concerns in this area. Thus, overall, there were marked differences in the perceptions of claimant's behaviors at home and at school. This is not indicative of autism.

Finally, with respect to the ABAS-3, neither claimant's mother nor claimant's teacher returned the questionnaire, so the assessment could not be completed.

Overall, the school concluded claimant did not meet special education criteria under the category of intellectual disability. There were no concerns that claimant had autistic-like features, so he did not qualify under autism. There were also no concerns regarding claimant's ADHD, so claimant was found not eligible under the category of other health impairment. The school also did not find claimant eligible under the category of specific learning disability because overall, claimant was performing at grade level and did not display cognitive deficits.

INDIVIDUALIZED EDUCATION PROGRAM PLAN DATED JANUARY 9, 2019

10. An IEP completed on January 9, 2019, completed when claimant was 10 years old and in the fourth grade, indicates claimant receives special education services for speech and language impairment. The IEP indicates claimant can read at the fifth-grade level and appropriately comprehend and analyze texts, make comparison and contrasting observations, find key details during reading, and appropriately summarize the text. Claimant performs at grade level in mathematics. Claimant performs at grade level in writing. The only area of concern noted was claimant's speech, which claimant's teacher described as "mildly delayed." No concerns

were noted with respect to claimants fine or gross motor development. Claimant has many friends at school and plays well with children at recess. Claimant follows classroom rules. He completes all his coursework. Claimant participates in classroom discussions and collaborates with his peers. Claimant takes care of all his personal needs in the school setting. Claimant does not require assistive technology and participates in physical education (he is also on the football team). The IEP also indicates claimant qualifies for the Gifted and Talented Education Program (GATE).

Claimant's mother related to the IEP team that claimant acts differently at home. He fights with his siblings. He is inattentive. He does not stay engaged during conversations. Claimant does not make eye contact and will not share things with siblings or other children. Claimant's teacher did not observe these behaviors at school, however.

Dr. Greenwald pointed out that the IEP noted no concerns regarding autism and claimant's behaviors (i.e. interacting with children, completing his work, performing at or above grade level at school) are inconsistent with a child who has autism. The IEP also did not show claimant suffered from a substantial disability in three or more areas of major life activity.

OCTOBER 15, 2019 AFTER VISIT SUMMARY

11. This document is in Spanish and an English translation was not provided. Nonetheless, it does not contain any information concerning autism. Rather, it simply recites a number of medications claimant takes for various medical conditions and lists ADHD and autism under claimant's "Problem List" without indicating where these diagnoses were obtained (or if they were even diagnoses as opposed to simply concerns).

LETTERS COMPLETED BY CLAIMANT'S DOCTORS

12. Regarding the letter completed by Dr. Monte, although it made reference to claimant's diagnoses of ADHD, autism, and Oppositional Defiant Disorder (ODD), ADHD and ODD do not qualify claimant for regional center services under the Lanterman Act and the letter did not provide any supporting documentation indicating how Dr. Monte arrived at a diagnosis of autism.

Regarding the letters completed by Dr. Michaelson, although they referenced autism and ADHD by history, like the letter from Dr. Monte, neither letter provided any supporting documentation indicating how Dr. Michaelson arrived at a diagnosis of autism.

DR. GREENWALD'S CONCLUSION

13. Dr. Greenwald explained that none of the documents reviewed showed that anyone at any time was concerned about claimant having autism. The letters written by claimant's doctors mention a diagnosis of autism, but nowhere in claimant's history was testing for autism ever conducted. Indeed, claimant's records are completely devoid of characteristics consistent with autism, such as persistent deficits in social communication and social interaction; 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; or disturbances that are not better explained by intellectual disability or global developmental delay. Moreover, claimant's behaviors noted by his mother were insufficient to warrant a psychological evaluation to rule out autism. The most compelling evidence against claimant meeting the criteria for autism is the fact that claimant, in the school setting, is social, cooperative, and

interactive. Autistic children are not selectively social – they are the same at school and home. In conclusion there are simply no clinical indications to establish claimant meets the diagnostic criteria for autism, and even if he did, he is not substantially disabled in three or more areas of a major life activity.

Claimant's Mother's Testimony

14. Claimant's mother's testimony is summarized as follows: Claimant was born "normal" but when claimant turned one and a half years old, claimant's mother started to see "things" and she was not happy. Claimant was told by "some nurses" that claimant had autism. Later in life, it became more evident that claimant had autism. As time went on, claimant's behaviors became worse. Claimant's mother did not elaborate on claimant's bad behaviors. Claimant's self-care skills are not good (no desire to take a bath, brush his teeth, etc.) Claimant does not have any friends, which is why she signed him up for football. As the time went by, claimant's mother worked with claimant on his "issues." Claimant does line up toys. When he began school, she had to get him a physical, and some doctor at some point indicated claimant had autism and speech delay so they referred her to IRC. IRC did not do anything for the past few years. When claimant entered third grade, he hit a girl in her "private parts" so claimant's mother "figured something was not right."

A pediatrician referred claimant for a mental health evaluation at that point. The therapist closed the case because he could not communicate with claimant due to claimant's speech delay and because most of claimant's characteristics fell within the category of autism.

Claimant repeats his actions all the time and bites things. When claimant is in school, he is bullied; children make fun of him; and he has no friends. Claimant does

not complete his schoolwork. Thus, claimant's mother does not understand why the IEP states claimant has great socialization skills and completes his work because he does not.

It has been very difficult for claimant's mother to obtain services for her son. She has another daughter who has a disability and is a regional center consumer, but the experience has not been the same for her son.

Claimant's mother's testimony was sincere and credible.

LEGAL CONCLUSIONS

Applicable Law

1. The Legislature enacted a comprehensive statutory scheme known as the Lanterman Act (Welf. & Inst. Code, § 4500 et seq.) to provide a pattern of facilities and services sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life. The purpose of the statutory scheme is twofold: To prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community, and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community. (*Assn. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 388.) Welfare and Institutions Code section 4501 outlines the state's responsibility for persons with developmental disabilities and the state's duty to establish services for those individuals.

2. The Department of Developmental Services is the public agency in California responsible for carrying out the laws related to the care, custody and treatment of individuals with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4416.)

3. 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.

4. 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.*)

5. Welfare and Institutions Code section 4642, subdivision (a)(1), provides that any person believed to have a developmental disability is eligible for “initial intake and assessment services” in the regional centers. Initial intake requires a decision be made regarding the need to provide an assessment, but does not require a regional perform an assessment. (*Id.* at subd. (a)(2).)

6. 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.

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.

(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.”

7. 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.

8. In a proceeding to determine whether an individual is eligible for regional center services, the burden of proof is on the claimant to establish by a preponderance of the evidence that he or she meets the proper criteria. (Evid. Code, §§ 115; 500.)

Evaluation

The only expert who testified was Dr. Greenwald. Based on the records provided, Dr. Greenwald's uncontested expert opinion was that claimant does not meet the DSM-5 diagnostic criteria for autism, and even if he did, the records did not show claimant suffers from a substantial disability in three or more areas of major life activity. There has never been any testing completed on claimant regarding autism. In all the documents provided, there has never been a concern regarding the possibility that claimant might have autism. The only mention of autism is in three letters by claimant's doctors, but none of those letters state where claimant ever received that diagnosis. Claimant's behaviors are inconsistent with autism. Claimant's teacher notes claimant socializes, interacts with other children, and generally performs as he should in the classroom. Claimant is performing at or above grade level, and even qualifies for the GATE program. None of these facts support the contention that claimant has autism. Claimant does receive special education services for speech and language impairment, but this does not qualify a person for regional center services. Claimant's mother's testimony was sincere and credible. She is clearly struggling with claimant's behavioral problems at home. However, a person with autism, as Dr. Greenwald explained, would have consistent behaviors across all settings and claimant does not.

Accordingly, a preponderance of the evidence did not establish that claimant is eligible for regional center services.

ORDER

Claimant does not have a substantial disability as a result of autism, intellectual disability, cerebral palsy, epilepsy, or a condition that is closely related to an

intellectual disability or requires treatment similar to a person with an intellectual disability. Accordingly, claimant's appeal is denied.

DATE: September 21, 2020

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 90 days.