

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of the Eligibility of:

Claimant,

and

Inland Regional Center,

Service Agency.

OAH No. 2018060736

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DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California (OAH), heard this matter in San Bernardino, California, on July 25, 2018.

Claimant, who is 18 years old, represented herself. Claimant previously designated her father, who did not attend this hearing, as her representative. Before the start of this hearing, claimant also designated her mother, who attended the hearing, as her representative.

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

The matter was submitted on July 25, 2018.

ISSUE

Is claimant eligible for regional center services under the Lanterman Act as a result of a diagnosis of autism spectrum disorder which constitutes a substantial disability?

## FACTUAL FINDINGS

### JURISDICTIONAL MATTERS

1. On May 10, 2018, IRC notified claimant that she was not eligible for regional center services.
2. On June 6, 2018, claimant's father filed a fair hearing request appealing that decision and this hearing ensued.

### DIAGNOSTIC CRITERIA FOR AUTISM SPECTRUM DISORDER

3. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*, (DSM-5), identified 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 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.

### EVIDENCE PRESENTED AT HEARING

4. Claimant is an 18-year-old female who was a few days shy of turning 19 years old at the time of this hearing. She asserted she was eligible for services on the basis of Autism Spectrum Disorder.
5. Holly Miller, Psy.D. is a staff psychologist at IRC who conducts assessments to determine eligibility. She reviewed the records introduced at this hearing and explained why she did not find claimant eligible for regional center services. The records did not contain findings consistent with a diagnosis of Autism Spectrum Disorder as the

types of deficits found in persons with that diagnosis were not noted in the records. The records described claimant as well behaved, interacting with others, and communicative. Those descriptions ran counter to an Autism Spectrum Disorder finding. Dr. Miller testified that records that did list Autism Spectrum Disorder as a diagnosis contained no testing or documentation to support that diagnosis, making them unpersuasive, and those records also contained test results and observations that would rule out that diagnosis. Dr. Miller further opined that the cognitive test results contained in the records showed that claimant did not have global deficits that would be found in one with an intellectual disability, ruling out that diagnosis, as well. Dr. Miller's testimony was credible, persuasive, and supported by the records.

6. Dr. Miller explained that claimant first applied for IRC services in 2015. The IRC eligibility team determined she was ineligible for regional center services, noting that her Individualized Education Plan (IEP) determined her eligible for special education services under the category of Specific Learning Disability and that her cognitive scores were in the borderline to low average range. As Dr. Miller testified, a Specific Learning Disability is not a qualifying diagnosis for regional center services. In 2018, when claimant re-applied for services, the eligibility team again found her ineligible, noting that her IEP continued to indicate her primary disability was Specific Learning Disability and that her psychoeducational report did not support a diagnosis of Intellectual Disability or Autism Spectrum Disorder.

7. Claimant's 2014 IEP, when she was in ninth grade, indicated that her primary disability was Specific Learning Disability. No other disabilities were noted. Claimant was in a special education class for 208 minutes per day. She received resource specialist and general education assistance. Claimant's "Physical Skills" were "age appropriate." The "Self-Help Skills, Functional Skills, Independent Skills and Activities of Daily Living" section of the IEP noted that claimant "functions independently on the high school campus." Claimant read at both the ninth and seventh grade levels. She had

problems with division, needed to increase her fraction and decimal point skills, and needed to increase her writing skills. Claimant had good behavior and attendance, tried and did her best in class. Nothing in this IEP indicated claimant was eligible for regional center services.

8. Claimant's 2017 IEP, when she was in twelfth grade, again noted that her primary disability was Specific Learning Disability with no other disabilities noted. She spent 225 minutes weekly in "regular class" and 60 minutes yearly in "separate class." Reading was not an area of concern. Math was an area of concern with claimant having difficulty performing multi-step math problems. Listening comprehension was also an area of concern. Claimant's physical skills were age appropriate and she was able to take care of her daily needs and navigate the campus. Claimant's parents shared that she struggled with multi-step directions and her behavior at home was different than at school. No further information regarding the "different behavior" was noted. Nothing in this IEP indicated claimant was eligible for regional center services.

9. A June 21, 2018, one page "San Bernardino Valley College Mental Health-Disability Verification" signed by Steven Hureria, DNP, PM HNL-BP, noted that claimant's "date of diagnosis" was "12/07/2017 but reports since early childhood." The diagnoses were: "Unspecified intellectual disabilities, severe moderate; attention deficit hyperactivity disorder, unspecified type, moderate; anxiety disorder, unspecified, moderate to severe." No explanation for how these diagnoses were determined was provided. These conditions interfered with "performing manual tasks, learning, working, and caring for self." The functional limitations were: "poor concentration, difficulty focusing, poor executive planning, poor recall, [and] difficulty organizing/planning, high anxiety." No explanation for the source of this information was offered at hearing or provided with this document.

10. A September 2013 Psychoeducational Report, prepared when claimant was 14 years old and in middle school, documented the result of her assessments. On

California Standard tests she was Below Basic in English Language Arts and Far Below Basic in Mathematics. Her scores on California Modified Assessment tests ranged from Proficient to Below Basic. Claimant's scores on Cognitive Functioning/Learning Ability tests were Average and Low Average. Her scores on Perception/Processing Abilities were in the Average, Low Average and Borderline ranges. Claimant's scores on the Wechsler Individual Achievement Test-Third Edition were in the Below Average and Low ranges. During the social-emotional-behavioral-adaptive evaluation, claimant reported having friends, doing age appropriate activities, using age-appropriate problem-solving techniques, and she was able to describe her interests and goals. The assessor had no concerns in this area. Claimant had passing grades in all her subjects. Based upon the tests performed, claimant had "a severe discrepancy . . . between [her] cognitive and academic functioning due to deficits in one or more psychological processing areas. Therefore, she continues to meet eligibility criteria for Special Education services under the Specific Learning Disability category." Nothing in this report supported claimant's assertion that she had Autism Spectrum Disorder.

11. A 2016 Psychoeducational Report, prepared when claimant was 17 years old and in high school, documented the result of her assessments. The report stated that claimant "reportedly has [a] history of Attention Deficit Hyperactivity Disorder (ADHD)" and has been prescribed Foculin. Claimant was noted by her teachers to be cooperative and to follow directions. She "is caring and demonstrates no behavior concerns and is able to work in a group." Her grades were primarily A's with C's and D's in math. Low scores on standardized tests were attributed to a "learning disability." During observations claimant was noted to be "a warm and courteous student who was engaging and eager to do her best." She was able to state her needs and wants and could "communicate effectively with adults and peers." Her scores on cognitive functioning tests were in the Below Average, Low Average and Average ranges. Her scores on the Woodcock-Johnson IV Tests of Achievement were in the Very Low, Low

Average and Average ranges. No adaptive functioning/behavior issues were noted. Claimant got along well with others and was concerned with her performance in school. She was "a congenial, kind-hearted, and motivated student who appears to enjoy learning and interacting with others and demonstrates positive classroom behavior." Claimant continued to meet eligibility criteria for Special Education services under the Specific Learning Disability category. Nothing in this report supported claimant's assertion that she had Autism Spectrum Disorder.

12. Riverside Medical Clinic records documented claimant's foot surgery following a car accident in 2014. In July 2014, claimant was noted to have "staring spells where she is unresponsive." She had problems at school, difficulty following complex directions, and was confused a lot. Her physical examination was normal and "hyperventilation produced no staring spell." The psychiatric portion of the physical exam indicated that claimant had normal mood and affect and normal behavior. Her primary care doctor referred her to pediatric neurology with a diagnosis of "partial seizures." An August 13, 2014, "Problem List" documented that claimant had "Autism Spectrum Disorder (Chronic)" and "Childhood psychosis, residual state (Chronic)," both since "8/13/14 -Present" but contained no testing or other information to support those entries. Claimant was noted to have memory loss, a hard time remembering events from the previous day, a hard time focusing on a single task, and to get sidetracked.

An August 13, 2014, neurology consult noted that claimant had a "history of Autism diagnosed in 2008."<sup>1</sup> She also has psychotic features and talks to herself incessantly and is easily agitated." Claimant had anxiety and tangential speech, difficulty with personal-social reciprocity, and difficulty with math. Claimant had no automatisms

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<sup>1</sup> No information regarding the source of this diagnosis was contained in the records nor was there any testing documented to support the diagnosis.

or perseverative behavior. A family history of intellectual disability, learning disability and bipolar disorder was noted. The psychiatric assessment stated:

Her mood appears not anxious. Her affect is inappropriate. Her affect is not angry, not blunt and not labile. Her speech is rapid and/or pressured. She is agitated and actively hallucinating. She is not aggressive, is not hyperactive, not slowed, not withdrawn, and not combative. Thought content is not delusional. Cognition and memory are impaired. She expresses impulsivity and inappropriate judgement. She does not exhibit a depressed mood. She expresses no suicidal plans or homicidal plans. She exhibits abnormal recent memory and abnormal remote memory. She is inattentive.

The Assessment was Autism Spectrum Disorder and Psychosis NOS. Claimant was given a trial of an anti-psychotic medication (Abilify) to help her "agitation and bizarre behavior."

The October 2014 follow up visit noted that since taking Abilify claimant no longer heard voices, but still had severe insomnia and anxiety. Focalin had been discontinued, although it was unclear from the records when it had been prescribed. The Assessment again noted Autism Spectrum Disorder and Psychosis NOS, but now added "Add with hyperactivity" and Insomnia. Abilify and Focalin were prescribed.

Despite what was documented in the records, there were no supporting testing, evaluations or any information explaining how the Autism Spectrum Disorder diagnosis was made. These "Assessments," without any supporting evaluations or testing, were insufficient, alone, to support claimant's assertion that she had Autism Spectrum Disorder.

13. Attached to claimant's fair hearing request was a three-page typed letter in which claimant provided "the story of my life." The letter provided insight, introspection, and a level of self-awareness that was inconsistent with a diagnosis of Autism Spectrum Disorder.

14. Claimant's mother testified about her daughter's difficulties with math and making friends. She provided very lengthy testimony about how her daughter never received the services or help she needed in school, merely being passed along despite her lack of knowledge. She described the trouble claimant got into at school when she followed others, describing a hide and seek game where students told claimant to enter the boys' bathroom. She described her classroom observations of teachers who did not care that students were not learning and who failed to offer extra help to struggling students. Her testimony was credible and sincere and was a scathing indictment of the public education system. It was clear she was worried about her daughter's future and had real concerns regarding her lack of education. However, as heartfelt and passionate as her testimony was, it did not establish that claimant was eligible for regional center services.

15. Claimant described her anxiety, difficulties with math and making friends, and her fears for her future. Her testimony was very emotional and demonstrated she has great insight to her situation, has concerns with what life will bring and was very aware of her limitations. Her level of introspection was not consistent with an individual with Autism Spectrum Disorder because persons with that condition typically lack the insight and self-awareness that claimant possesses. Claimant's testimony supported IRC's position that she suffers from a learning disability, anxiety, ADHD, and other mental conditions, none of which are qualifying diagnoses, and that she does not have Autism Spectrum Disorder.



## LEGAL CONCLUSIONS

### BURDEN AND STANDARD 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. The standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

### STATUTORY AUTHORITY

2. The Lanterman Act is set forth at Welfare and Institutions Code section 4500 et seq.

3. Welfare and Institutions Code section 4501 states:

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 follows:

“Developmental disability” means 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. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability, but shall not include other handicapping conditions that are solely physical in nature.

5. California Code of Regulations, title 17, section 54000,<sup>2</sup> provides:

(a) “Developmental Disability” means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to

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<sup>2</sup> The regulations still use the term “mental retardation,” instead of the term “Intellectual Disability.”

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) 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. 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.

## EVALUATION

7. The Lanterman Act and the applicable regulations set forth criteria that a claimant must meet in order to qualify for regional center services. None of the documents introduced in this hearing demonstrated that claimant has Autistic Spectrum Disorder. Although that diagnosis was listed in some of the records, no support for it

was contained therein. While claimant does have ADHD, anxiety and other mental health concerns, they are not qualifying conditions. She qualified for special education services based on a Specific Learning Disability and the observations and test results in the observations and test results in those records were contrary to a diagnosis of Autistic Spectrum Disorder.

Claimant had the burden of establishing her eligibility for regional center services. As she introduced no reliable evidence demonstrating that she was eligible for regional center services, her appeal of IRC's determination that she was ineligible must be denied.

## ORDER

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

DATED: July 27, 2018

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MARY AGNES MATYSZEWSKI

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.**