

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2016100584

DECISION

Susan J. Boyle, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on February 1, 2017, in San Bernardino, California.

Leigh-Ann Pierce, Consumer Services Representative, represented Inland Regional Center (IRC).

Claimant's mother and father represented claimant.

The matter was submitted on February 1, 2017.

ISSUE

Is IRC's previous determination that claimant was eligible for regional center services under the Lanterman Act based on a diagnosis of Autism Spectrum Disorder clearly erroneous?

FACTUAL FINDINGS

JURISDICTION

1. Claimant is an eight year-old boy who lives with his parents and younger brother. He has received regional center services since he was 19 months old.

2. In September 2016, IRC notified claimant that a professional team had determined he was no longer eligible for regional center services and that services would terminate in October unless he filed a timely appeal.

3. Claimant, through his representatives, filed a Fair Hearing Request on October 7, 2016, and challenged IRC's proposed termination of services.

4. The parties agreed to a brief continuance of the proceedings so that IRC could conduct a home and school observation. That observation was completed on December 12, 2016, and this hearing followed.

ELIGIBILITY FOR EARLY START AND REGIONAL CENTER SERVICES TO AGE SEVEN YEARS AND NINE MONTHS

5. Claimant received Early Start services from the Regional Center of Orange County when he was 19 months old.¹ Claimant's Early Start case was transferred to IRC when claimant and his family moved to an area within IRC's boundaries in 2011. IRC evaluated claimant when he was 35 months old, diagnosed him with Autistic Spectrum

¹ Families whose infants or toddlers to 36 months who have or who are at risk for developmental delay or disability are eligible to receive an "Early Start" in California. Through the regional center system, teams of service coordinators, healthcare providers, early intervention specialists, therapists, and parent resource specialists evaluate and assess infants and toddlers and provide appropriate early intervention services to eligible infants and toddlers.

Disorder, and determined he was eligible for continued regional center services after age three.

6. Claimant's school district evaluated him for special education services shortly before he turned three years old. The school district found him eligible on the basis of "Autistic-Like Behaviors." Claimant attended a preschool with an Autism program, and he was in a special day class. He attended a regular education kindergarten, first and second grade, supplemented by resource services and speech and occupational therapy. His primary classification for special education services is Autism; his secondary classification is for Speech or Language Impairment.

JANUARY 2016 INDIVIDUAL PROGRAM PLAN

7. On January 21, 2016, IRC and complainant's mother signed an annual Individual Program Plan (IPP) Summary Sheet in which the parties agreed that claimant and his family would receive 20 hours per month of respite services and ABA co-pay assistance from September 24, 2015, through March 24, 2016. Claimant requested an increase in respite hours, continuation of ABA co-pay assistance, and self-determination training services.

8. The IPP document confirmed that IRC authorized an increase in respite care from 20 to 26 hours per month. The IPP stated that claimant participated in soccer and baseball leagues and community outings with his family. A goal claimant's family hoped claimant would achieve was to learn to ride his bike to increase his level of independence.

9. The IPP stated that claimant independently used the bathroom, but he occasionally required help wiping after a bowel movement. Claimant required reminders in daily grooming and hygiene, for example, to shampoo his hair, clean private areas, and brush his teeth. He also required some assistance with dressing, including fastening zippers and buttons and tying shoe laces.

10. Claimant was found to have a large vocabulary and was able to communicate his needs and wants verbally. The IPP stated that claimant played "tetherball and chase with his peers and initiates social interactions across settings." Claimant's family did not have concerns about claimant's communication skills.

11. Under the category, "Community/Social Life," the IPP stated that claimant "has many friends," and noted that claimant's family had "no concerns in this area" Under "Education" the IPP reported that claimant was integrated into a general education class and was performing at grade level. Claimant's mother stated that claimant had "improved with his social interactions at school. He plays with his friends on the playground." Claimant's family did not have any concerns about claimant's education.

12. Under the category, "Personal/Emotional Growth," claimant's mother reported that claimant "engages in disruptive social behaviors at least once a week." She stated he removes his bed sheets when he is upset and is not compliant with instructions when he is tired. These behaviors are prevented by claimant's parents directing him to a restful activity when he appears tired.

Claimant's mother said claimant engages in aggressive conduct daily. He acts out by hitting his younger brother when he is upset. He also has emotional outburst daily in which he screams and cries when he does not get his way. Claimant's mother reported that claimant was "easily redirected and his behaviors are improving"

13. The IPP noted that claimant was receiving ABA services. The ABA services were funded by claimant's family's health insurance, and IRC provided co-pay assistance for up to 18 co-payments of \$20 each per month. It was contemplated in the IPP that the ABA services would be transferred Medi-cal funding.

PRIOR PSYCHOLOGICAL AND PSYCHOEDUCATIONAL ASSESSMENTS.

2011 Psychoeducational Assessment by School District

14. In October 2011, claimant's school district performed a psychoeducational assessment of claimant. In his November 28, 2011, report of that assessment, the school psychologist, noted that claimant was medically diagnosed with Autism Spectrum Disorder by the Autism Multidisciplinary Team from Kaiser Permanente in 2010. Among other assessment tools, the school psychologist administered the Adaptive Behavior Assessment System – II (ABAS-II). The results of this test indicated that claimant's adaptive behaviors were "well below age-expectancies at this time." The school psychologist also administered the Gilliam Autism Rating Scale-Second Edition (GARS-2). In that assessment, claimant's scores indicated a "Very Likely probability of autism." In the Childhood Autism Rating Scale, Second Edition, Standard Version (CARS-2-ST), claimant's scores indicated he had "Severe Symptoms of Autism Spectrum Disorder." The school psychologist determined that claimant qualified for special education services under California Code of Regulations, Title 5, Section 3030g, Autistic-Like Behaviors.²

2011 Psychological Assessment by IRC

15. On December 5, 2011, when claimant was three years old, Edward B Pflaumer, Ph. D., performed a psychological assessment of claimant to gather

² 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.

information to assist IRC's multidisciplinary team in determining claimant's continuing eligibility for IRC services.

Dr. Pflaumer stated that claimant wore diapers, but the parents were attempting toilet training. Claimant's parents reported that claimant engaged in violent behavior, including banging his head, kicking, hitting, screaming, throwing things and slamming doors if he did not get what he wanted or was stopped from doing something he liked doing. The tantrums lasted as long as 20 minutes.

Claimant's parents stated that claimant related "well to his family most of the time and when he wants something, but as soon as he gets what he wants he ignores them." Claimant's parents reported that when claimant recently attended a birthday party, he "hid in a corner by himself and engaged in repetitive behavior rather than interacting with other children." The repetitive stimming behavior claimant engaged in included spinning and flapping his ears. Claimant's parents reported he liked to open and close doors, turn lights on and off and run in and out of the door. Claimant spoke in short sentences and phrases.

16. During an assessment interview with Dr. Pflaumer, claimant "gave fleeting eye contact, but showed little emotion." Claimant was hesitant to relate to Dr. Pflaumer, and he had little interest in the toys in Dr. Pflaumer's office.

17. Claimant's scores on the Autism Diagnostic Observation Schedule (ADOS) indicated he was Autistic; he received a score of 18 where 12 was the cutoff for autism. In the CARS, claimant's scores indicated Mild to Moderate Autism Spectrum Disorder; he received a score of 32.5 where 30 to 37 indicated mild to moderate autism. Based on his scores on the Vineland Adaptive Behavior Scales (Vineland), Interview Edition, Dr. Pflaumer provided an Axis I diagnostic impression of Autistic Disorder. After considering the results of Dr. Pflaumer's assessment, claimant was found eligible for IRC services due

to a diagnosis of autism. Dr. Pflaumer recommended that claimant's eligibility be reviewed in three years.

2014 Psychological Assessment by Center for Behavior Sciences

18. In or about September 2014,³ Ronald Moreno, M.A., BCBA, Clinical Manager of Center for Behavior Sciences (CBS) assessed claimant for an updated report to Kaiser Insurance. Mr. Moreno evaluated claimant's level of developmental functioning in the areas of cognition, physical and motor skills, communication, social/emotional and self-care. Mr. Moreno's report noted that claimant's parents reported that claimant engaged in tantrum behaviors approximately five times a day for ten minutes per each episode. Other individuals who worked with claimant reported tantrums occurring once a day for three to five minutes each. The report provided multiple program goals for claimant's continued ABA services and included proactive strategies to work with claimant and manage his behaviors. Mr. Moreno recommended that claimant continue to receive 43 hours of "direct intensive intervention focusing on Applied Behavior Analytic principles" per month.

2014 Psychoeducational Assessment by School District

19. A psychoeducational assessment of claimant was performed by another school psychologist sometime prior to a school scheduled Individual Education Plan (IEP) meeting set for November 7, 2014.⁴ A member of the IEP assessment team

³ Mr. Moreno's report is dated September 30, 2014; however, the report does not indicate the date of the assessment.

⁴ The report was not dated, but the report indicated the assessments were conducted between October 26 and 29, 2014.

observed claimant in his classroom on October 26 and 27, 2014.⁵ The observer noted, among other things, that claimant, "at times [would] discuss the learning activity with his peers and adults in the room," did not request help with tasks, did not appear nervous or anxious, and was distracted by sounds. Several assessments were administered, including the CARS-2. Claimant's scores on the CARS – 2 indicated that he had Mild to Moderate Symptoms of Autistic Spectrum Disorder. The school psychologist concluded that claimant had "made progress in most areas relating to his ability to function appropriately in the classroom, adaptive behaviors, and his ability to access grade level school academic curriculum for learning, but [claimant] continues to demonstrate autistic like behaviors that significantly impact his learning in the academic classroom setting. [Claimant] has grown in his understanding of social emotional understanding but still has significant difficulty in social communicative reciprocity." The school psychologist determined that claimant continued to be eligible for special education services provided by the school district under the category of Autism and Speech and Language Impairment.

PSYCHOLOGICAL ASSESSMENT BY DR. RUTH STACY⁶

20. Ruth Stacy, Psy.D. has been a Staff Psychologist with IRC for one year. Her job duties include performing and interpreting psychological assessments, reviewing various assessments and records provided to IRC by consumers, and collaborating with other professionals to determine eligibility for IRC services. She has been licensed as a

⁵ Although the 2014 report does not specify which team member observed claimant, the report was signed by the school psychologist and it was assumed that person observed claimant.

⁶ Dr. Stacy testified at the hearing consistent with her report.

psychologist since October 2013. Prior to serving as Staff Psychologist, Dr. Stacy was a Senior Counselor with IRC for 15 years. She obtained her doctorate in psychology from Trinity College of Graduate Studies in 2008.

21. On July 27, 2016, Dr. Stacy performed a psychological assessment of claimant to obtain his level of functioning and determine eligibility for continued IRC services. Dr. Stacy reviewed prior assessments and records in claimant's file, interviewed claimant, and administered the ADOS-2 and the Vineland-II, Parent/Caregiver Rating Form. Dr. Stacy prepared a Psychological Assessment Report that contained her findings. Dr. Stacy reviewed and considered the reports of the prior assessments described above in reaching her conclusions about claimant.⁷

22. Dr. Stacy reported that claimant was cooperative during the assessment. She stated he was anxious at first, but he became more relaxed as the testing progressed.

ADOS-2 Results

23. On the ADOS-2, claimant obtained a score of 5 where the cut off for Autism Spectrum was 7. He scored a comparison score of 3, which indicated he was at the low level for Autism Spectrum related symptoms.

Dr. Stacy reported that claimant spoke in short sentences and in a "largely correct" manner. His speech occasionally had a "sing-song" quality, but had varied intonation and pitch. He did not have repetitive speech, echolalia or scripted language. He talked with Dr. Stacy about his thoughts, feelings and experiences. He did not ask for

⁷ Mr. Moreno's September 2014 report was not referenced by Dr. Stacy in her report; however, that report was offered by IRC and received in evidence as background materials Dr. Stacy reviewed and considered in reaching her conclusions about claimant.

another puzzle piece beyond his reach, but looked at Dr. Stacy and tapped the puzzle board when he needed another piece.

Dr. Stacy stated that claimant had "good eye contact, once he became comfortable, but he had limited facial expressions." Claimant had "little insight into typical social relationships and he had little insight into his role in the relationship." He expressed pleasure, like laughing when throwing a ball with Dr. Stacy. Claimant engaged in imaginative and pretend play during the assessment.

Claimant's parents reported that claimant was affectionate; he liked to cuddle and gives hugs and kisses. They also reported that claimant will sometimes show empathy or awareness of other people's feeling. If his mother is crying he will sometimes try to comfort her, but he does not do this if his brother is crying. Claimant's parents reported that claimant plays with his brother and other children if he is comfortable with them. Claimant has a friend whom he visits at the friend's house. Claimant plays age appropriate board games with others.

Claimant's parents said that claimant has temper tantrums daily if he does not get his way. When this happens he sometimes hits his mother or brother or yells "I hate you." Claimant's parents stated that claimant only has tantrums at home; he is reported to be polite at school.

24. Claimant's parents told Dr. Stacy that claimant used to spin and twirl himself, but he grew out of it. He did not engage in any repetitive behaviors during his assessment.

25. Claimant's parents stated that claimant is more anxious and fearful than other children his age. He becomes anxious if something is not as he expected it to be. Claimant's parents said claimant will notice a change in routine, but he "typically doesn't get mad about it." The parents stated that claimant's daily routine is very flexible.

26. Dr. Stacy concluded the results of the ADOS-2 "suggest" claimant does not have Autism Spectrum Disorder.

Vineland-II Results

27. Claimant's parents were interviewed by Dr. Stacy using the Vineland – II questions. Based upon claimant's parents' responses, claimant scored an adaptive behavior composite score of 78, Moderately Low. The information provided by claimant's parents included the following:

Claimant follows two-part, and sometimes three-part instructions. He sometimes fails to understand phrases that were not meant to be taken word for word. His vocabulary is at least 100 words, and he names and identifies most common colors. He understands the basic parts of a story or television plot. He sometimes describes experiences in detail.

Claimant feeds himself and is toilet trained. He dresses himself, brushes his teeth with help, and showers without help. He is "sometimes" careful about hot or sharp objects. He helps with simple household chores. He can use the telephone, use the television without help, and has the computer skills to play games or start programs. He sometimes can identify coins. He sometimes looks both ways to cross the street.

Claimant shows affection to familiar people and shows an interest in children his age. Claimant sometimes uses actions or words to show happiness or concern for others. He sometimes demonstrates friendship behavior. He sometimes acts when another person needs help and sometimes recognizes the likes and dislikes of others.

Claimant sometimes chooses to play with other children, plays cooperatively with more than one child for more than five minutes, and shares his toys. Claimant changes his behavior depending upon how well he knows another person. He sometimes says "please," "thank you," or "I'm sorry." He sometimes controls his anger when plans are changed or when he does not get his way.

Dr. Stacy's Conclusion

28. The results of the ADOS-2 suggest claimant does not have Autism Spectrum Disorder. The results of the Vineland-II showed that claimant's adaptive life skills were in the Moderately Low range and do not constitute a substantial deficit in adaptive functioning. Claimant's cognitive skills are in the Low Average to Average range of intellectual functioning.

29. Dr. Stacy concluded that claimant no longer qualifies for regional center supports and services. She determined he currently does not meet the criteria for services under any of the categories described in the Lanterman Act. She confirmed that a consumer's eligibility status can change from eligible to not eligible. Dr. Stacy also confirmed that the criteria for eligibility for special education services is not the same as that for IRC services, and a consumer can receive special education services without being eligible for IRC services.

DETERMINATION TO TERMINATE SERVICES

30. By letter dated September 26, 2016, IRC advised claimant's parents that, "a team of professionals at [IRC]" had determined that "the original decision that [claimant] is eligible for regional center services was not correct" and that services provided by IRC would end on October 27, 2016, unless claimant's representatives timely filed an appeal of IRC's determination. IRC said it based its decision that claimant was no longer eligible because it found that he did not have Autism or any other qualifying condition, and he was not "substantially disabled as a result of autism" or any other qualifying condition. IRC stated it used the same definition of "'substantially disabled'" that it has used when it originally determined claimant was eligible for IRC services.

31. On October 5, 2016, claimant's mother signed a Fair Hearing Request on claimant's behalf appealing IRC's decision. In her hearing request, claimant's mother

disagreed with IRC because she believed claimant was eligible for regional center services based upon having Autistic Spectrum Disorder and that he was substantially disabled as a result.

32. On October 14, 2016, claimant's mother participated in a telephonic conference with IRC staff to discuss claimant's request for a fair hearing. By letter dated October 20, 2016, Ms. Pierce summarized the meeting, including that claimant's mother had provided details about claimant's conduct and behaviors at home that was "not previously identified in records." IRC suggested that it conduct a home and school observation of claimant before making a final determination about claimant's eligibility for continued supports and services. Claimant's parents agreed.

SCHOOL AND HOME OBSERVATION OF MICHELLE M. LINDHOLM, PH.D.⁸

33. Michelle M. Lindholm, Ph.D. is a licensed clinical psychologist. She was employed by IRC as a psychologist assistant in 2003; she became a clinical psychologist with IRC in 2011. Her duties in both positions include reviewing records and documentation, performing comprehensive intellectual assessments, and evaluating individuals' eligibility for regional center services. Dr. Lindholm observed claimant at school and home and prepared a report of her observations and conclusions. She did not review any of claimant's records before conducting her observations so that she could observe without bias.

34. On December 12, 2016, Dr. Lindholm spent 3.5 hours at claimant's school and 1.25 hours at his home.

School Observation

35. Dr. Lindholm observed the following when she visited claimant's school:

⁸ Dr. Lindholm testified consistent with her report.

36. Claimant was not usually in a crowd of children. He was among the quieter and more passive students in the class. He did not raise his hand to offer answers to the teacher's questions, but he was able to answer the teacher if she called on him. He looked around the classroom and spoke to other students but only rarely. If it appeared he needed help, he looked around, but he did not ask for help. He often looked at other students to see what he was supposed to be doing.

37. At snack time, claimant struggled with opening his milk and straw, but he did not ask anyone for help. Other children having the same problem asked others, including Dr. Lindholm, for help. Claimant stayed focused and ultimately was able to open the milk and use the straw to drink. Claimant sat close to another student, but neither spoke to the other.

38. During recess, claimant gravitated to sports. He wanted to play handball, but he took too much time looking around to see what his options were, and so, he was not able to get a turn at handball. Claimant chatted some with others and showed signs of excitement when something happened in the sports.

39. At lunch, claimant sat next to a fellow classmate. He smiled and chatted with this student briefly. Another student from the class sat on claimant's other side. Claimant spoke with both of these boys and occasionally with other boys at the table when they initiated conversation with him. He easily opened his lunch sack and ate all of his lunch. Claimant briefly talked with a student who came up to him during lunch.

40. After lunch, claimant walked towards handball, but another student joined him and they both went to play soccer. The children playing soccer were not involved in an organized game, instead, several soccer balls were being kicked around. Claimant was able to follow the ball. He talked to a few students while playing.

Home Observation

41. Although Dr. Lindholm was at claimant's school for three and one half hours, claimant did not appear to recognize her when she arrived at his home. With his father's prompting, claimant shook Dr. Lindholm's hand and made eye contact with her.

42. Claimant was unable to tell his father or Dr. Lindholm what happened in school that day or what activities he worked on even after prompting from Dr. Lindholm. Claimant's brother was at the home. In response to Dr. Lindholm's question, "Who is this?," claimant said "my brother." He also responded appropriately when Dr. Lindholm asked what his brother's name was. Dr. Lindholm noted that claimant's brother had a friendly and outgoing personality and was more animated than claimant. While claimant's brother was more focused on Dr. Lindholm, claimant was more aloof socially than a typical child would be.

43. Claimant's ABA therapist arrived at claimant's home while Dr. Lindholm was there. Claimant smiled and greeted the therapist with excitement. The ABA therapist asked claimant if he was going to introduce her to Dr. Lindholm, but claimant did not remember Dr. Lindholm's name.

44. The ABA therapist told claimant she was going to keep track of how many times he looked away and, after that, claimant would keep track. It took "deep concentration" for claimant to maintain eye contact. When he started to look down or toward a window, he would stop short of looking entirely away. When he scored his own ability to maintain eye contact, he did not recognize or score the four times he looked away.

45. Claimant read for 20 minutes. He did not show any emotional response to the reading. Afterwards, he had little comprehension of what he had just read. The ABA therapist asked leading questions so that claimant could answer her questions.

46. The ABA therapist asked claimant about his birthday party that had been held a few days before. Claimant stated he had a crowd at the party and a bounce house. Further information about the event was elicited by prompting and asking questions.

Dr. Lindholm's Conclusions

47. Dr. Lindholm's clinical impression was that claimant has Autistic Spectrum Disorder; however, she agreed with Dr. Stacy that claimant was not eligible for IRC services because he was not substantially disabled. Her observation was that claimant was relatively independent at school and at home. Dr. Lindholm stated that the determination that claimant was relatively independent was based on his ability to do certain tasks, not that he did them on his own without prompting.

48. Dr. Lindholm recommended that claimant's family request another assessment in the future. Dr. Lindholm also suggested that claimant's family try to include a social component in his school IEP.

EVIDENCE PRESENTED AT THE HEARING ON CLAIMANT'S BEHALF

Mother's Testimony

49. Claimant's mother said that from the time claimant was 18 months old until he reached age three, he received ABA therapy for five days a week, two hours a day. That therapy was funded by the Orange County Regional Center. Claimant and his family moved to the IRC catchment area in August 2011. Claimant has had the same ABA provider for six years and he is comfortable with them. Claimant also receives 26 hours of respite and is eligible for Medi-Cal co-pay assistance as an IRC consumer.

50. When claimant first received ABA services, they were given in his babysitter's home because claimant's parents both worked. This arrangement did not allow claimant to get full advantage of the ABA services. Claimant's family, therefore,

made the difficult decision that claimant's father would give up his employment to stay home and care for claimant and so that claimant could receive the ABA services in his home. Claimant's mother continued working at a job that requires she drive 90 minutes each day so that the family can make ends meet.

51. The ABA provider, CBS, has told the family that claimant is ready to be "weaned" from ABA therapy. But, if claimant is no longer eligible for services through IRC, claimant's family will lose Medi-Cal co-pay assistance, they will be unable to pay for claimant to receive further ABA therapy, and claimant will be abruptly cut off from receiving any therapy. Parents do not want to see this happen. Claimant's mother noted the high divorce rate in families with autistic children. The parents are not able to go out on their own. They spend most of their time worrying about him and 90 percent of their finances to provide care and services for him.

52. They are in agreement with the gradual reduction of ABA services; in fact, the reduction of hours has already begun. Claimant's mother stated their goal is that claimant would not require IRC and Social Security services all his life, but that he would be able to live a productive and independent life. His parents believe he requires the weaning period from CBS to complete his training towards the goal of being independent.

53. Claimant's mother questioned how observing claimant for one day would provide IRC with a valid indication of claimant's regular conduct and adaptive behaviors. For example, according to claimant's mother, claimant continues to need daily hygiene training, particularly as it relates to toilet habits. He continues to have difficulty tying his shoes. ABA helps him work on these skills.

54. Claimant's mother described claimant as having good days and bad days. On bad days, claimant is aggressive. Claimant sees the world in black and white. If he does not get what he wants, he gets aggressive. For example, if it is time to take a

shower and claimant is not first, he becomes aggressive and non-compliant. It requires the parents to take time to calm him down. They must be careful with their words or claimant will throw things from his shelves onto the floor.

When claimant becomes aggressive, he will hit his brother or mother. Claimant's mother gave an example of claimant becoming aggressive. She said that claimant loves going to the library, and he asks to be reminded when his books are due to be returned. One day claimant's mother suggested they stop at the library because she knew he enjoyed going there. But this was not the usual day claimant went to the library, and he became extremely aggressive. He scratched and kicked his mother while she was driving and trying to calm him down. Claimant had her by the hair when they reached their home, and claimant's mother had to call his father to help her get out of the car. The parents later learned that claimant became upset because he wanted to go home to see his father. Claimant cannot deal with change in his schedule, and he cannot regulate or modulate his behavior.

55. Claimant also hits his brother. Last year claimant hit his brother every day; now he hits him once a week. Claimant cannot verbalize his feelings so he turns to physical aggression. Claimant's mother said claimant does not realize how strong he is. Claimant's mother said that claimant does not engage in aggressive behavior in school; he is sweet and cooperative at school.

56. Claimant's mother said that ABA has taught claimant what to do when he gets upset, but when an incident occurs, he does not use the skills he was taught. Claimant does not apologize for his aggressive conduct even if he sees his mother cry.

57. Claimant's mother stated that, although claimant may speak to some children, he does not have "real friends." She said claimant's younger brother gets invited to every birthday party and outing, but not claimant. Claimant continues to be socially awkward. As demonstrated with Dr. Lindholm, if claimant sees someone he

recently met, it takes him time to “put all the pieces together” and realize he met the person before. Claimant’s mother has seen him not recognize children from his school when he meets them in a store outside of the school setting.

58. Claimant’s parents are concerned for claimant’s future. They want to allow the ABA services to be gradually reduced and they believe that, without IRC eligibility, they will not be able to fund the services. Claimant’s mother stated the co-pays for claimant to receive ABA services are \$5,000 per year.

59. Claimant’s mother’s testimony was heart-felt, candid and credible. She recognized that claimant had made progress, but she was very concerned what the result would be if his services were suddenly terminated.

ABA Provider Letter

60. An undated letter from Ronald Moreno, clinical manager at CBS, stated that, since August 2011, claimant had been receiving ten hours each of ABA direct training and supervision/consultation ABA services from CBS. Mr. Moreno confirmed that, at the time of the undated letter, claimant was receiving six hours per week of one-to-one direct training services and eight hours of supervision/consultation services per month. Mr. Moreno wrote:

[I]t was recommended by CBS to begin [claimant’s] fade out plan on [sic] September 2016. CBS Inc. will fade two direct service hours every three months starting in September 2016.

Mr. Moreno noted that, while claimant has made progress, he “continues to have skill deficits in the areas of self-regulation and social skills. In addition, a barrier to [claimant’s] progress includes failure to generalize skills across different settings and novel peers.”

61. Mr. Moreno wrote that it was CBS's clinical recommendation that claimant and his family "continue with the fade out plan to prevent relapse, regression, or new behavioral excesses." He concluded that it "is critical that [claimant] complete his fade out plan before services are terminated."

LEGAL CONCLUSIONS

THE BURDEN AND STANDARD OF PROOF

1. In a proceeding to determine whether a previous eligibility determination "is clearly erroneous," the burden of proof is on the regional center to establish that the individual is no longer eligible for services. The standard is a preponderance of the evidence. (Evid. Code, § 115.) Thus, IRC has the burden to establish by a preponderance of the evidence that its previous eligibility determination "is clearly erroneous."

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

2. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4500, et seq.) The purpose of the Act is to rectify the problem of inadequate treatment and services for the developmentally disabled, provide "[a]n array of services and supports" to persons with developmental disabilities, and 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.)

3. When an individual is found to have a developmental disability as defined under the Lanterman Act, the State of California, through a 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.)

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. Welfare & Institutions Code section 4512, subdivision (l)(1), provides: "Substantial disability" means the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

- (A) Self-care.
- (B) Receptive and expressive language.
- (C) Learning.
- (D) Mobility.
- (E) Self-direction.
- (F) Capacity for independent living.
- (G) Economic self-sufficiency.

6. Welfare and Institutions Code section 4643.5, subdivision (b), provides:

An individual who is determined by any regional center to have a developmental disability shall remain eligible for services from regional centers unless a regional center, following a comprehensive reassessment, concludes that the original determination that the individual has a developmental disability is clearly erroneous. MOVE

7. California Code of Regulations, title 17, section 54000, 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 retardation⁹, 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:

⁹ The regulations have not been amended to replace "mental retardation" with "intellectual disability."

- (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."

8. California Code of Regulations, title 17, section 54001, subdivision (a), defines a "substantial disability" as:

- (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.

9. California Code of Regulations, title 17, section 54001, subdivisions (b) and (c) describe the composition of the team of professionals and client representatives who assess whether a consumer has a substantial disability. Those subdivisions state as follows:

(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.

10. California Code of Regulations, title 17, section 54001, subdivision (d), requires that "[a]ny reassessment of substantial disability for purposes of continuing

eligibility shall utilize the same criteria under which the individual was originally made eligible.”

EVALUATION

11. IRC failed to establish by a preponderance of the evidence that claimant’s prior eligibility determination based upon a diagnosis of Autism Spectrum Disorder is clearly erroneous. The opinions of both Dr. Stacy and Dr. Lindholm indicated that although claimant has Autism Spectrum Disorder, his disability does not constitute a substantial disability, thereby making him ineligible for IRC services. However, those opinions were not persuasive in light of the claimant’s mother’s evidence, the CBS letter and the observations made at school by both IRC and school psychologists. Dr. Stacy’s and Dr. Lindholm’s opinions do not support a finding that that claimant’s prior diagnosis of Autism Spectrum Disorder is “clearly erroneous.” Although the evidence established that claimant has made progress and is on track to no longer being substantially disabled due to his Autism Spectrum Disorder, he is not there yet. Claimant’s conduct during Dr. Stacy’s assessment on July 27, 2016, and during the several hour observation of Dr. Lindholm, are in stark contrast to what claimant’s mother credibly described is happening at home. Further, CBS, who works on a weekly basis with claimant and his family stated that it was “critical” for claimant to continue his fade out plan before IRC services are terminated.

12. Based upon the totality of the evidence, IRC failed to prove by a preponderance of the evidence that the prior determination that claimant was substantially disabled is clearly erroneous.

ORDER

Claimant's appeal from Inland Regional Center's determination that claimant was not eligible for services based upon claimant not having a developmental disability that results in his being substantially disabled is granted.

DATED: February 14, 2017

SUSAN J. BOYLE

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.