

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2018060602

DECISION

Susan J. Boyle, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on November 14, 2018, in San Bernardino, California.

Claimant's mother appeared and represented claimant.

Jennifer Cummings, Program Manager, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

Oral and documentary evidence was presented. IRC gave an oral closing argument at the end of the presentation of evidence. Claimant was granted additional time to read the evidentiary documents received just prior to the hearing. The record remained open until December 5, 2018, for claimant to submit a written closing argument and until December 12, 2018, for IRC to respond to claimant's written closing. Claimant timely filed a written closing document. IRC did not file a written response, but it relied on its oral closing argument. The matter was submitted on December 12, 2018.

ISSUE

Was the previous determination that claimant was eligible for regional center services based on a diagnosis of autism spectrum disorder (ASD) and that he had a substantially disabling condition "clearly erroneous?"

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. Claimant is a five-year-old male who lives with his mother and father. He has been found to be eligible for special education services under a diagnosis of ASD, but no services are being provided.

2. Individuals having a developmental disability that results from an intellectual disability, autism, cerebral palsy, epilepsy or a disabling condition closely related to intellectual disability or requiring treatment similar to that required for individuals with an intellectual disability (fifth category) may be entitled to supports and services supplied by or through IRC. (Welf. & Inst. Code § 4512, et seq.) (Lanterman Act.)

3. On March 11, 2015, San Gabriel/Pomona Regional Center found claimant eligible for Early Start¹ services on the basis of his having developmental delays in communication and social/emotional areas. He was provided physical, occupational, and speech therapy, and specialized instruction through that program.

¹ The Early Start program provides services for children up to three years old who are determined to be "at risk" for developmental delays. Services authorized by the Early Start program are provided through regional centers; however, eligibility for Early Start services does not automatically entitle individuals to receive services past the age of three. Individuals over the age of three must meet the criteria in the Lanterman Act to be eligible for continued regional center services and supports.

4. On April 20, 2018, Ruth Stacy, Psy.D., conducted a psychological assessment of claimant. Dr. Stacy found that claimant did not meet the eligibility criteria for regional center services.

5. By letter dated May 31, 2018, IRC advised claimant that a "team of professionals" decided that the original decision finding claimant eligible for IRC services was "clearly erroneous." The team further determined that claimant was not eligible for IRC services because he did not have a developmental disability as defined by the Lanterman Act. The letter stated that claimant did not have either autism or a substantial disability. The team relied on the records and reports in claimant's file and Dr. Stacy's April 20, 2018, assessment.

6. On June 4, 2018, claimant's mother, on behalf of claimant, filed a Fair Hearing Request to appeal IRC's decision to close claimant's case and stop providing services to him. The Fair Hearing Request did not specify under which category of disability claimant sought to continue to receive IRC services and supports.

7. No evidence was presented at the fair hearing to suggest claimant had a diagnosis of cerebral palsy or epilepsy or that he was eligible for services based on intellectual disability or "the fifth category." At the administrative hearing, claimant's mother confirmed she was seeking continued services for claimant under the category of ASD. Therefore, the scope of this decision is limited to a determination whether claimant is eligible for continued regional center services based on ASD.

8. On June 26, 2018, claimant's mother attended an informal meeting with representatives from IRC. She expressed her belief that IRC's assessment of claimant was not comprehensive because it did not include a school observation, and many of claimant's social interactions occurred at school. IRC agreed to observe claimant at school and consider the report of that observation in deciding whether claimant is eligible for continuing IRC services.

9. On July 10, 2018, Holly Miller, Psy.D., observed claimant for two hours in his preschool, Sunny Days of California, and interviewed his prior year's teacher and the Director of the preschool.

10. IRC did not change its decision to close claimant's file after considering the information obtained from Dr. Miller's school observation.

11. This hearing followed.

PRIOR HISTORY OF ASSESSMENTS AND SCHOOL RECORDS

July 2016 Assessment of Liza Carrillo, PhD.

12. On July 21 and 29, 2016, Liza Carrillo, PhD., a licensed educational psychologist, performed a psychological assessment of claimant, who was then two years and eight months old. The assessment was to determine whether claimant qualified for regional center services. Dr. Carrillo reviewed claimant's records and administered a battery of tests including the Vineland Adaptive Behavior Scale, 2nd Ed., (VABS); Autism Spectrum Rating Scales (ASRS); and the Autism Diagnostic Observation Schedule-2 (ADOS-2), module 2.

13. Records reviewed by Dr. Carrillo noted concerns that claimant's affect was flat and that he had fleeting eye contact, lack of interest in social interaction with peers and inadequate socialization skills. In March 2015, claimant's mother reported claimant had appropriate affect, but he had some lingering social-communication difficulties, such as limited attention span; engaging in tantrums; failing to interact and play with others as expected; not paying attention to his surroundings; exhibiting an aversion to being hugged, held or kissed; engaging in some hand flapping; and being bothered by loud noises. After a year of therapy, claimant showed significant improvement and was "age appropriate in almost all areas assessed." Although his interpersonal skills improved, there were still instances of "lack of eye contact, inability to relate source of

upset, and perseveration on toys or stories.” In his intensive infant program, claimant showed improvement in joining in social play, taking turns, and engaging in conversation.

14. The standardized assessments of claimant’s intellectual functioning showed that claimant was within the High Average range of general mental ability, and he had “no significant difference between his performance in the verbal and nonverbal domains.” Test results also demonstrated that claimant was “functioning adaptively at the Adequate range overall.”

15. Dr. Carrillo’s diagnostic impression of claimant was that he had mild ASD, and he was high functioning. Dr. Carrillo relied on claimant’s “history of difficulties in social communication and social interactions, as well as highly-focused interests and sensory sensitivity.” She stated that claimant still displayed “some stereotypic/repetitive behaviors, and he has remaining sensory sensitivity.” She noted, however, that claimant had made “very good progress” in the year prior and that she expected he would continue to progress. Because he was making such good progress, Dr. Carrillo recommended claimant be re-assessed within one or two years “to determine if symptom behaviors have completely resolved and how he is coping adaptively in multiple settings”

August 10, 2016, Final Progress Report – Sunny Days of California, Inc.

16. In a final progress report dated August 10, 2016, when claimant was 33 months old, Lakiesha Hohl, Team Supervisor, prepared a report documenting claimant’s behavior in school and progress he had made. Sunny Days considered claimant to be developmentally delayed. Ms. Hohl reported that claimant was “eager to meet the Therapist upon her arrival.” He engaged in play with his peers, allowed peers to join him in social play, held hands with peers while singing “Ring around the Rosy,” and initiated and engaged in conversation.

17. Ms. Hohl administered the DAYC-2 assessment tool, interviewed claimant's parents, and observed claimant in the pre-school. Claimant showed improvement in several areas and performed at levels at or above his chronological age in areas such as social/emotional (34 months) and language (34-38 months). The only areas where claimant scored below his chronological age were adaptive skills (26 months) and gross motor (26 months).

September 12, 2016, Autism Diagnostic Summary

18. On September 12, 2016, Deborah Langenbacher, Ph.D., a licensed psychologist with San Gabriel/Pomona Regional Center, prepared an Autism Diagnostic Summary that addressed whether claimant was eligible for continued regional center services after he turned three years old and was no longer in the Early Start program. In her summary, Dr. Langenbacher relied on Dr. Carrillo's July assessments to conclude that claimant had a diagnosis of ASD and, on that basis, he was eligible for regional center services. She recommended claimant receive Behavioral Health Treatment, speech therapy, and occupational therapy. An interdisciplinary team reviewed Dr. Carrillo's assessment and affirmed Dr. Langenbacher's opinion and recommendations. There is no indication that Dr. Langenbacher administered any assessment tests.

19. On September 26, 2016, claimant's case was transferred to IRC.

Claimant's Eligibility for Special Education

20. On October 14 and 18, 2016, Claudia Hernandez, School Psychologist, administered a battery of assessment tests including the VABS (parent and teacher), Autism Spectrum Rating Scales (ASRS) (parent and teacher), and ADOS-2. Ms. Hernandez also reviewed claimant's records, interviewed his parents, and observed him in the testing setting.

21. Claimant scored within the Well Above Average and Average range in his developmental profiles and within Moderately High range in overall adaptive behavior, communication domain, daily living domain, socialization domain, and motor skills domain. However, claimant's teacher rated him in the At-Risk range for hyperactivity, aggression, depression, and adaptability and rated him in the "slightly to very elevated" range for Social/Communication and Unusual Behaviors on the ASRS. Ms. Hernandez wrote that Claimant's "overall Total score on the Module 2 on the ADOS-2 resulted in an Autism classification. His ADOS-2 Comparison Score further indicated that he displayed a high level of autism-spectrum-related symptoms as compared with children who have ... ASD and are of the same chronological age and language level." Ms. Hernandez opined that claimant met the Education Code criteria to receive special education services for Autism. The final decision to determine claimant's eligibility was to be made by an Individualized Education Plan (IEP) team.

22. On October 14 and 18, 2016, Jennifer Hamman, M.S., CCC-SLP, Speech-Language Pathologist for claimant's school district performed a speech and language assessment. On October 21, 2016, she prepared a report of her findings in which she found claimant did not "meet eligibility criteria for Special Education as a child with a Speech/Language Impairment."

23. On October 21, 2016, claimant's school district prepared an Individualized Family Service Plan (IFSP) to exit claimant from the Early Start program. The IFSP noted that claimant's parents did "not have major concerns, but sometimes [claimant] has some emotional moments (crying, frustration)." Claimant's parents expressed an interest in obtaining respite services from the regional center.

24. On October 21, 2016, claimant's Special Education Local Plan Area (SELPA) prepared an IEP for claimant. The IEP indicated that claimant qualified for special education services with a primary disability of Autism, however, he was progressing well

in the regular school setting and his learning was not impacted by his Autism. Therefore, the IEP indicated that the school district would not provide any services to claimant.

October 2016 Evaluation Through Kaiser Permanente

25. On October 27, 2016, Glenn Yukio Miya, M.D., met with claimant and his mother for a consultation. Dr. Miya reviewed claimant's records, observed him, discussed claimant's progress with his mother, and performed a physical examination. There was no evidence that Dr. Miya administered any standardized assessment tests during this visit. Dr. Miya wrote that claimant was "engaging, showed excellent eye contact followed commands well, and was socially appropriate. There was no stemming. He did not build much on our conversations." He assessed claimant as having a developmental delay, and "Autism, based on reports from Regional Center and School District." After noting that claimant was "making much improvement in his social and verbal skills since starting pre-school," Dr. Miya ordered speech and ABA therapy and stated he would re-evaluate claimant in six months.

Individual Program Plans Developed with IRC

26. On December 1, 2016, IRC and claimant's mother developed the first annual Individual Program Plan (IPP) that detailed the IRC services that would be provided to claimant. IRC reviewed claimant's history and current functioning. Claimant's mother expressed continuing concerns about claimant's existing behaviors, such as having tantrums and difficulty expressing his needs, and two new behaviors, hitting and spitting at his peers. Claimant's mother stated claimant was only aggressive at school and did not display those behaviors at home. The services provided to claimant under the IPP were limited to respite care. IRC advised claimant's mother that IRC would reevaluate claimant within one year.

27. On December 1, 2017, IRC and claimant's mother developed an annual IPP that reexamined the IRC services to be provided to claimant. IRC reviewed claimant's history and current functioning. Claimant's mother stated that claimant did well on a family trip to New York, and he got along well with his cousins. She expressed her continuing concern that claimant sometimes displayed inappropriate social behaviors, such as spitting and hitting. Claimant's private pre-school informed claimant's mother that claimant may be dismissed from the school if he had one more incident of bad behavior. Claimant received Applied Behavior Analysis (ABA) therapy services through private insurance, which was helping claimant develop and improve his social skills. IRC did not contest claimant's eligibility for services under a diagnosis of ASD. The only service provided by IRC was to continue respite care.

2018 Re-Assessment by Dr. Hernandez

28. Dr. Hernandez reassessed claimant on December 15, 2017, and January 12 and 26, 2018, to gather information for educational goals and to determine if he continued to qualify for special education services. Dr. Hernandez reviewed claimant's records, interviewed claimant's parents, and observed claimant. In addition, Dr. Hernandez administered a comprehensive battery of standardized assessment including, DP-3, VABS-II, Behavior Assessment System for Children, Second Edition (BASC-2) (parent and teacher scales), ASRS (parent and teacher), and ADOS-2.

29. Claimant's scores for cognitive functioning, overall adaptive behavior, communication domain, socialization domain, and motor skills domain were all within the Above Average to Adequate range. Scores for depression and aggression were rated in the clinically significant and at-risk range. Claimant scored within the ASD on the ADOS-2. Dr. Hernandez thus confirmed claimant's diagnosis, but she wrote that his diagnosis was not impacting his intellectual functioning.

2018 Pre-Academic Assessment Report

30. On January 26, 2018, David Lewis, Special Education Pre-School Teacher, member of claimant's Preschool Assessment Team, performed a pre-academic assessment of claimant. Mr. Lewis reviewed claimant's records, observed him, interviewed his mother, and administered the Bracken assessment. Mr. Lewis opined that claimant was "probably not being challenged enough in the classes that they have him in. [Claimant] shows the propensity to be a good student and has the ability to be successful in academic settings, although he has trouble transitioning."

2018 IEP Exiting Claimant From Special Education

31. On February 6, 2018, claimant's SELPA held an IEP meeting to discuss claimant's continuing eligibility to receive special education services, to determine the appropriate placement for him, and to identify the services, if any, that would be provided to him. The IEP provided that claimant's primary disability was Autism but indicated that he was "exiting from Special Education." Observations of claimant showed that claimant was a happy child, and he engaged in back and forth conversation. Claimant's mother reported that claimant had made lasting friendships, asked to play with his best friend, and engaged in "lots of pretend play." However, claimant's mother said claimant was "kicked out of private preschool programs due to behavioral issues." The IEP team concluded that, although he had a clinical diagnosis of ASD, it did not impact him academically and, therefore, he did not meet the criteria for special education. Claimant's mother signed the IEP indicating she consented to "all parts of the [IEP]."

CURRENT ASSESSMENT AND DETERMINATION OF NON-ELIGIBILITY

April 20, 2018, Psychological Assessment

32. On April 20, 2018, Ruth Stacy, Psy.D., performed an assessment of claimant to obtain his current levels of functioning and determine if he was eligible for IRC services and supports. Dr. Stacy is a clinical psychologist who is a staff psychologist at IRC. She has also held positions at IRC such as Senior Intake Counselor and Senior Consumer Services Coordinator. She has been involved in assessing individuals who desire to obtain IRC services for over 27 years. In addition to her doctorate degree in psychology, she also holds a Master of Arts in counseling psychology, a Master of Arts in sociology, and a Bachelor of Arts in psychology and sociology. She has also had training from Western Psychological Services in the administration of the Autism Diagnostic Observation Scale (ADOS) and training from IRC in the administration of the Autism Diagnostic Interview (ADIR). Dr. Stacy qualifies as an expert in the diagnosis of ASD and in the assessment of individuals for IRC services. Dr. Stacy prepared a report of the findings of her assessment of claimant and testified at the hearing. Her report and testimony are summarized as follows:

33. To be eligible for regional center services and supports, an individual must have a qualifying diagnosis that results in a substantially handicapping condition. A condition is substantially handicapping when the individual has significant functional limitations in three or more defined areas of major life activity. (Cal. Code Regs., tit. 17, § 54001.) The Lanterman Act lists seven areas of major life activity, but only five of those apply to individuals under 15 years of age: self-care, receptive and expressive language, learning, mobility and self-direction. Dr. Stacy refers to the Association of Regional Center Agencies (ARCA) Guidelines when determining if an individual meets the criteria to establish he or she has a substantially handicapping condition. In determining if an individual has a qualifying diagnosis that results in a substantially handicapping

condition, Dr. Stacy may administer developmental tests, review file documents, observe the claimant, and/or interview family members, teachers, or others with relevant knowledge of the individual's functioning. Dr. Stacy prepares a report that is considered along with other input by the members of an interdisciplinary team to determine whether a claimant is eligible for IRC services and, if so, what services should be offered.

34. The fact that an individual has been found to have a developmental disability that qualifies the individual to receive IRC services does not guarantee that the individual will qualify for services in perpetuity. This is particularly true for younger claimants whose abilities and functioning are continuing to develop. It is not unusual for a child between three and five years of age to be considered developmentally disabled but then to progress and improve to such a degree that he or she no longer satisfies the developmentally disabled criteria. Dr. Stacy referenced a document titled, "Autistic Spectrum Disorders, Best Practice Guidelines for Screening, Diagnosis and Assessment published by the California Department of Developmental Services, 2002 (Guidelines). The Guidelines emphasized that it is essential to monitor and reassess very young children (two to five years old) on a periodic basis because "the stability of the diagnosis within the spectrum may fluctuate." The Guidelines confirm that a young child could meet diagnostic criteria for autistic disorder at age 2, but that their symptoms and behaviors can change considerably as they develop further.

35. Dr. Stacy disagreed with Dr. Carrillo's opinion that claimant met the criteria for ASD. Dr. Stacy testified that Dr. Carrillo, a licensed educational psychologist, is not qualified to diagnose mental disorders and is limited to determining eligibility for services to be provided by a school, in accordance with Title V. Only a medical doctor or licensed clinical psychologist is qualified to diagnose a mental condition such as ASD. Therefore, although Dr. Carrillo's report was reviewed, her diagnosis of ASD was not determined to be conclusive or established. Dr. Stacy noted that the original regional

center relied on Dr. Carrillo's unqualified diagnosis to determine claimant was eligible for regional center services, as did Ms. Langenbacher, Ms. Hernandez, and Dr. Miya.

36. Dr. Stacy reviewed claimant's records, interviewed claimant's mother, observed claimant, and administered the Childhood Autism Rating Scale, Second Edition (CARS2-ST), ADOS2, and the Adaptive Behavior Assessment System, Third Edition (ABAS-III). Claimant's scores in the CARS2 were in the Minimal to No Symptoms of Autism Spectrum Disorder range. Dr. Stacy testified claimant's scores suggest claimant does not have ASD.

37. During testing, claimant exhibited good eye contact and appropriate gaze; his speech was accompanied by "subtle and socially appropriate changes in gesture, gaze, and facial expression"; he engaged in reciprocal social interactions with Dr. Stacy; he sometimes initiated interactions with her; and he showed pleasure. Claimant's mother reported that claimant has friends and wants to be with other children. He is affectionate with his parents and is aware of other people's feelings. Claimant hits others approximately once a month and continues to get upset easily and have temper tantrums. Claimant did not have unusual or repetitive body movements, such as flapping. Dr. Stacy found claimant's adaptive skills were in the Average range of adaptive functioning, and that he did not "have a substantial deficit in adaptive functioning as defined in Welfare and Institutions Code, section 4512, and Title 17, California Code of Regulations, section 54000."

38. Dr. Stacy opined that claimant did "not meet criteria for regional center services" under any of the categories listed in the Lanterman Act, including ASD, and he did not have adaptive deficits that constituted a substantially handicapping condition. She further opined that the prior diagnoses of ASD were clearly erroneous. She stated that even if a diagnosis of ASD had been correct, claimant's adaptive scores would not have supported a finding that claimant was eligible for IRC services and supports. Thus,

claimant did not meet the criteria mandated by the Lanterman Act to entitle him to IRC services. Dr. Stacy suggested that claimant may have Attention Deficit/Hyperactivity Disorder (ADHD), which is not a basis for eligibility for regional center supports or services. She recommended that claimant be evaluated for ADHD.

May 29, 2018, IRC Eligibility Team Meeting

39. On May 29, 2018, IRC's multidisciplinary team met to determine whether claimant continued to be eligible for regional center services and supports. The team found that claimant was not eligible for services and supports on the basis of intellectual disability, ASD or the fifth category.

July 10, 2018 School Observation

40. After Dr. Stacy evaluated claimant, his mother disputed the team's finding that claimant did not meet the Lanterman Act criteria. She requested that IRC conduct a school observation because she believed that most of claimant's negative behaviors occurred at school. On July 10, 2018, Holly Miller, Psy.D., IRC Staff Psychologist, observed claimant at his school. She also interviewed claimant's teacher and the director of the school. Dr. Holly observed claimant playing with sand and a dump truck near, but not with, other children. He became frustrated when other children played near him or attempted to use toys he was using. Inside the school, claimant became frustrated waiting in line to use the bathroom; he hit the wall while grunting and pouting. Later, claimant followed directions during snack time, and he engaged in conversation with others. During chapel time he behaved appropriately until the end of the activity. During group story time, claimant listened although he seemed impulsive at times.

41. Claimant's teacher confirmed that Dr. Holly's observations were consistent with claimant's general behavior. Claimant's teacher reported that claimant had a history of engaging in "bloodcurdling" screams when he did not get his way, which alienated

him from the other students. However, she stated that claimant's behavior had improved, and he would express an interest in playing with others. Nonetheless, claimant frustrated easily, had rotating preoccupation with certain toys or topics, and was easily distracted. He sometimes used a "sing song" voice when he discussed the subject of his preoccupation. He had difficulty understanding others' feelings or motives.

42. The IRC team did not change its opinion that claimant was not eligible for IRC services after Dr. Holly's school observation.

CLAIMANT'S MOTHER'S TESTIMONY

43. Claimant's mother stated she was not allowed to attend IRC's eligibility meeting although she requested to be there. She believed her concerns were not adequately presented to the eligibility team. Her underlying belief was that she could have changed the team's conclusion had she been at the meeting.

44. Claimant's mother submitted notes claimant's teacher wrote and provided to claimant's parents about the disruptive behaviors claimant was exhibiting in his new school. The notes indicated that claimant had difficulty following directions in the morning, he screamed for 30 minutes at a time, he cried and yelled at teachers when he was not able to do what he wanted to do, and he had trouble cleaning up, sharing and keeping his hands to himself. The teacher wrote that the consequence of his behavior was that other children did not want to play with him.

45. Claimant's mother also submitted documents from Easterseals, through whom claimant was receiving ABA therapy. The Easterseals documents noted the behaviors the ABA therapy was addressing and the goals by which they measured claimant's progress.

46. Claimant also presented documents from claimant's school and a letter from his teacher. The letter from the teacher was consistent with the teacher's

conversations with Dr. Holly, and the reports from the school were consistent with the observations made by Dr. Holly.

47. Dr. Stacy stated she had seen the school documents before offering her expert opinion, but she had not seen the Easterseals documents or teacher notes. After reviewing them at the fair hearing, Dr. Stacy testified that her opinion that claimant was not eligible for regional center services had not changed. Dr. Stacy confirmed that she was aware claimant had behavior concerns, and that is why she recommended claimant be assessed for ADHD.

48. Claimant's mother questioned who would help her son if the school district was not providing any support and IRC found claimant ineligible for services. She was concerned that if claimant's behaviors continued, he would lose his current placement as he had lost others. She noted she often has to collect claimant from school because he is not behaving properly.

49. Claimant's mother said claimant was very literal and concrete – it was hard for him to read social cues. She believed claimant had good eye contact with her and his father but not with others in the community. In school, claimant has difficulty transitioning from one activity to the other, he can't soothe himself, and he continues to hit and kick other students and his teacher. Claimant's mother wanted someone to help her and her son. She sought a one-to-one aide to be with claimant in the classroom to help with social interactions and behaviors.

50. In her written closing statement, claimant's mother argued that claimant had been assessed for ASD four times, even though the level/severity had changed over time. All but the IRC assessment concluded that claimant had ASD. Claimant's mother asserted that, despite Dr. Stacy's findings, claimant continued to have adaptive deficits that provide a basis for IRC eligibility. Claimant's mother asked that claimant be found eligible for services, but at a minimum that his file remain open until Dr. Miya can

perform a full assessment and issue his opinion of whether claimant has a diagnosis of ASD.

51. Dr. Stacy was present during claimant's mother's testimony. Dr. Stacy's opinion did not change after considering that testimony.

LEGAL CONCLUSIONS

THE BURDEN AND STANDARD OF PROOF

1. In a proceeding to determine whether the previous determination that an individual has a developmental disability was clearly erroneous, the burden of proof is on the regional center to establish that the individual is no longer eligible for services. 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. 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 developmentally disabled individuals 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 is suffering from a substantial developmental disability 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 individuals with an intellectual disability. (Welf. & Inst. Code, § 4512, subd. (a).) A qualifying condition must also start before the age 18 and be expected to continue indefinitely. (Welf. & Inst. Code, § 4512.)

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. 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).)

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 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:

² The regulations have not been amended to replace “mental retardation” with “intellectual disability.”

(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. ...

8. 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 his integration into the mainstream life of the community. (Welf. & Inst. Code, § 4501.)

9. Welfare and Institutions Code section 4643.5, subdivision (b) states:

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.

10. 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.

EVALUATION

11. The Lanterman Act and the applicable regulations set forth criteria that a claimant must meet in order to qualify for regional center services. Although the San Gabriel/Pomona Regional Center initially diagnosed claimant with ASD and determined he was eligible for regional center services, and IRC accepted that diagnosis and finding without assessment when his case was transferred to IRC in 2016, his diagnosis at such an early age was of "mild" ASD. Claimant has progressed since 2016 and many of the symptoms of ASD have been ameliorated, which suggests the original diagnosis was not accurate. The inconsistency in the display of behaviors and symptoms, which are substantially more prevalent at school than at home also suggests claimant was not accurately diagnosed with ASD since the symptoms of ASD are constant and not selective. The evidence also supports a finding that claimant's original eligibility finding was clearly erroneous since claimant does not satisfy the criteria for "substantial disability" as it is defined by the Lanterman Act. (Welf. & Inst. Code § 4512, subd. (l)(1).)

12. Dr. Stacy disputed claimant's diagnosis of ASD. She noted that the only finding of ASD was made by an educational psychologist who is not qualified to make the diagnosis. The regional centers, including IRC, who provided services to claimant relied on this unqualified diagnosis. The Guidelines acknowledge that very young children may meet ASD diagnosis criteria in their early years, but it may be found after additional development that the diagnosis was wrong or no longer applicable. Dr. Stacy opined that the original diagnosis was clearly erroneous. Further, Dr. Stacy opined, without persuasive opposition, that even if claimant was properly diagnosed with ASD,

his condition did not result in a substantial handicap such that he would be eligible for IRC services.

13. IRC's eligibility team reviewed all of the available documentation, including Dr. Stacy's psychological assessment, and determined that claimant was not eligible for continued services. These determinations have been described as difficult and complex. (*Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1129.) The language of the Lanterman Act and the implementing regulations "clearly defer to the expertise of the [Department of Developmental Services] and the [regional center] professionals and their determination as to whether an individual is developmentally disabled." (*Id.* at p. 1129.)

14. Undeniably, claimant's mother's motives are laudable. However, IRC has met its burden to establish that claimant's prior diagnosis and finding of eligibility for IRC services was clearly erroneous and claimant is now not eligible for those services. Dr. Stacy recommended that claimant be evaluated for ADHD and suggested that many if not all of his behaviors could be explained by that diagnosis.

15. The fact that claimant was found to be qualified for special education as a student with ASD, does not establish whether he has a substantial disability within the meaning of the Lanterman Act. Eligibility for special education is more inclusive than eligibility for regional center services and is addressed in California Code of Regulations, title 5, section 3030. Eligibility for regional center services is addressed in California Code of Regulations, title 17.

16. None of the documents introduced in this hearing demonstrated that claimant presently has a diagnosis of ASD that causes a substantial handicap. IRC met its burden of proving that the prior determination that claimant was eligible for services is clearly erroneous at present. As such, claimant's appeal of IRC's determination, that he is no longer eligible to receive services, must be denied.

ORDER

Claimant's appeal from the Inland Regional Center's determination that he is no longer eligible for regional center services and supports is denied. Claimant is ineligible for regional center services and supports under the Lanterman Developmental Disabilities Services Act.

DATED: December 27, 2018

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 (90) days.