

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request
of:

CLAIMANT,

v.

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2016080953

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter in San Bernardino, California, on October 10, 2016.

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

Claimant's mother and father appeared on behalf of claimant, who was not present.

The matter was submitted on October 10, 2016.

ISSUE

Is claimant eligible for regional center services under the Lanterman Act based on a diagnosis of Autism Spectrum Disorder (autism)?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. On July 15, 2016, following a review of records provided by claimant, IRC notified claimant that he was not eligible for regional center services because the records provided to IRC did not establish that he had a substantial disability as a result of an intellectual disability, autism, cerebral palsy, epilepsy, or a disabling condition closely related to an intellectual disability that required similar treatment as an individual with an intellectual disability.

2. Claimant filed a fair hearing request on July 27, 2016. The fair hearing request stated the following:

[Claimant] has been medically diagnosed with Autism Spectrum Disorder, Level 1 . . . He has significant impairments related to his Autism Spectrum Disorder, and these impairments are substantially handicapping him in the areas of learning, communication, self-care, self-direction, and his future ability to live independently and be economically self-sufficient.

3. On September 1, 2016, claimant's parents and IRC representatives met to discuss claimant's fair hearing request. IRC memorialized the discussion that took place during the informal meeting and concluded that claimant did not qualify for regional center services. In the September 7, 2016, informal meeting letter, IRC explained the basis for its ineligibility determination as follows:

Thank you for attending the informal meeting held on September 1, 2016, regarding your fair hearing request

[¶] . . . [¶]

I explained that all the records IRC has received report that [claimant] has been served under Emotional Disturbance and other mental health [diagnoses], and mental health [diagnoses] do not qualify for regional center services. I did ask why the school district did not find an issue with [Autism Spectrum Disorder] in earlier records. You explained [claimant] was home schooled until the age of 12 and you thought he was just "being a typical boy."

We both agreed that you would provide additional records and other information to me by September 14, 2016[,] because I will be discussing the new information with the eligibility team on that day. Once I have met with the team, I will advise you if IRC will be able to offer a resolution or if we will need to proceed to hearing.

4. Claimant's parents provided the additional information discussed at the informal meeting, but it did not change IRC's position on the eligibility determination. This hearing ensued.

DIAGNOSTIC CRITERIA FOR AUTISM SPECTRUM DISORDER

5. 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 autism.

CLAIMANT'S BACKGROUND

6. Claimant is 16 years old and currently resides at Cinnamon Hills Youth Crisis Center in Utah due to his uncontrollable behaviors. Claimant has an extensive medical and psychological history that includes documented evidence of Psychotic Disorder, Attention Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder, Obsessive Compulsive Disorder, Phobia (specific), Mood Disorder, and Pervasive Developmental Disorder. Claimant has been served by special education over the past few years under the category of "other health impaired" and "Emotional Disturbance."

7. Claimant's parents submitted a variety of medical, psychological, and school records pertaining to claimant dating from 2013 to present. None of the records contained a conclusive diagnosis of autism following a comprehensive assessment such as the Autism Diagnostic Observation Scale (ADOS) or Autism Diagnostic Interview (ADIR). Claimant did screen as possibly autistic on the Gilliam Autism Rating Scale (GARS) and Gilliam Asperger's Disorder Scale (GADS) in a February 19, 2013, assessment by his school psychologist, but no objective testing was ever completed to render a full diagnosis of autism. As explained in that report, the GARS and GADS are merely screening devices designed to measure characteristics of autism; a "high" or "probable" rating on either screening is not the equivalent of a diagnosis of autism.

8. Rachel Wheeler, M.D., has been claimant's doctor for a year since he has been living at the Cinnamon Hills Youth Crisis Center in Utah. She is also a psychiatrist. No curriculum vitae was provided indicating the nature and extent of her experience

and background treating children with autism or assessing children for eligibility under the Lanterman Act, DSM-5, California Code of Regulations. Dr. Wheeler's background in differentiating between children with autism versus children with mental health diagnoses is also unknown.

Dr. Wheeler testified at the hearing and also wrote a letter for the hearing, dated September 12, 2016. Her testimony and the content of her letter are summarized as follows: Dr. Wheeler has diagnosed claimant with autism. Claimant has numerous characteristics that are consistent with autism, such as deficits in social-emotional reciprocity and restricted interests in patterns of behavior and activities. Claimant also has severe behavioral problems, which include defiance with authority figures, non-compliance with rules, verbal and physical aggression, destruction of property, impaired social and emotional reciprocity, sensory sensitivities, and poor academic performance. In Dr. Wheeler's opinion, despite the fact that other records have indicated claimant did not meet the criteria for autism because of the presence of delusional thoughts, she believes those symptoms merely made it more challenging to diagnose autism.

Dr. Wheeler did not conduct any objective assessments in order to make the diagnosis of autism, because in reviewing a comprehensive February 2014 assessment completed by Kaiser Permanente, she felt it supported a diagnosis of autism. The Kaiser assessment, however, contained diagnoses of Psychotic Disorder, ADHD, Oppositional Defiant Disorder, Obsessive Compulsive Disorder, Phobia (specific), Mood Disorder, and Pervasive Developmental Disorder. The Kaiser assessment to which Dr. Wheeler referred also stated the following:

[Claimant] does not appear to be on the Autism Spectrum based on history and current presentation; however, it is not possible to adequately assess social reciprocity in a child who is not thinking logically and clearly. . . .

Dr. Wheeler does not believe claimant has psychosis as stated in the Kasier assessment; she believes his behaviors are better explained by autism. Claimant is currently on two different medications (Zyprexa and Zoloft) that help with mood and aggression stabilization, and she expects his behavioral challenges will continue indefinitely.

9. Paul McGarry is a licensed clinical social worker at Cinnamon Hills who has been working with claimant since January 2016. Mr. McGarry submitted a letter in support of claimant's fair hearing request and also testified at the hearing. His letter and testimony are summarized as follows:

Mr. McGarry described claimant as having difficulty with social and emotional reciprocity, having significant deficits in verbal and nonverbal communication, and being very rigid in his daily life. Because of claimant's rigidity, he has difficulty relating to peers. Mr. McGarry stated claimant has a tendency to "perseverate on themes of social breakdown, racial issues, [and] survival living" With therapy in the structured setting provided by Cinnamon Hills, claimant's behaviors have improved over the past six months to where claimant does show some social and emotional reciprocity with his family. Mr. McGarry did not conduct any assessments or other tests to confirm a diagnosis of autism, but like Dr. Wheeler, he does not believe psychosis explains claimant's behaviors.

10. Claimant's mother testified at the hearing. Her testimony is summarized as follows: Claimant's mother testified that claimant is the youngest of four children. Claimant, like his siblings, was home-schooled. Claimant's mother testified that claimant is very rigid in his thinking, and his behavior is always at the extremes – either all or nothing. She confirmed the type of behaviors previously noted in the letters by Dr. Wheeler and Mr. McGarry. She stated that when claimant turned 13 years old, she placed him in a regular school setting and started seeking professional help because she

did not have the tools to help him at home. Because of his behaviors, he was placed in Cinnamon Hills less than a year and a half after starting in a regular school setting.

Claimant's mother feels that they may have waited too long to transition claimant into a school setting, because by that time they tried to integrate him into that setting, it may have been too late.

Claimant will be returning home soon, but he will first go through a "step down" program to assist in the transition back home. Claimant's mother is saddened by the fact that her son will never be "normal," but hopes that he can be helped to a point where he will be able to live on his own in the future.

11. Claimant's father testified at the hearing. His testimony is summarized as follows: Claimant's father primarily wanted to advocate for services because claimant will be turning 18 in a few years. Claimant's father is concerned that without some support or structure, claimant will not be successful in the future.

12. Claimant's parents' testimony was credible, heartfelt, and sincere. They clearly want the best for their son so he can be self-sufficient in the future and are seeking all possible options to meet that goal.

EVIDENCE PRESENTED BY IRC

13. IRC produced documentary evidence, including school individualized educational programs (IEPs), psychological assessments, medical records, and letters from various doctors and social workers. At the hearing, claimant produced exhibits that were also reviewed. Many of the documents in claimant's exhibits were duplicative of exhibits already provided to IRC.

14. Ruth Stacy, Psy.D., testified on behalf of IRC. Dr. Stacy is a staff psychologist at IRC. She has also held positions at IRC such as Senior Intake Counselor, Senior Consumer Services Coordinator, and Psychological Assistant. She has been involved in assessing individuals who desire to obtain IRC services for over 26 years. In

addition to her doctorate degree in psychology, she also holds a Master of Arts in Counseling Psychology, a Master of Arts in Sociology, and a Bachelor of Arts in Psychology and Sociology. She has also had training from Western Psychological Services in the administration of the ADOS and ADOS-2, and training from IRC in the administration of the ADIR. Dr. Stacy qualifies as an expert in the diagnosis of autism and in the assessment of individuals for IRC services.

15. Dr. Stacy reviewed all claimant's records and concluded that claimant was not eligible for IRC services under the Lanterman Act because the records indicated a long history of mental health diagnoses, and although symptoms of mental health diagnoses can mimic autism, claimant's records did not demonstrate that he had a diagnosis of autism under the criteria used in the DSM-5.

Dr. Stacy pointed out that claimant's most recent IEP, dated February 24, 2016, showed claimant was served under the categories of Emotional Disturbance and "Other Health Impairments." Neither category qualifies a person for regional center services.

Dr. Stacy reviewed the IEP addendum dated August 9, 2016, and stated that the behaviors and character traits noted were not consistent with a person who has autism. For example, the IEP Addendum stated that claimant effectively communicates his wants and needs and is open to staff encouragement. The IEP Addendum indicated that claimant is not fond of authority figures. Dr. Stacy explained that this characteristic shows social awareness, albeit negative, but nonetheless it is not typical for a person with autism to show that type of social awareness. The IEP further stated that claimant will apologize at times for wrongful behavior, and can be open to accepting the opinions of others. Again, Dr. Stacy explained that these characteristics are inconsistent with a person who has autism.

Dr. Stacy reviewed claimant's school discipline record. The record included disciplinary actions taken between March and May 2015. Dr. Stacy explained that the

various disciplinary actions showed claimant's inappropriate interactions with others (i.e. inserting himself into verbal conflicts, making inappropriate comments to irritate other children, making threatening comments to students and teachers, defying orders, and disrupting class when something happened that he did not like). However, as she explained in connection with claimant's IEP, claimant's social awareness in the school setting may be negative, but it involves social interaction nonetheless. This is not what one would expect to see with a person who has autism. In fact, Dr. Stacy stated claimant's behaviors are more consistent with a person who has Oppositional Defiant Disorder and ADHD – and claimant has a long history of being diagnosed with both these afflictions.

Dr. Stacy reviewed the Kaiser assessment dated February 2, 2014. She pointed out that the assessment did not diagnose claimant with autism and did not contain any testing for autism. Dr. Stacy noted that claimant's noted history of medical problems in the Kaiser assessment was consistent with other documentation in his records, which included ADHD, Oppositional Defiant Disorder, Obsessive Compulsive Disorder, Phobia-Specific, Mood Disorder, Childhood Psychosis, and Pervasive Developmental Disorder. The ultimate diagnosis in the assessment was Psychotic Disorder, Not Otherwise Specified.¹ Dr. Stacy also found it telling that the report specifically stated claimant did "not appear to be on the Autism Spectrum"

Regarding the letters from Dr. Wheeler and Mr. McGarry, Dr. Stacy noted that neither Dr. Wheeler nor Mr. McGarry assessed claimant for autism. Dr. Stacy explained that the most comprehensive assessment to determine whether a person has autism is

¹ Claimant struggled with the assessment due to attention and compliance problems. Claimant refused to complete the self-assessment.

the ADOS. Similarly, the ADIR is also very helpful, but claimant has never been assessed using the ADOS or ADIR.²

A letter from Tony Overduin, claimant's school psychologist dated September 6, 2016, stated that claimant's educational performance was most likely adversely affected by his emotional disturbance, and not autism. Mr. Overduin cautioned, however, that his assessment was limited to eligibility for special education under Title 5, and was not a diagnosis. Dr. Stacy agreed with Mr. Overduin, and further explained that the Title 5 criteria, even for autistic-like behavior, is different than the criteria for regional center services under the Lanterman Act.

Dr. Stacy reviewed a Multidisciplinary Team Report dated February 24, 2016, completed by personnel from claimant's school district. Again, the report contained no diagnosis of autism. However, the school did administer the GARS, which is a screening instrument used to assess individuals with severe behavioral problems for autism. The GARS scales were completed by claimant's special education teacher, claimant's team leader, and claimant's mother. On the GARS, a person with a score of over 71 is "very likely autistic." The three scores yielded from the three different raters were 59, 81, and 100. Dr. Stacy pointed out that if a person truly had autism, the resulting scores would normally be more consistent with each other and not so varied like the scores that resulted in claimant's case. Dr. Stacy also stated that it was important to remember that the GARS was simply a screening device and not a diagnosis, and that no follow up

² As Dr. Stacy explained, however, the ADOS and ADIR may be difficult to utilize in order to assess claimant because of his behavioral problems and mental health afflictions. In some cases, the emotional disturbance or psychosis can affect the assessments yielding a false high, thus indicating a person is autistic when, in fact, they are not.

assessments like the ADOS or ADIR were administered to actually confirm whether claimant had autism. The report also stated the following: claimant was able to describe his feelings and communicate clearly; claimant does engage in repetitive activities at home, but not at school; claimant recovers quickly after a setback and adjusts well to changes in routines or plans; and claimant does not show unusual interests in sensory aspects of play materials, body parts, or objects. Dr. Stacy stated that these behaviors and characteristics are inconsistent with a person who has autism.

Dr. Stacy reviewed a psychoeducational team assessment report dated February 19, 2013, which also administered the GARS as well as the GADS. On both screening tools, claimant screened as having a high likelihood of autism. But again, as Dr. Stacy cautioned with the February 24, 2016, report, both are merely screening tools and no follow up testing was conducted to assess claimant for autism. Additionally, this team assessment pre-dated the 2014 Kaiser assessment, which did not indicate a diagnosis of autism.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. In a proceeding to determine eligibility, 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.)

STATUTORY AUTHORITY

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.

[¶] . . . [¶]

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.*)

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4. California Code of Regulations, title 17, section 54000, provides:
- (a) "Developmental Disability" means a disability that is attributable to mental retardation,³ 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 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.

- (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. Welfare and Institutions Code section 4642 requires a regional center to perform "initial intake and assessment services" for "any person believed to have a developmental disability."

7. Welfare and Institutions Code section 4643, subdivision (a), provides: "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"

EVALUATION

8. Claimant had the burden to establish eligibility for regional center services. None of the documents introduced in this hearing established by a preponderance of the evidence that claimant has autism. Indeed, the documents showed quite the contrary; they appeared to establish that claimant suffers or has suffered from Psychotic Disorder, ADHD, Oppositional Defiant Disorder, Obsessive Compulsive Disorder, Phobia (specific), Mood Disorder, and Pervasive Developmental Disorder, among other things. None of these afflictions qualify a person for services under the Lanterman Act.

None of claimant's records support a diagnosis of autism under the DSM-5. Although claimant has been screened in the past using the GARS and the GADS and the screening showed the likelihood of autism, as Dr. Stacy explained, these are screening tools only, not conclusive diagnoses. Moreover, the scores yielded on the GARS in 2014

were inconsistent among the three raters, which indicates against autism. Neither the ADOS nor the ADIR has ever been administered. Several of the documents provided specifically stated that claimant was most likely not autistic, or that claimant's behaviors and educational decline were more likely explained by his emotional disturbance or other mental health disorders.

It is true that claimant does display some behavioral characteristics that are autistic-like. But, as Dr. Stacy explained, these behaviors are also attributable to claimant's mental health diagnoses. Most important, as Dr. Stacy explained, is that claimant does actually exhibit social and emotional reciprocity, it is just that his behaviors are often inappropriate. In sum, claimant's behaviors and documented history are more indicative of a mental health concern than that of autism.

Dr. Stacy and Dr. Wheeler both testified as experts in this case, and provided opposing opinions. A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1318-1319.) In resolving any conflict in the testimony of expert witnesses, the opinion of one expert must be weighed against that of another. In doing so, consideration should be given to the qualifications and believability of each witness, the reasons for each opinion, and the matter upon which it is based. California courts have repeatedly underscored that an expert's opinion is only as good as the facts and reason upon which that opinion is based. (*Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 924.) Relying on certain portions of an expert's opinion is entirely appropriate. A trier of fact may "accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted." (*Stevens v. Parke Davis & Co.* (1973) 9 Cal. 3d 51, 67.) The trier of fact may also "reject part of the testimony of a witness, though not directly contradicted, and combine the accepted

portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material." (*Id.*, at 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal. App. 2d 762, 767.) The fact finder may also reject the testimony of a witness, even an expert, although it is not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal. 3d 875, 890.)

Dr. Stacy's testimony was credible. Dr. Wheeler was also credible. However, given Dr. Stacy's extensive career working specifically with clients of IRC served under the Lanterman Act, her extensive testimony regarding the documents provided by claimant, her explanations as to why each document indicated against a diagnosis of autism, and the fact that no objective assessment has ever been completed in order to confirm a diagnosis of autism, Dr. Stacy's conclusions were found to be more persuasive.

Claimant's parents' love for their son is evident and their desire to find services for him sincere. They clearly want the best for their son and are working hard to ensure he has every opportunity to succeed in his life. Their testimony was credible. However, on this record, a preponderance of the evidence did not establish that claimant meets the diagnostic criteria for autism under the DSM-5, or that IRC should be required to conduct an assessment. Accordingly, claimant is not eligible for regional center services.

ORDER

Claimant's appeal from the Inland Regional Center's determination that he is not eligible for regional center services is denied.

DATED: October 17, 2016

_____/s/_____

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 ninety days.