

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2014080578

DECISION

On November 12, 2014, Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by telephone conference.

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

Claimant's grandmother represented claimant.

Oral and documentary evidence was introduced, and the matter was submitted on November 12, 2014.

ISSUE

1. Is claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) on the basis of a diagnosis of mental retardation¹ or autism?

¹ The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V), recently replaced the term "mental retardation" with the term "intellectual disability." But, the term mental retardation will be used in

2. Is IRC required to perform an intake and assessment of claimant to determine if he is eligible for regional center services under the Lanterman Act?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. Claimant is a sixteen-year-old boy who lives with his grandmother, who has adopted him. His grandmother sought regional center services for claimant because he has a number of issues, and she believes that he may be autistic based on a number of characteristics that he exhibits.

2. Sometime between July 12, 2014, and August 8, 2014, claimant requested that IRC provide services to claimant. As part of that request claimant provided various documents to IRC, including letters from claimant's psychiatrist and documents from various school districts, to support claimant's request for services.

3. On August 8, 2014, IRC notified claimant that claimant is ineligible for regional center services based on a review of his records because he does not have a disability that qualifies him to receive IRC services.

4. On August 11, 2014, claimant's grandmother filed a fair hearing request appealing IRC's decision.

EDUCATIONAL AND PSYCHOLOGICAL RECORDS REVIEWED BY IRC

5. Since at least January 2007, claimant has had a history of anxiety disorder that has made it difficult for him to attend school. Claimant entered into special education classes on October 28, 2008, at the age of ten, based upon a primary

this decision because the Lanterman Act requires regional centers to provide services for individuals who have a developmental disability, including "mental retardation."

diagnosis of emotional disturbance. Claimant has been attending therapy sessions with a psychiatrist for many years. He is currently taking Seroquel and 60 mg of Prozac daily to treat his anxiety and depression.

6. Claimant recently began receiving special education through the Home Hospital Program from Palm Springs Unified School District that allows him to do his classwork at home rather than requiring him to go to school. Over the past few years claimant has attended school in various locations, including in the Greater Anaheim School District, Palm Springs High School, and Orange County School District.

7. Claimant has been evaluated on multiple occasions to determine his special education needs. On December 19, 2013, Riverside County Special Education Local Plan Area (SELPA) evaluated claimant as part of its individualized education program and created a report. The school psychologist, Dr. Sheryl Deeds, participated in the creation of the report. According to that report, claimant's primary diagnosis was emotional disturbance with no secondary diagnosis. The report further noted that claimant communicates well, is able to express his opinions and needs, and is kind and genial with other students. The report recommended that claimant have therapy with Dr. Joaquin Galeano to help him attend school.

8. On December 8, 2010, the Greater Anaheim SELPA evaluated claimant as part of claimant's Individualized Education Program and created a report. The school psychologist, whose name is not legible on the document, participated in creating this report. The school psychologist reviewed claimant's assessment results and stated that the results indicated that claimant has depression, lack of motivation, withdrawal and anxiety. The report concluded that claimant qualified for special education services based on his emotional disturbance.

9. On December 13, 2013, the Palm Springs Unified School District conducted a triennial assessment of claimant and created a report. The assessment was

conducted by a team of individuals, including Nancy Romano, a special education teacher, Christine MacCalla, a nurse, and psychologist Sheryl Deeds. As part of their assessment, claimant was tested on the Reynolds Intellectual Assessment Scale, and the results of that test show that claimant's intellectual and cognitive abilities fall within the average range. Additionally, the report stated that claimant does not attend school regularly, has a history of school avoidance/separation anxiety, becomes so stressed that he vomits and has heart palpitations, but has no other significant health concerns. The report added that claimant's "previous test results indicate that auditory and visual processing skills and memory are all within normal limits." The report concluded that claimant continues to meet the criteria for special education because of a handicapping condition of emotional disturbance, which has been exhibited over a long period and to a marked degree. His emotional disturbance adversely affects his educational performance.

10. Claimant submitted two letters from Warris Richard Walayat, M.D., child and adolescent psychiatrist with the Borrego Community Health Foundation, dated July 12, 2014, and May 24, 2014. In the July 12, 2014, letter Dr. Walayat stated that claimant has been under his care since January 25, 2014, for the following diagnoses: intermittent explosive disorder, unspecified anxiety state, unspecified pervasive developmental disorder, Asperger's syndrome, and agoraphobia with no panic attacks. Dr. Walayat's July 12, 2014, letter provided no basis for his listed diagnoses and there was no indication that claimant had received any tests in that regard.

11. In the May 24, 2014, letter Dr. Walayat recommended that claimant be placed in a Home Hospital Program for his educational development. In his letter Dr. Walayat stated:

"[Claimant] is under treatment at Borrego Medical Center,
Cathedral City since January 24, 2014 for Anxiety Disorder,

NOS and Major Depressive Disorder, single severe episode, with recurrence, Asperger Syndrome; Reactive Detachment Disorder. He has severe social and school phobia and it has made difficulty to attend public school.”

Dr. Walayat provided no basis for his listed diagnoses and no indication that claimant had ever been tested for Asperger Syndrome.

TESTIMONY OF SANDRA BROOKS, PH.D.

12. 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 eight years. Her duties in the position of staff psychologist include reviewing records and conducting evaluations to assist the multidisciplinary team to determine if potential clients are eligible for service. During her employment at IRC Dr. Brooks has reviewed the records of over one thousand clients or potential clients to determine their eligibility for services with IRC.

13. Dr. Brooks reviewed claimant’s records in this matter but did not meet with claimant in person for her assessment. As part of her review of claimant’s records, Dr. Brooks reviewed Dr. Walayat’s letters and all the school records provided by claimant. Dr. Brooks opined that these materials do not establish that claimant is eligible for services from IRC on the basis of mental retardation or on the basis of autism. Specifically, with regard to mental retardation, Dr. Brooks referred to the intellectual assessment testing provided by the Palm Springs Unified School District showing that claimant has average scores on his test results from testing conducted in at least 2008 and 2011. Dr. Brooks testified that such high scores are inconsistent with a diagnosis of mental retardation and are much higher than borderline scores that could place claimant in the fifth category of eligibility.

14. With regard to autism, Dr. Brooks stated that there is no indication in any of the school assessments from psychologists or otherwise that claimant has symptoms of autism or needs to be tested for autism. Dr. Brooks stated that the two letters from Dr. Wayalat list Asperger's Syndrome, which is a disorder in the autism spectrum, as a diagnosis for claimant. However, Dr. Brooks testified that there is no indication that claimant has ever been tested for such a diagnosis, as would be required for an official diagnosis. According to Dr. Brooks, the testing required for such a diagnosis and the results of the test must show a significant deficit in areas such as learning, communication, self-direction, and capacity for independent living. According to the school records, claimant has not had such testing and does not evidence a significant deficit in those areas.

15. Also, Dr. Brooks stated that the letters from Dr. Wayalat listing multiple diagnoses are internally inconsistent. Specifically, he lists as a diagnosis both Asperger's Syndrome and Pervasive Developmental Disorder (PDD). According to Dr. Brooks a patient technically can't be diagnosed with both Asperger's Syndrome and PDD because Asperger's Syndrome falls under the umbrella of PDD and is simply one type of PDD. Dr. Wayalat's letter also lists Agoraphobia as a diagnosis; however, Agoraphobia is a diagnosis that overlaps with Asperger's Syndrome and is also a mental health issue. These inconsistencies further undermine the assertion that claimant is autistic, particularly in light of his long history of mental health issues.

TESTIMONY OF CLAIMANT'S GRANDMOTHER

16. Claimant's grandmother testified that claimant has never been tested for any disorder on the autism spectrum as far as she is aware. She stated that Dr. Wayalat thinks that claimant has Asperger's Syndrome, but that he has not tested claimant for that diagnosis. She stated that it was possible that he had been tested about ten years ago in Orange County for autism, but no such records were provided to IRC. There is

also no indication in any of his subsequent school records that autism is or was a possible diagnosis of claimant.

17. Claimant's grandmother stated that she has requested the school districts to test claimant for autism, but no such test has been conducted. She asserted that claimant is a smart boy, but he has had all sorts of problems with making friends, problems with his motor skills and with emotional disturbances. Claimant has been in therapy with various psychiatrists for about twelve years.

THE PARTIES' ARGUMENTS

18. IRC argued that the records provided for their review failed to establish that claimant has any diagnosis that would qualify him for services from IRC. IRC further asserts that it is not required to test claimant for autism to determine if claimant is eligible for services based on the records provided.

19. Claimant's grandmother disagreed with IRC's position that claimant has no indicators to show that he is autistic, and she believes that IRC should test claimant to determine if he has autism and is therefore eligible for services.

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 mental retardation, cerebral palsy, epilepsy, autism, or what is referred to as the fifth category – a disabling condition closely related to mental retardation or requiring treatment similar to that required for mentally retarded 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 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 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. When an individual is found to have a developmental disability as defined under the Lanterman Act, the State of California, through the regional center, accepts responsibility for providing services and supports to that person to support his or her integration into the mainstream life of the community. (Welf. & Inst. Code, § 4501.)

7. "Services and supports" for a person with a developmental disability can include diagnosis and evaluation. (Welf. & Inst. Code, § 4512, subd. (b).)

8. 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).)

9. 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.

EVALUATION

10. Claimant's grandmother asked for a Fair Hearing to obtain an assessment of claimant. She believed claimant could be eligible for regional center services because he exhibited autistic-like behaviors and because he qualified for special education services from his school district. Claimant's grandmother expressed her genuine desire to have a full assessment performed so that she could understand what claimant suffered from and how she could best help him. Her motives are sincere and commendable. IRC correctly determined, as Dr. Brooks credibly explained, that an intake assessment was not required to assess claimant for mental retardation because claimant's performance on intellectual testing shows that he has average intellectual ability. The basis of claimant's request for services from IRC rests on the assertion that claimant is autistic.

11. The information contained in claimant's records does not support a reasonable belief that claimant has a developmental disability as defined by the Lanterman Act that would trigger IRC's obligation to provide or procure a further assessment of claimant. Claimant's school records show that claimant suffers from

mental health disorders that affect his behavior and academic performance, and these disorders do not qualify claimant for regional center services. Although Dr. Walayat opined that claimant has Asperger's Syndrome, a disorder on the autistic spectrum, he reached this conclusion without testing claimant. His opinion is, thus, given little weight.

12. Eligibility for special education services does not determine eligibility for regional center services. The Lanterman Act and the applicable regulations specify the criteria an individual must meet in order to qualify for regional center services. The regional center is statutorily required to use different criteria for eligibility than a school district.

13. Claimant's grandmother was sincere, her testimony heartfelt, and her frustration palpable. She is clearly motivated by her desire to help her child and to obtain the services she believes are necessary to allow him to function in the world; she undoubtedly has her child's best interest at heart. However, the weight of the evidence demonstrates that claimant is not eligible to receive a further assessment or other services under the Lanterman Act based on autism. The weight of the evidence establishes that claimant does not have a condition that makes him eligible for regional center services.

ORDER

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

Claimant's appeal from IRC's determination that it will not provide intake services, including performing an assessment, is denied.

DATED: November 26, 2014

_____/s/_____

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.