

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

v.

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2018030902

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter in San Bernardino, California, on May 3, 2018.

Leigh-Ann Pierce, Program Manager, represented Inland Regional Center (IRC). Claimant represented himself, but asked that his mother assist him, which she did.

The matter was submitted on May 3, 2018.

ISSUE

Is claimant eligible for regional center services under the Lanterman Act under the category of Autism Spectrum Disorder (autism) or Intellectual Disability?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. On February 14, 2018, IRC notified claimant, an 18-year-old man, 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. On March 13, 2018, claimant filed a fair hearing request appealing IRC's determination simply stating "all paper not received for earlier years." Thus, the Fair Hearing Request did not state a claim. On the Fair Hearing Request, claimant also wrote, "do not have (need one)" under the heading "authorized representative."

3. Claimant did not obtain an authorized representative or attorney and no authorized representative was listed in either IRC's records or OAH's system.

4. The Informal Meeting Letter typically included in eligibility cases was not included in the evidence packet. Thus, it was unclear from the record whether IRC and claimant held an informal meeting to discuss the nature of the Fair Hearing Request. Nonetheless, at some point, IRC and claimant agreed that the issue to be resolved in this matter is whether claimant qualified for regional center services under the categories of autism or intellectual disability.

5. In OAH No. 2017031248, which was decided on May 9, 2017, claimant was found not eligible for regional center services under the category of intellectual disability.¹ Thus, with respect to intellectual disability, the issue in this case is identical –

¹ Although the issue listed in the decision was whether IRC needed to conduct an "intake and assessment" to determine whether claimant was eligible for services under the category of intellectual disability, the Fair Hearing Request in that case simply

denial of services. Although normally an identical claim by an identical party would be foreclosed based on the doctrine of *res judicata*, IRC conducted an additional psychological assessment of claimant in January 2018. Although the conclusion was that claimant was not eligible for regional center services based in part, on a diagnosis of intellectual disability, the assessment constitutes new evidence. Therefore, the doctrine of *res judicata* does not apply and claimant cannot be foreclosed from challenging eligibility under the category of intellectual disability based on the prior OAH decision.

DIAGNOSTIC CRITERIA FOR AUTISM

6. The Diagnostic and Statistical Manual of Mental Disorder – Fifth Edition (DSM-5) identifies criteria for the diagnosis of autism. 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 to qualify for regional center services under autism.

DIAGNOSTIC CRITERIA FOR INTELLECTUAL DISABILITY

7. The DSM-5 contains the diagnostic criteria used to diagnose intellectual disability. Intellectual disability is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. Three diagnostic criteria must be met in order to receive a diagnosis of intellectual disability: Deficits in intellectual functions, such as reasoning,

sought review based on denial of services.

problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience; deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility; and, the onset of these deficits must have occurred during the developmental period. Intellectual functioning is typically measured using intelligence tests. Individuals with an intellectual disability typically have intelligent quotient (IQ) scores at or below the 65-75 range.

The essential features of intellectual disability are deficits in general mental abilities and impairment in everyday adaptive functioning, as compared to an individual's age, gender, and socio-culturally matched peers.

EVIDENCE PRESENTED AT HEARING

8. Holly Miller, Psy.D., is a staff psychologist at IRC. She obtained her Doctor of Psychology in 2009, and already held a Master of Science in Psychology and Bachelor of Arts in Psychology. Dr. Miller has served in a variety of positions, including clinical supervisor where she was in charge of the mental health services provided by the County of Riverside Department of Public Social Services. She served in various internships, all of which involved conducting or assisting in psychological assessments. She has published scholarly works in two peer-reviewed professional journals, and has won awards in her field. Dr. Miller also has extensive experience in the assessment and diagnosis of individuals seeking to obtain regional center services under the Lanterman Act, and in serving on the multi-disciplinary team for IRC to review the cases of those seeking services. Dr. Miller is an expert in the areas of autism and intellectual disability.

9. Dr. Miller conducted an extensive review of claimant's past records, which included: multiple Individualized Education Plans (IEPs) and IEP Addendums; documents from the Department of Rehabilitation; a letter from Parkwood Behavioral Health System; a Methodist Healthcare Medical Progress Note; a summary of a psychological

evaluation dated September 30, 2016; a psychoeducational report by East Valley SELPA dated November 17, 2016; Outpatient Child Developmental Consultation by Kaiser Permanente dated August 3, 2017; and progress notes from Kaiser Permanente. Dr. Miller also conducted her own assessment of claimant on January 8, 2018. The following is a summary of Dr. Miller's testimony, assessment, and the above-referenced documents.

10. None of the records provided by claimant showed a diagnosis of autism or intellectual disability, under the DSM-5. None of the records provided showed the characteristic symptoms of autism or intellectual disability prior to age 18. Claimant had been diagnosed in the past with the following: Major Depressive Disorder, Oppositional Defiant Disorder, Attention Deficit Hyperactivity Disorder (ADHD), Dyslexia, visual-spatial impairment, learning disorder in reading and written expression, strabismus (crossed eyes), and encephalopathy (a birth injury). Claimant has also been on psychological medications such as Vyvance, Intuniv, Clonopin, Adderall, and Strattera. All of the above-referenced conditions are mental health conditions and are not developmental disabilities that qualify a person for regional center services.

11. Claimant has been receiving special education services since 2008 for specific learning disability and other health impairment. Neither of these conditions qualify a person for regional center services.

12. Claimant has been seeing a psychiatrist since 2010 for behavior problems. The records note he had a history of suicidal thoughts. Claimant has been hospitalized twice, in 2015 and 2016 for "suicidal thoughts/attempts."

13. A 2017 Kaiser evaluation reported that claimant had autism. However, the testing and symptoms listed throughout the report do not correlate to typical autistic behaviors. The background information portion noted that claimant had recently been expelled from school due to behavior problems. Claimant refused to do things his

teacher wanted him to do. Claimant was also disobedient with school officials and school police. These behaviors show claimant has the ability to make choices and knows right from wrong. Moreover, the report showed that claimant made intermittent contact with the examiner, answered questions appropriately, and did not exhibit any repetitive behaviors. Thus, the finding of autism simply does not correlate to the observations and details in the report. A subsequent progress note from Kaiser also cuts against a diagnosis of autism. The note mentions that claimant is doing "ok" in school and his mood is "good." Claimant told the examiner he was able to focus on what he needs to make good decisions. Claimant was "engaging" and "open" when discussing interventions.

14. Dr. Miller's January 8, 2018, psychological assessment also shows claimant does not qualify for regional center services under the categories of autism or intellectual disability. Dr. Miller utilized the following test measures: Autism Diagnostic Observation Scale, Second Edition (ADOS); Kaufman Brief Intelligence Test, Second Edition (KBIT); Social Responsiveness Scale, Second Edition (SRS); Direct Observation; and Document Review.

15. Dr. Miller noted that although claimant has some intellectual deficiencies, they are inconsistent and variable. That is not what you would normally see with a person who is intellectually disabled, who would have consistent deficits across all areas. Claimant's school records similarly lack consistent deficits across all areas. In her evaluation, claimant showed such varied scores that his scores are actually more consistent with a person who has ADHD or specific learning disabilities, which is what he is served under through special education.

16. Although claimant did score above the autism cutoff on the ADOS, Dr. Miller explained that the elevated score was most likely due to claimant's ADHD and other mental health challenges. She noted that the day she completed the assessment,

claimant was disinterested, exhibited low energy, and told her he was tired. Thus, these factors could have affected his testing and triggered the ADOS score. In short, claimant's testing does not correlate with the score achieved in the ADOS.

17. Dr. Miller also explained that based on her record review, the descriptions of claimant in the past were wholly inconsistent with a person who had autism or intellectual disability; it appeared something happened in 2015/2016 which changed his behaviors and abilities. Prior to that time, claimant's records showed him to be friendly, cooperative, conversational, developing rapport with evaluators, mood congruent affect, age appropriate insight and judgement, academic scores generally within the average range, and even expressing a desire to be a pilot. Following that time, there were behavioral problems, two hospitalizations for suicidal thoughts and/or attempts, and an expulsion from school. Dr. Miller said that is not typical of intellectual disability or autism; neither of those conditions simply appears at age 16 or 17.

18. Dr. Miller's assessment, which included interviewing claimant's mother, showed claimant speaks in full sentences, can take medications, can prepare meals, completes personal activities, uses good table manners, is active and enjoys sports, can be left home alone, leaves to go to community center to play basketball, has safety awareness, obtained a driver license in Arkansas, keeps a balance on a bank card, and is able to make purchases. Thus, even if claimant had an intellectual disability or autism, there is no evidence he is substantially disabled.

19. Claimant's mother testified at the hearing. Claimant's mother expressed her frustration with the system, noting that claimant tried to get services from the Department of Rehabilitation but they sent him back to regional center. She did not seem to understand how there could be a document that says "autism" in his files yet he did not qualify for services. Dr. Miller explained to her that a DSM-5 diagnosis requires a comprehensive assessment of past records, to show onset before age 18; claimant's

mother disagreed and said the past records should be disregarded and what is “on the paper” should be followed. Claimant’s mother also said she did not provide Dr. Miller all of the information that showed claimant was not substantially disabled, and she did not know where Dr. Miller obtained that information from.

20. Claimant was provided the opportunity to testify, but chose not to do so. It is noted that during the hearing, claimant appeared attentive and was listening to what was happening. As Dr. Miller and his mother engaged in some verbal discussions regarding why Dr. Miller believed claimant does not qualify for services, claimant interjected with his own questions. The questions were difficult to follow, but appropriate for the discussion. When asked to rephrase the questions, he did so, and Dr. Miller attempted to answer them. Claimant then said that he has learned to cope with people. Claimant explained that he finds people very judgmental in every way, so he has chosen to cope by not looking at or interacting with them. He described his coping skills. Claimant did not feel that the fact that he has chosen to cope with his problems should be used to say he does not have autism. Claimant’s mood, affect, questions, responses, explanations, and overall behavior at the hearing was very reflective of his surroundings and showed that he has social and emotional skills and can interact with others. He did not exhibit any restricted repetitive and stereotyped patterns of behavior, interests, or activities. When asked if claimant wanted to make a closing argument, or had any final thoughts, he said he did not because there was no point. In general, claimant seems like a pleasant person but also very frustrated with the process.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. In a proceeding to determine eligibility, the burden of proof is on the claimant to establish he or she meets the proper criteria and the standard is a preponderance of the evidence. (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.*)

4. California Code of Regulations, title 17, section 54000, provides:

(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;

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.

(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."

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.

CONCLUSION

6. Claimant has the burden to establish eligibility for regional center services. Claimant did not meet his burden.

The records submitted do not show claimant meets the DSM-5 criteria for either autism or intellectual disability. Although claimant has had varying challenges throughout his lifetime, most of those challenges are related to mental health concerns such as Major Depressive Disorder, Oppositional Defiant Disorder, ADHD, Dyslexia, visual-spatial impairment, learning disorder in reading and written expression, strabismus (crossed eyes), and encephalopathy (a birth injury). There is no history of autism until the Kaiser report in 2017, but the findings in the report do not relate to the actual observations of claimant in that same report. Moreover, claimant's past

educational history shows varying scores in many areas, but generally, average intelligence. Claimant's scores in Dr. Miller's assessment also varied, which is not typical of someone with intellectual disability. Finally, Dr. Miller's credible testimony established that claimant's other challenges may have affected his score on the ADOS, so even though he scored above the cutoff for autism, the score was unreliable. In short, there is nothing in the record that show by a preponderance of the evidence that claimant has autism or an intellectual disability, the symptoms of which manifested before age 18. Finally, even if claimant did have autism or an intellectual disability, the record similarly is devoid of evidence that he is substantially disabled in three or more areas of major life activities.

ORDER

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

DATED: May 11, 2018

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.