

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Eligibility of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2016030634

DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California (OAH), heard this matter in San Bernardino, California, on April 21, 2016.

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

Claimant's mother, who filed the Fair Hearing Request failed to appear. After waiting thirty minutes, the case was called and Inland Regional Center established that satisfactory service had been effectuated on claimant. IRC elected to proceed with a prove-up hearing.

The matter was submitted on April 21, 2016.

ISSUE

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

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. On February 24, 2016, IRC notified claimant that he was not eligible for regional center services.
2. In March 2016, claimant's mother filed a fair hearing request, appealing IRC's decision.

DIAGNOSTIC CRITERIA FOR AUTISM SPECTRUM DISORDER

3. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, (DSM-5)*, identifies diagnostic criteria necessary to reach the diagnosis of Autism Spectrum Disorder. The diagnostic criteria include: Persistent deficits in social communication and social interaction across multiple contexts; restricted, repetitive 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.

EVIDENCE INTRODUCED AT HEARING

4. Claimant is a five-year-old male. Claimant's mother stated in claimant's Fair Hearing Request that her son had been "referred by child psychiatrist [who] explained [that her] son in her professional opinion qualified for [regional center services]." Claimant's mother asserted that "medical documents show" that he was eligible. On the intake application claimant's mother indicated that the services she was requesting were "assistance with autism/bipolar/ADD services." Claimant's mother identified his health history as "autism, mental illness, ADD, bipolar." She identified his medications as Adderall

for ADD and Risperdal for autism/hypersensitive. Claimant's mother indicated that claimant was "accident prone, constantly hurting himself," and identified his behavioral characteristics as unusual fears, head banging, sleeping difficulties, hyperactivity, poor eye contact, repetitive movements, resistance to change, bedwetting (over five years old), and interested in things, not people.

5. Veronica Ramirez, Psy.D., IRC staff psychologist, reviewed all of the records and testified in this proceeding. Dr. Ramirez concluded that claimant was ineligible for regional center services because none of the documents indicated that he had a qualifying developmental disability.

6. Among the documents Dr. Ramirez reviewed was a May 15, 2015, Individualized Education Program (IEP). The IEP indicated that claimant's primary disability was speech or language impairment. He had no secondary disability. The Social/Emotional/Behavioral section of the IEP noted that claimant "is a very friendly little boy. He shows concern for others. He plays cooperatively with peers, but has on rare occasion hit to communicate displeasure." Dr. Ramirez testified that these traits are inconsistent with someone having autism, but the hitting notation was consistent with someone with a speech language impairment who was unable to communicate his desires or frustrations. This section of the IEP also noted that claimant "is able to attend the whole group activities, but will play with the person next to him and needs reminders to attend. He will follow the classroom rules and routines with some reminders to stay on task. He's able to wait his turn when engaged in a turn taking activity. He will become distracted and act 'silly' when others near him are acting out. He will attend the whole group activities provided he is close to the teacher away from distracting peers." Dr. Ramirez noted that these observations were also inconsistent with someone with autism, and that trying to be the class clown, although unacceptable, demonstrates claimant is seeking attention from others, a trait that is inconsistent with someone with autism. Furthermore, Dr. Ramirez

testified that the same IEP section noted that claimant's parent "reports that [claimant] plays well with peers and does not show significant behavioral problems at home, though he may bang his head against the wall when upset; he enjoys being around other family and nonfamily members, shares big smiles and other joyful expressions." Dr. Ramirez testified that these observations are inconsistent with an individual with autism, but are consistent with someone having difficulty communicating because of a speech or language impairment.

The notes section of the IEP also documented that the educational psychologist reviewed the results of his report and that claimant "does not present as having a cognitive delay or any sort of learning disability." Claimant's mother expressed concerns at the IEP regarding claimant's communication and some behavioral issues, some of which she felt may be due to issues relating to claimant's "father being in an accident." Possible counseling options were discussed. Goals relating to claimant's speech and language would be put in place. The IEP team reconvened on May 26, 2015, and noted that a resource teacher would be working with claimant, that he had improvement in his behavior and language development, but there was some mild delay of speech sounds, the cause of which was unknown.

Nothing in claimant's IEP demonstrated that he was eligible for regional center services.

7. Claimant's May 18, 2015, school district Speech Language Evaluation identified his speech language impairment. The classroom observation section noted that claimant "tries very hard in class. He listens during small and large group activities, with occasional reminders to pay attention. He talks to the teachers and lets his needs be known. His speech can be difficult [to] understand at times." The report noted that claimant "worked with consistent effort. He was compliant to all requests. He responded to praise for efforts by smiling and readily beginning new tasks." Dr. Ramirez testified that

nothing in the Speech Language Evaluation indicated that claimant had autistic spectrum disorder. In fact, his willingness to engage in classroom activities was contrary to the behavior seen in an individual with autism.

8. Claimant's May 15, 2015, school district Assessment Team report contained an evaluation performed by the school psychologist. As a result of the testing performed, claimant's cognitive abilities were "estimated to be within the Borderline to Low Average range. His academic achievement is in the Delayed Range. A significant discrepancy was not demonstrated at this time." Further, claimant "does not demonstrate a significant discrepancy between his estimated cognitive abilities and his academic achievement. [Claimant] does not appear to meet eligibility under this handicapping condition."

The Educational History section of the Assessment Team report noted that claimant's special education teacher "reported that he is very friendly and makes friends easily. He is also willing to try new things. He can be easily distracted and likes to be a class clown." The Medical/Developmental History section documented that claimant "was happy and pleasant to be around, he kept making eye contact, and smiling. He enjoyed the screening games and was able to follow directions." The Classroom Observation section documented that claimant laughed when another student pointed something out, engaged in the classroom counting activity, was able to follow directions, was complimented for his ability to do so, and appropriately interacted with another student during the activity. Dr. Ramirez testified that these findings were inconsistent with an individual with an autism spectrum disorder.

The Assessment Team report contained the results of the Vineland Adaptive Behavior tests administered in 2013 and 2014, the ADOS tests administered in 2013, and the Childhood Autism Rating Scale-2 performed 2014. Those tests did not indicate that claimant had autism spectrum disorder. Dr. Ramirez testified that the test scores did not indicate that claimant had a qualifying diagnosis. Dr. Ramirez also explained that the

cognitive tests administered did not indicate that claimant had an intellectual disability or qualified for regional center services under the fifth category.¹ Nothing in the Assessment

¹ The DSM-5 also contains the diagnostic criteria used for intellectual disability. Three diagnostic criteria must be met: Deficits in intellectual functions, deficits in adaptive functioning, and the onset of these deficits during the developmental period. An individual must have a DSM-5 diagnosis of intellectual disability to qualify for regional center services. Intellectual functioning is typically measured using intelligence tests. Individuals with intellectual disability typically have IQ scores in the 65-75 range.

Under the "fifth category" the Lanterman Act provides assistance to individuals with "disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals" but does "not include other handicapping conditions that are solely physical in nature." Along with the other four qualifying conditions (cerebral palsy, epilepsy, autism spectrum disorder, and intellectual disability), a disability involving the fifth category must originate before an individual attains age 18 years of age, must continue or be expected to continue indefinitely, and must constitute a substantial disability.

The fifth category is not defined in the DSM-5. In *Mason v. Office of Administrative Hearings* (2001) 89 CalApp.4th 1119, 1129, the California Court of Appeal held that the fifth category was not unconstitutionally vague and set down a general standard: "The fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded. Furthermore, the various additional factors required in designating an individual developmentally disabled and substantially handicapped must apply as well." On March 16, 2002, in response to the *Mason* case, the Association of Regional Center Agencies

Team report demonstrated that claimant was eligible for regional center services.

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.)

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

(ARCA) approved the Guidelines for Determining 5th Category Eligibility for the California Regional Centers (Guidelines). In those Guidelines, ARCA noted that eligibility for Regional Center services under the fifth category required a “determination as to whether an individual functions in a manner that is similar to that of a person with mental retardation OR requires treatment similar to that required by individuals with mental retardation.” (Emphasis in original.) The Guidelines stated that Mason clarified that the Legislative intent was to defer to the professionals of the Regional Center Eligibility Team to make the decision on eligibility after considering information obtained through the assessment process. The Guidelines listed the factors to be considered when determining eligibility under the fifth category.

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.

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 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 to qualify for regional center services. None of the documents introduced in this hearing demonstrated that claimant has autistic spectrum disorder or that he has an intellectual disability or is eligible under the Fifth Category. Claimant failed to provide sufficient evidence to demonstrate his eligibility to receive regional center services. Thus, his appeal of IRC's determination that he is ineligible to receive services must be denied.

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ORDER

Claimant's appeal from Inland Regional Center's determination that he is not eligible for regional center services and supports is denied. Claimant is ineligible for regional center services and supports under the Lanterman Developmental Disabilities Services Act.

DATED: April 26, 2016

_____/s/____

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.