

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

CLAIMANT

v.

INLAND REGIONAL CENTER

Service Agency

OAH No. 2018040899

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on September 24, 2019, in San Bernardino, California.

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

There was no appearance on behalf of claimant.

Oral and documentary evidence was received. The record was closed and the matter submitted for decision on September 24, 2019.

ISSUE

Is IRC's original determination finding claimant eligible for regional center services under a provisional diagnosis of Autism Spectrum Disorder (ASD) clearly erroneous in light of IRC's recent comprehensive reassessment?

FACTUAL FINDINGS

Diagnostic Criteria for Autism

1. The *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5) identifies criteria for the diagnosis of Autism Spectrum Disorder. The diagnostic criteria include 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 based on autism.

Background

2. Claimant is a 10-year-old boy who is eligible for regional center services based on a provisional diagnosis of ASD.

3. Edward Pflaumer, Ph.D., originally found claimant provisionally eligible for regional center services when claimant was 2 years and 11 months old. On January

10, 2012, Dr. Pflaumer conducted a psychological assessment and administered the following: Wechsler Preschool and Primary Scale of Intelligence, third edition; Peabody Picture Vocabulary Test, third edition; Expressive Vocabulary Test; Vineland Adaptive Behavior Scales; Autism Diagnostic Observation Scale – Module 1 (ADOS-1); and the Childhood Autism Rating Scale (CARS). Claimant was not cooperative and distracted during testing, resulting in Dr. Pflaumer being unable to complete some of the assessments. On the CARS, claimant fell just above the cutoff for mild to moderate autism. On the ADOS, claimant scored in the mild to moderate autism range. The assessments designed to test intelligence revealed claimant was “quite bright” and exhibited cognitive skills in the “average range.” Claimant displayed an “odd pattern” of behaviors. His communication skills were “strong” and his socialization skills weaker, which is not typically what one would expect with autism. Dr. Pflaumer felt, overall, ASD was a “reasonable” diagnosis, but that “further testing should be conducted in two years” since claimant was “making good progress.” Dr. Pflaumer concluded: “[I]t is anticipated that subsequent testing will reveal progress to the point that the diagnosis of autistic disorder can be eliminated.” Dr. Pflaumer then listed the ASD diagnosis as “provisional.”

4. On February 12, 2018, when claimant was 8 years 11 months old, Sandra Brooks, Ph.D., a staff psychologist at IRC, conducted a psychological assessment of claimant. She administered multiple tests, interviewed claimant’s mother, interviewed claimant’s teacher, and reviewed previous records. Dr. Brooks concluded claimant was no longer eligible for regional center services under the Lanterman Act under a diagnosis of ASD.

5. On March 28, 2018, IRC sent claimant’s mother a Notice of Proposed Action notifying her that an eligibility team had convened and determined that

claimant was no longer eligible for regional center services because the original diagnosis of ASD was not correct.¹ The Notice of Proposed Action also notified claimant's mother that claimant would continue to be eligible for services during the appeal process, if she appealed.

6. On April 8, 2018, claimant's mother filed a Fair Hearing Request challenging IRC's determination, and noting that claimant "deserves services."

7. On April 19, 2018, OAH sent the parties a Notice of Hearing setting the hearing for May 29, 2018.

8. On April 24, 2018, claimant's mother and a team of individuals from IRC met telephonically to discuss the Notice of Proposed Action and Fair Hearing Request. At the conclusion of the meeting, IRC adhered to its determination. In a letter dated May 4, 2018, which memorialized the meeting between the parties, IRC wrote:

At this time, IRC is standing by its decision that claimant is not eligible for regional center services. The Psychological Assessment conducted at IRC on February 12, 2018 determined that claimant no longer met the criteria for regional center services on the basis of autism spectrum

¹ Welfare and Institutions Code section 4643.5, subdivision (b), authorizes the regional center to reassess clients to determine if a diagnosis previously made is currently correct. Although IRC advised that the diagnosis "was not correct," the issue is not whether a diagnosis made in the past was correct, but rather, the issue is: given how the client currently presents, would that diagnosis be given today?

disorder. Dr. Brooks' assessment was consistent with testing conducted by Kaiser Permanente. Claimant is noted to be friendly and social and did not demonstrate restricted or repetitive behaviors. The inattention and distractibility that were demonstrated were consistent with ADHD. The unusual body movements he demonstrated appeared to be associated with Tourette's Syndrome, rather than the stereotypical body movements often associated with ASD.

You stated that claimant has been referred to an autism center in Murrietta for an evaluation. It has not yet been scheduled. We mutually agreed to continue the hearing currently scheduled for May 29, 2018.

9. The first continuance, which was at the request of claimant's mother so she could obtain additional documentation, was granted and the matter continued to August 13, 2018.

10. On August 2, 2018, claimant's mother requested a second continuance. According to an e-mail from IRC to OAH, claimant's mother requested the continuance because she "had secured two assessments" for claimant over the next two months. The matter was continued to November 5, 2018.

11. On October 19, 2019, claimant's mother requested a third continuance. According to an e-mail from IRC to OAH, claimant's mother requested the continuance because she had received approval from insurance to have testing conducted at Loma Linda Hospital. The matter was continued to January 10, 2019.

12. On January 8, 2019, IRC submitted a fourth request for a continuance on claimant's mother's behalf. According to an e-mail from IRC, claimant's mother told IRC that even though they had approval to conduct an assessment, Loma Linda "was full" and they needed more time. The matter was continued until April 30, 2019.

13. On March 5, 2019, IRC submitted a fifth request for a continuance, on claimant's mother's behalf. According to the motion filed by IRC, claimant's mother told IRC that no appointments were available at Loma Linda until after June 2019. The matter was continued to September 24, 2019.

14. On September 5, 2019, IRC e-mailed claimant's mother requesting an update regarding claimant's appointments, insurance approvals for claimant's assessments, documents, or any other information concerning the case. Claimant's mother, to date, has sent nothing more to IRC.

15. On September 17, 2019, IRC sent claimant's mother its evidence packet and witness list for the September 24, 2019, hearing.

16. On September 19, 2019, claimant's mother called IRC and left a voice mail on Ms. Zermeño's phone. Claimant's mother left a very demanding voice mail telling IRC that it "is going to have to" continue the hearing for a sixth time. In the voice mail, claimant's mother gave the same reason she had been giving over the past year and a half, stating, she had not had claimant assessed yet. Claimant's mother did not file anything written with OAH or otherwise contact OAH to request a continuance. IRC opposed the request.

On September 24, 2019, the matter was called for hearing. It was determined that, based on the prior history of the case, claimant's mother was aware that a request for continuance was just a request, until granted by OAH. Service of all the notices of

hearing was proper, including the last, and claimant's mother had adequate notice that the hearing would proceed on September 24, 2019. Welfare and Institutions Code, section 4712, subdivision (a), provides that a fair hearing "shall be held . . . unless a continuance based upon a showing of good cause has been granted to the claimant." There was neither a showing of good cause to continue the matter a sixth time, nor an order granting claimant's mother's continuance request. As claimant's mother was given proper notice of the hearing and failed to appear, the matter proceeded as a default.

Evidence Presented at Hearing

17. Dr. Brooks is a licensed clinical psychologist. She obtained her Ph.D. in clinical psychology in 2006 from Loma Linda University. She also has a Bachelor of Arts in English and Psychology and a Master of Science in Experimental Psychology. Dr. Brooks has been a staff psychologist at IRC since 2010, where she specializes in the assessment and diagnosis of persons for the purpose of determining eligibility for regional center services. Prior to that, she served as a psychological assistant at IRC from 2007 to 2009. Prior to that, she served in multiple positions across the country. She has been involved with many professional presentations in the field of psychology, and attended countless trainings and workshops in her field.

Dr. Brooks reviewed the following documents prior to conducting her own psychological assessment: claimant's Individualized Education Program plan (IEP) dated May 6, 2016; a letter from Kathleen Hurwitz, M.D., dated May 2, 2014²; Dr.

² The letter was not given great weight because it was not accompanied by any assessments or other data; it was merely an opinion letter that Dr. Hurwitz concluded with Dr. Pflaumer's 2012 assessment that claimant had ASD but was very bright.

Pflaumer's 2012 psychological assessment; a February 8, 2012 psychoeducational evaluation conducted by claimant's school psychologist, Ines Anderson, M.A.; an outpatient child development consultation from Kaiser Permanente dated June 6, 2013; and a psycho-educational assessment report completed by claimant's school psychologist, Kiersten Hemborg, on April 29, 2014. The following is a summary of Dr. Brooks's testimony and the records reviewed.

Tourette's Syndrome is a problem with the nervous system that causes people to make sudden movements or sounds that they cannot control. Stress, excitement, being sick, or tired can make these symptoms worse. In some cases, Tourette's Syndrome can be embarrassing and can affect an individual's social life or work.

Claimant has also been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD).

Claimant has been receiving special education services under the categories of other health impairment and speech and language impairment. Claimant has never received special education services under autism. The comments in the IEP describe claimant as being helpful and friendly, and always wanting to please others. Claimant's adaptive skills are not of concern, and he has "excellent pragmatics." These are not the features of someone who has ASD.

Regarding Dr. Pflaumer's evaluation, Dr. Brooks noted that he likely made the diagnosis provisional because claimant was so young, found to be highly intelligent,

Nothing was attached to show Dr. Hurwitz's background with ASD, or how she reached that conclusion on her own.

and just at the cutoff for a mild autism diagnosis. Dr. Brooks testified that claimant's communication was found to be strong, which is not typical for someone with ASD.

The February 8, 2012, assessment completed by claimant's school psychologist when claimant was 2 years and 11 months old found claimant to have average intelligence. On the CARS, claimant scored within the range to be considered for mild to moderate autism, so the school recommended that the IEP team convene to review the assessment results. Nonetheless, claimant never received special education services under the category of autism.

Regarding the outpatient child development consultation from Kaiser Permanente dated June 6, 2013, when claimant was 4 years 11 months old, the report noted claimant was very smart, hyperactive, and exhibited anxiety. Kaiser administered the ADOS - Second Edition (ADOS-2), and claimant was found to be well within the non-spectrum range. On the parent report screening questionnaire, claimant was also found to be outside the range for ASD. Claimant's speech and language was also found to be average, which is inconsistent with autism.

Regarding the psychoeducational assessment report completed by claimant's school psychologist, Kiersten Hemborg, on April 29, 2014, when claimant was 5 years and 2 months old, claimant was again determined to have very high intellectual functioning, and also observed to have "no atypical behaviors associated with autism." Claimant exhibited average expressive and receptive language skills and average verbal and nonverbal skills. Claimant was described as friendly, expressive, and engaged in the evaluation - all of which are inconsistent with autism. Claimant also exhibited age appropriate communication, appropriate eye contact, great leadership skills, and was able to wait patiently, all of which are not typical behaviors in a child who is autistic.

Regarding Dr. Brooks's assessment, claimant fell outside of the cutoff for ASD on the CARS and also fell outside the cutoff for ASD on the ADOS-2. The ADOS is the "gold standard" of testing for ASD; thus, if someone is not found to meet the cutoff on the ADOS-2, they likely do not meet the DSM-5 diagnostic criteria for ASD. Claimant's mother also told Dr. Brooks that some of claimant's inappropriate outbursts or gestures are explained by his Tourette's Syndrome, which make his social interactions difficult. When claimant's mother corrects claimant's behaviors, claimant feels bad about it and tells her he wishes he did not have that problem. Dr. Brooks said that type of social awareness is not consistent with ASD. On the teacher questionnaire, claimant's teacher did not note any behaviors consistent with autism. Also, during some of the testing involving storytelling, claimant was able to identify his own emotions, the emotions of those in the story, and engage in reciprocal conversations about the story. These are not typical of ASD.

Accordingly, Dr. Brooks concluded claimant does not meet the DSM-5 criteria for ASD and is not substantially disabled in three or more major life activities. Thus, he is ineligible to continue receiving services from IRC.

LEGAL CONCLUSIONS

Applicable Law

1. The Legislature enacted a comprehensive statutory scheme known as the Lanterman Developmental Disabilities Services Act (Welf. & Inst. Code, § 4500 et seq.) to provide a pattern of facilities and services sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life. The purpose of the statutory scheme is twofold: To

prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community, and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community. (*Assn. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 388.) Welfare and Institutions Code section 4501 outlines the state's responsibility for persons with developmental disabilities and the state's duty to establish services for those individuals.

2. The department is the public agency in California responsible for carrying out the laws related to the care, custody and treatment of individuals with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4416.)

3. 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.

4. 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.*)

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

(a) “Developmental Disability” means a disability that is attributable to intellectual disability³, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with intellectual disability.

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.

(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 psychosocial 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 intellectual disability, educational or psychosocial 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 intellectual disability.”

6. California Code of Regulations, title 17, section 54001, provides:

(a) “Substantial disability” means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

(A) Receptive and expressive language;

(B) Learning;

(C) Self-care;

(D) Mobility;

(E) Self-direction;

(F) Capacity for independent living;

(G) Economic self-sufficiency.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

(c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

(d) Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.

7. 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.

8. In a proceeding to determine whether a previous determination that an individual has a developmental disability "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; 500.) Thus, IRC has the burden to establish by a preponderance of the evidence that its previous eligibility determination "is clearly erroneous."

Conclusion

9. Claimant has many challenges, most notably, Tourette's Syndrome, which explains many of the social and speech irregularities he exhibits. Claimant does not exhibit any of the hallmark features of ASD, such as restricted or repetitive interests, or stereotyped patterns of behavior, interests, or activities. Further, on both the ADOS (which is the gold standard in making the diagnosis of ASD) and the CARS (a screening tool that indicates whether someone exhibits autistic features), claimant fell outside the cutoff for ASD. Finally, claimant has never been served in special education under ASD. Even if claimant had an autism diagnosis, he must still demonstrate the diagnosis is a "substantially disability" in order to qualify for regional center services. Claimant's school records do not show any behaviors that would render him substantially disabled and no other evidence demonstrating a substantial disability were offered.

IRC established by a preponderance of the evidence that its original determination finding claimant eligible for regional center services under a diagnosis of ASD is clearly erroneous in light of the comprehensive reassessment conducted by Dr. Brooks, in conjunction with other documentary evidence presented at the hearing.

ORDER

Claimant's appeal (from Inland Regional Center's decision that its original determination finding claimant eligible for services and supports based on a provisional diagnosis of ASD is clearly erroneous) is denied. Claimant is no longer eligible for regional center services and supports under the Lanterman Developmental Disabilities Services Act.

DATE: September 27, 2019

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 90 days.