

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2017030239

DECISION

On April 18, 2017, Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California.

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

Claimant's father represented claimant, who was present.

Oral and documentary evidence was introduced, and the matter was submitted on April 18, 2017.

ISSUE

Is claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) on the basis of a diagnosis of autism spectrum disorder?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. Claimant is a four-year-old boy who lives with his parents, six year old brother and two year old sister. Claimant's brother currently receives services from IRC on the basis of his diagnosis of autism spectrum disorder (ASD). Claimant received Early Start services beginning in August 2013, based on his developmental delays. Early Start services terminated in 2015 at his third birthday. Claimant was diagnosed with ASD in June 2016.

2. Sometime during early 2017, claimant's parents applied to IRC for claimant to obtain services under the Lanterman Act. In February 2017, IRC reviewed claimant's records and concluded that no intake services would be provided to claimant because claimant did not have a "substantial disability" as a result of ASD so as to qualify for services.

3. On February 16, 2017, IRC notified claimant that he was not eligible for regional center services based on a review of his records because he does not have a disability that qualifies him to receive IRC services.

4. On February 22, 2017, claimant's father filed a fair hearing request appealing IRC's decision.

5. On March 9, 2017, an informal telephonic meeting with claimant's father and IRC was held to discuss claimant's status regarding eligibility for regional center services. On that date, IRC scheduled a psychological assessment of claimant on March 21, 2017, with Ruth Stacy, Psy.D., in order to further assess his eligibility for regional center services.

6. On March 21, 2017, Dr. Stacy performed a psychological assessment of claimant to determine his eligibility for services. After the assessment, IRC determined that claimant was not eligible for services, and this hearing followed.

DIAGNOSTIC CRITERIA FOR AUTISM SPECTRUM DISORDER

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

TESTIMONY OF DR. STACY

8. Ruth Stacy, Psy.D., is employed by IRC as a staff psychologist. She has held that position for a year and a half. Her duties include reviewing records, performing comprehensive psychological assessments, and evaluating individuals' eligibility for regional center services. Prior to her position as a staff psychologist at IRC, Dr. Stacy worked for 15 years at IRC as a senior counselor in the intake department of IRC. Dr. Stacy reviewed claimant's records and performed a psychological assessment of claimant on March 21, 2017, and formed the opinion that claimant is not eligible for IRC services.

9. Dr. Stacy testified about the March 21, 2017, psychological assessment of claimant and summarized her findings in her report. Her assessment included an interview of claimant's father and Dr. Stacy's direct observations of claimant. Dr. Stacy stated that direct testing of claimant could not be done because he was not interested or cooperative during most of the assessment. As documented in her report Dr. Stacy

reviewed the following documents regarding claimant: Early Start program report,¹ school records from Jurupa Unified School District, Easter Seals Autism Services report, and Outpatient Child Development Consultation from Kaiser Permanente. Dr. Stacy utilized the Vineland Adaptive Behavioral Scales, Third Edition (Vineland-III) to assess claimant's current developmental levels. The Vineland-III relied on the answers provided by claimant's father on a questionnaire regarding claimant's communication, daily living, motor, and socialization skills.

In her report, Dr. Stacy wrote that, based on claimant's father's reporting in the Vineland-III, claimant's communication skills, daily living skills, and socialization skills are in the Moderately Low range. His motor skills are in the Adequate range, and overall his adaptive skills are in the Moderately Low range. Dr. Stacy further wrote that her review of claimant's records also indicate that his adaptive skills are in the Moderately Low range (an overall adaptive composite score of 77) for his age. Based on this information, Dr. Stacy concluded that claimant has a diagnosis of ASD, but that his ASD is not a substantially handicapping condition as defined in Welfare and Institutions Code, section 4512, and California Code of Regulations, title 17, section 54000 *et. seq.* Dr. Stacy explained that with the Vineland-III assessment, in order for a person to be considered "substantially handicapped" for the purpose of qualifying for services at IRC, an overall adaptive composite score of 70 or less would be needed. She stated that claimant's overall adaptive composite score of 77 is too high and would demonstrate that he is not substantially handicapped.

¹ Dr. Stacy explained that Early Start services are provided for children who are at risk for developmental disabilities and show developmental delays of around 33 percent in one or more areas. Early Start services automatically terminate when the child reaches age three.

Dr. Stacy further testified that in order to determine whether a diagnosis of ASD is substantially handicapping so as to qualify for services from IRC, there must be significant functional limitations in at least three of the seven life activities listed in California Code of Regulations, section 54001. She stated that because claimant is only four years old, two of the seven listed life activities do not apply, which are "capacity for independent living" and "economic self-sufficiency." She explained that her review of claimant's records and her assessment indicated that claimant did not have significant functional limitations in any of the seven listed life activities. Dr. Stacy also stated that the Kaiser Permanente report showed that claimant's self-care skills were age appropriate. The Easter Seal's report showed that the Vineland Adaptive Behavioral Scales, Second Edition (Vineland-II) was used to evaluate claimant, and his overall adaptive composite score was 79, which is above the 70 cut-off for a substantially handicapping condition. Furthermore, she testified that the school district records show that in August 2016 claimant had a psychoeducational assessment where the Developmental Assessment of Young Children, Second Edition was administered to claimant. The results showed that he had an overall score of 91 for adaptive behavior and described that result as indicative of average abilities related to the acquisition of adaptive behavioral skills. Dr. Stacy concluded that claimant was not eligible for IRC services on the basis of ASD because he did not have a substantial disability as defined in the Lanterman Act. (Welf. & Inst. Code § 4512, subd. (l); Cal. Code of Regs., tit. 17, § 54001, subd. (a).)

TESTIMONY OF CLAIMANT'S FATHER

10. Claimant's father testified that claimant is currently receiving ABA services from Kaiser Permanente, and as a result, claimant has seen an improvement with his ASD. However, claimant's father stated that the family has to pay a co-pay in order to receive the ABA services for claimant, and he is not able to pay it. Claimant's brother

currently receives services from IRC based on a diagnosis of ASD, and claimant's father stated that claimant greatly benefited from the services from the Early Start Program from IRC. Claimant's father believes that further services from IRC would benefit claimant greatly.

11. Claimant's father stated that claimant is enrolled in special education classes at his school based on a diagnosis of ASD. He testified that claimant is performing better in his special education class than the other students in that class, but claimant is still not functioning at a level where he can attend regular classes instead of special education classes. Claimant's father believes that because Kaiser Permanente and the Jurupa Unified School District both find that claimant needs special services because of his ASD diagnosis that IRC must also provide services for claimant on the basis of his ASD diagnosis.

12. Claimant's father testified that claimant struggles with his communication and claimant's younger sister is able to communicate better than claimant. He stated that he does not believe that he should sit back and wait for claimant's condition to worsen before obtaining services from IRC. Claimant's father stated that he has two children with ASD, his family struggles to pay for child care, and payment of the co-pay for the Kaiser Permanente ABA services is too much for his family to pay.

THE PARTIES' ARGUMENTS

13. IRC argued that the records provided for their review and the psychological assessment performed by Dr. Stacy demonstrated that claimant has a diagnosis of ASD, but failed to establish that claimant has a substantial disability that would qualify him for services from IRC.

14. Claimant's father disagreed with IRC's position that claimant does not qualify for services under the Lanterman Act, and argued that claimant should not have

to wait for his ASD to become substantially disabling before receiving services because a delay in receiving services from IRC will cause his ASD to get worse.

LEGAL CONCLUSIONS

THE BURDEN AND STANDARD OF PROOF

1. In a proceeding to determine whether an individual is eligible for regional center services, the burden of proof is on the claimant to establish that he or she has a qualifying diagnosis. The standard of proof required is preponderance of the evidence. (Evid. Code, § 115.)

2. A preponderance of the evidence means that the evidence on one side outweighs or is more than the evidence on the other side, not necessarily in number of witnesses or quantity, but in its persuasive effect on those to whom it is addressed. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

THE LANTERMAN ACT

3. Pursuant to the Lanterman Act (Welf. & Inst. Code, § 4500, et seq.), the State of California accepts responsibility for persons with developmental disabilities. The purpose of the Act is to rectify the problem of inadequate treatment and services for the developmentally disabled and to enable developmentally disabled individuals to lead independent and productive lives in the least restrictive setting possible. (Welf. & Inst. Code, §§ 4501, 4502; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) The Lanterman Act is a remedial statute; as such it must be interpreted broadly. (*California State Restaurant Association v. Whitlow* (1976) 58 Cal.App.3d 340, 347.)

4. An applicant is eligible for services under the Lanterman Act if he or she can establish that he or she is suffering from a substantial disability that is attributable to intellectual disability, cerebral palsy, epilepsy, autism, or what is referred to as the fifth

category – a disabling condition closely related to intellectual disability or requiring treatment similar to that required for intellectually disabled individuals. (Welf. & Inst. Code, § 4512, subd. (a).) A qualifying condition must also start before age 18 and be expected to continue indefinitely. (Welf. & Inst. Code, § 4512.)

5. California Code of Regulations, title 17, section 54000, also defines “developmental disability” and the nature of the disability that must be present before an individual is found eligible for regional center services. It states:

(a) Developmental Disability means a disability that is attributable to mental retardation², 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 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.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

6. When an individual is found to have a developmental disability as defined under the Lanterman Act, the State of California, through the regional center, accepts responsibility for providing services and supports to that person to support his or her integration into the mainstream life of the community. (Welf. & Inst. Code, § 4501.)

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

8. A regional center is required to perform initial intake and assessment services for "any person believed to have a developmental disability." (Welf. & Inst. Code, § 4642.) "Assessment may include collection and review of available historical diagnostic data, provision or procurement of necessary tests and evaluations, and summarization of developmental levels and service needs" (Welf. & Inst. Code, § 4643, subd. (a).) To determine if an individual has a qualifying developmental disability, "the regional center may consider evaluations and tests . . . that have been performed by, and are available from, other sources." (Welf. & Inst. Code, § 4643, subd. (b).)

9. California Code of Regulations, title 5, section 3030, provides the eligibility criteria for special education services required under the California Education Code. The criteria for special education eligibility are not the same as the eligibility criteria for

regional center services found in the Lanterman Act. A school providing services to a student under an autism disability is insufficient to establish eligibility for regional center services. 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.

EVALUATION

10. Claimant's father believes claimant should be eligible for regional center services because he has a diagnosis of ASD and he exhibits perceptive and expressive language delays, and cognitive delays; because he qualified for special education services from his school district; and because he receives ABA services from Kaiser Permanente. Claimant's father expressed his genuine desire to obtain the necessary services for claimant to maximize his potential. His motives are sincere and commendable.

11. The information contained in claimant's records and the assessment performed by IRC, however, does not support a reasonable belief that claimant's diagnosis of ASD is a substantial disability that would trigger IRC's obligation to provide services to claimant. Claimant's medical records and Early Start Services records show that claimant suffers from ASD, but his ASD is not a substantially handicapping condition so as to qualify claimant for regional center services.

12. Eligibility for special education services does not determine eligibility for regional center services. The Lanterman Act and the applicable regulations specify the criteria an individual must meet in order to qualify for regional center services. The regional center is statutorily required to use different criteria for eligibility than a school district. Additionally, the school district's determination that claimant is eligible for special education services on the basis of a diagnosis of ASD is not a qualifying diagnosis for regional center services as the school district does not make a determination on whether or not the ASD is a substantially disabling condition in order

to provide special education services. Likewise, Kaiser Permanente also does not require a “substantial disability” determination prior to providing ABA services.

13. Claimant’s father was credible, his testimony heartfelt, and his frustration palpable. He is clearly motivated by his desire to help his child and to obtain the services he believes are necessary to allow him to function in the world; he undoubtedly has his child’s best interest at heart. However, the preponderance of the evidence did not establish that claimant is eligible to receive services under the Lanterman Act based on a diagnosis of ASD because claimant’s ASD is not a substantial handicapping condition. The weight of the evidence established that claimant does not have a condition that makes him eligible for regional center services.

ORDER

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

DATED: May 01, 2017

DEBRA D. NYE-PERKINS

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety days.