

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

E.H.,

Claimant,

v.

Inland Regional Center,

Service Agency.

OAH No. 2012100699

DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on December 3, 2012.

Claimant's mother, T.D., represented claimant who was not present at the hearing.

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

Oral and documentary evidence was received on December 3, 2012, at which time the matter was submitted.

ISSUE

Is claimant eligible for regional center services under the Lanterman Act as a result of autism?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. On September 10, 2012, IRC notified claimant that he was not eligible for

regional center services.

2. On October 5, 2012, claimant filed a Fair Hearing Request appealing IRC's determination that he was not eligible for regional center services, and this hearing ensued.

DIAGNOSTIC CRITERIA FOR AUTISM

3. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, (DSM-IV-TR)*, identified criteria for the diagnosis of autism. As noted in that text, "Pervasive Developmental Disorders are characterized by severe and pervasive impairment in several areas of development reciprocal social interaction skills, communication skills, or the presence of stereotyped behavior, interests, and activities." The group of disorders identified as Pervasive Developmental Disorders are Autistic Disorder, Rett's Disorder, Childhood Disintegrative Disorder, Asperger's Disorder, and Pervasive Developmental Disorder-Not Otherwise Specified. The DSM-IV-TR notes that, "The essential features of Autistic Disorder are the presence of markedly abnormal or impaired development in social interaction and communication and a markedly restricted repertoire of activities and interests." An individual must have a DSM-IV-TR diagnosis of "Autistic Disorder" to qualify for regional center services.

The DSM-IV-TR diagnostic criteria for "Autistic Disorder" are:

"A. A total of six (or more) items from (1), (2), and (3), with at least two from (1) and one each from (2) and (3)

1. qualitative impairment in social interaction, as manifested by at least two of the following:

- a. marked impairments in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body posture, and gestures to regulate social interaction;
 - b. failure to develop peer relationships appropriate to developmental level;
 - c. a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people, (e.g., by a lack of showing, bringing, or pointing out objects of interest);
 - d. lack of social or emotional reciprocity;
2. qualitative impairments in communication as manifested by at least one of the following:
- a. delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime);
 - b. in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others;
 - c. stereotyped and repetitive use of language or idiosyncratic language;
 - d. lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level.

3. restricted repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least two of the following:

- a. encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus;
- b. apparently inflexible adherence to specific, nonfunctional routines or rituals;
- c. stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements);
- d. persistent preoccupation with parts of objects.

B. Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction; (2) language as used in social communication; and (3) symbolic or imaginative play.

C. The disturbance is not better accounted for by Rett's Disorder or Childhood Disintegrative Disorder.

EVIDENCE PRESENTED AT HEARING

4. Claimant is currently a seven year old male. He has a history of ear infections and tube placement and was initially thought to be deaf. As a result he has had significant language development delays. Based upon conflicting information in the reports, IRC requested an opportunity to evaluate claimant. Claimant's mother denied IRC's request,

asserting that the records she provided established eligibility for services and that her son had undergone enough testing. She asserted that any further evaluations merely delayed the process and she requested her hearing proceed as scheduled.

5. Claimant's school records demonstrated that he receives speech and language services in order to improve his expressive and receptive language skills. Claimant received special education services under a primary disability of autism. Education services are provided under Title 5, whereas regional centers are governed by Title 17. Title 17 eligibility requirements are more stringent than Title 5.

6. A March 31, 2009, IRC psychological assessment determined that claimant had an Axis I Expressive language Disorder but no Axis II diagnosis. He was not eligible for regional center services based upon a diagnosis of autistic disorder, mental retardation, or 5th category.

7. A May 13, 2010, psychoeducational report from claimant's school district determined that claimant "continues to meet the eligibility criteria of Autism." Again, Title 5 eligibility is broader than Title 17 eligibility.

8. A 2012 Loma Linda neuropsychological evaluation conducted over several days determined that claimant "meets DSM-IV criteria for diagnostic disorder."

9. Sara Hibbs, Psy.D., testified about her review of records and request to evaluate claimant. She explained that the Loma Linda testing administered to claimant was for individuals with fluent language skills, something all the records showed that claimant did not possess. The Loma Linda report also did not record claimant's test scores and many results were in the "autism spectrum" range, a non-qualifying condition. Claimant's adaptive skills were in the moderate range which also led Dr. Hibbs to doubt the validity of the conclusions as that range was not sufficient to diagnose autism. Accordingly, the Loma Linda report raised more questions than it answered which was why Dr. Hibbs wanted to further evaluate claimant. Dr. Hibbs' unrebutted testimony

established that the Loma Linda report, in and of itself, was not sufficient to determine claimant was eligible for services absent more given his other records.

10. Claimant's mother asserted that the recent Loma Linda evaluation demonstrated that claimant was eligible for services under a diagnosis of autistic disorder and that regional center relied on 2009 and 2010 records to support their position, records that were now outdated and were written before claimant was diagnosed with autism. Claimant's mother explained that she discussed Dr. Hibbs' concerns with the Loma Linda evaluator who advised that she would not re-word her report and that it did diagnose claimant with autistic disorder thereby qualifying claimant for services.

11. Claimant's mother testified that Social Security also reviewed these records and recently determined that claimant was eligible for benefits under a diagnosis of autism. Claimant asserted that this further demonstrated he was eligible for regional center services. However, no evidence as to how Social Security made its decision was offered.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. In a proceeding to determine eligibility, the burden of proof is on the claimant to establish he or she meets the proper criteria. The standard is a preponderance of the evidence. (Evid. Code, § 115.)

In this proceeding, claimant had the burden to establish that he has a "developmental disability" within the meaning of Welfare and Institutions Code section 4512, subdivision (a) by a preponderance of the evidence.

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 which originates before an individual attains age 18, 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 mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be

closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature."

REGULATORY AUTHORITY

5. California Code of Regulations, title 17, section 54000 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 disorder. Such psychiatric disorders include psycho-social

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 had a diagnosis of autism. The burden was on claimant to establish his eligibility for regional center services. As claimant introduced insufficient evidence demonstrating that he was eligible to receive regional center services, his appeal of IRC’s determination that he is ineligible to receive services must be denied.

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. Likewise social security eligibility is also not relevant to a determination regarding regional center eligibility.

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ORDER

Claimant E.H.’s appeal from the Inland Regional Center’s determination that he is not eligible for regional center services and supports is denied. This Order is without prejudice and does not preclude claimant from seeking the evaluation previously offered by IRC.

DATED: December 5, 2012

A handwritten signature in black ink, appearing to read 'Mary Agnes Matyszevski', is written over a horizontal line.

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.