

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2018060843

DECISION

Susan J. Boyle, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 29, 2018, in San Bernardino, California.

Claimant's mother appeared and represented claimant.

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

The matter was submitted on August 29, 2018.

ISSUE

Is claimant eligible for regional center services based on a diagnosis of autism spectrum disorder (ASD)?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. Claimant is a 16-year-old young man who lives with his mother and father. He has continuously received special education services beginning when he was four

years old. The primary disability under which he received those services has not been consistent and sometimes included autism.

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. Claimant has sought to receive services and supports from IRC multiple times. In addition to claimant's current request, IRC has found claimant ineligible for regional centers services on July 30, 2015, April 4, 2016, and August 24, 2016.

4. Sometime prior to May 14, 2018, claimant again sought to receive services and supports from IRC. Pursuant to claimant's request for services, IRC reviewed claimant's records but determined it would not provide intake services to claimant. IRC's Notice of Proposed Action dated May 14, 2018, stated that claimant was found to be ineligible for regional center services and supports because he did "not have a 'developmental disability.'" In the Notice of Proposed Action and an accompanying letter, IRC did not specify the category of the disability it considered when it determined claimant was not eligible for services.

5. Claimant's mother signed a Fair Hearing Request that was received by IRC on June 14, 2018. The Fair Hearing Request did not specify under which category of disability claimant sought to receive IRC services and supports.

6. 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 services for claimant under the category of ASD. Therefore, for purposes of this decision, the scope of the denial of services and appeal

therefrom are limited to a determination whether claimant is eligible for regional center services based on ASD.

### CLAIMANT'S RECORDS

7. Claimant began receiving special education services from his school district in 2007 when he was four-years old. The basis for a student to receive special education services and a plan for the student's continuing educational needs is set forth in an Individualized Education Program (IEP). The IEP is developed by the student's school district during a meeting at which a team of educational professionals familiar with the student and the student's family discuss the student's needs and progress. The IEP is periodically reviewed and revised in accordance with the student's progress. The criteria used to determine whether a student is eligible for special education services is not the same as that used to determine eligibility for regional center services. The assessments and determinations are independently made by IRC, although IRC may consider information obtained from school and special education determinations in its assessment of a prospective client.

March 4, 2008, IEP From Denton, Texas

8. On March 4, 2008, claimant's elementary school held an annual IEP meeting to review claimant's then current IEP. Claimant was five years and seven months old and in kindergarten. The IEP that resulted from that meeting provided that claimant qualified for special education services under a primary disability of "speech impairment."

9. Notes in the IEP indicate that claimant "interacts appropriately with peers" and adults and is cooperative. In response to a question asking if claimant had any behaviors that impede his learning the box "N/A" was checked. Shortly after this IEP, claimant moved with his family to California.

#### December 2009 Speech and Language Evaluation

10. On four days in December 2009, Denise Inman, M.S., C.C.C.-S.L.P., a speech and language pathologist, performed an evaluation of claimant for the triennial review of his IEP. Claimant was seven-years old and in the first grade. Ms. Inman administered nine tests, evaluated two checklists/rating scales that were completed by claimant's teacher, and observed claimant in school. Ms. Inman concluded that claimant's "level of communication performance in the language areas are within the average range, with exception to articulation and expressive grammar skills." Ms. Inman opined that claimant continued "to meet eligibility criteria for –[special education] speech therapy related services."

#### December 2009/January, 2010 Psycho-Educational Evaluation<sup>1</sup>

11. In December 2009 and January 2010, Jodi Rowin, M.S., school psychologist, performed a psycho-educational evaluation of claimant. Ms. Rowin reviewed claimant's records and administered eight tests, including the Gilliam Asperger's Disorder Scale (GADS) and the Behavior Assessment System for Children, Second Edition (BASC-2). She also interviewed claimant, his parent and teacher, and observed him in the classroom.

12. Ms. Rowin noted that claimant came to the evaluation with "no apparent anxiety." She described him as "talkative and cooperative throughout the testing session," but he "required constant redirection to the task presented to him."

13. Ms. Rowin's report indicated that claimant was described by others as "happy and active." His parents stated he enjoyed other children, but he had temper tantrums, cried easily and was aggressive with others. His teacher indicated he had

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<sup>1</sup> The Psycho-Educational Evaluation report was not dated.

trouble focusing and maintaining attention. She also stated claimant needed improvement in peer relationships. In an interview with Ms. Rowin, claimant said he had "best friends" at school.

14. Ms. Rowin's assessment found that claimant had average cognitive skills, low average visual motor integration, visual processing, and auditory processing skills. His adaptive skills were at the level of a six year old. Social-emotional scales were reported to show "clinically significant or at-risk behavior within the home and school setting in hyperactivity, aggression, conduct problems attention problems, and atypicality." The rating scales completed by claimant's parents indicated high probability of ASD, while the rating scales completed by claimant's teacher indicated a borderline probability of ASD. Based on these results, Ms. Rowin opined that the IEP team could consider special education eligibility based on the "primary educational category of Autism."

#### February 10, 2010, Academic Assessment and Report

15. Jennifer Ekenstam, Resource Teacher, performed an academic assessment of claimant and wrote a report dated February 10, 2010. Ms. Ekenstam interviewed claimant's general education teacher and administered the Wechsler Individual Achievement Test, Second Edition (WIAT-II). Ms. Ekenstam concluded that claimant's academic performance was "approaching" grade level in mathematics, but he was below grade level in reading and writing. The results of the WIAT-II showed that claimant was in the average range in Total Reading, Basic Reading Skills, Mathmatics, Reading Comprehension, Reading Fluency, Math Problem Solving, and Math Calculation skills. He tested below average in Written Expression and Oral Expression.

February 10, 2010, IEP

16. On February 10, 2010, claimant's elementary school held an IEP meeting to review claimant's then current IEP. The IEP that resulted from that meeting provided that claimant qualified for special education services under a primary disability of ASD. No secondary disability was indicated. The IEP noted, "[claimant] demonstrates behavior consistent with educational criteria for Autism. He has difficulties with participating and progressing in the general education classroom in the areas of reading, writing, and social skills/work habits." Nonetheless, claimant was described as "friendly." His teacher reported that claimant required help in areas of "citizenship, fairness, respect and caring, and in the areas of responsibility and trustworthiness to accept responsibility for his own actions." The psycho-educational, speech and language, and academic assessments performed by Ms. Rowin, Ms. Inman, and Ms. Ekenstam, respectively, were reviewed and considered. All of claimant's annual goals and objectives were related to speech and language development.

17. The IEP provided that claimant received instruction in the general education environment for 97 percent of the school day. He participated in all school activities with his peers with the exception of "speech therapy and specialized academic instruction." However, the IEP team believed that claimant would do better in a smaller class environment. The IEP team arranged for claimant's parents to observe a special day class and to change his placement to that class after his parents were able to observe the special day class. No mental health services were included in the IEP.

January 20, 2012, Progress Report

18. On January 20, 2012, Christine Cole, claimant's third grade teacher, prepared a Progress Report. She noted claimant was "making progress in all areas. Progress sufficient for goals" relating to reading, mathematics and writing. She checked

the boxes for “satisfactory” in all listed areas indicating that claimant accepted responsibility, listened and followed directions, and worked cooperatively.

February 16, 2012, IEP

19. On February 16, 2012, claimant’s elementary school held an annual IEP meeting<sup>2</sup> to review claimant’s then current IEP. Claimant was nine years and seven months old and in third grade. The IEP that resulted from that meeting provided that claimant qualified for special education services under a primary disability of autism. No secondary disability was indicated. The IEP noted, “[Claimant] has difficulty focusing, attending and learning in large group learning activities and environments.” It also noted that claimant is “a happy boy” who enjoys going to school and playing with his friends; however, he tended to argue and has difficulty focusing and paying attention. Claimant spent 72 percent of his time in school outside of the regular class and 28 percent of his time in the regular class and participating in extracurricular activities.

August 28, 2012, Psychological Assessment

20. On August 28, 2012, Gina Neikirk, Ph.D., performed a psychological assessment of claimant. Respondent was nine years, 10 months old and had just completed third grade. Although the report does not state so, the evaluation was apparently in response to a request for IRC services and supports.

21. Dr. Neikirk interviewed claimant’s parents, observed claimant, reviewed file records and administered the Wechsler Intelligence Scale for Children, 4<sup>th</sup> Edition (WISC-IV), Autism Diagnostic Observation Schedule – Module 3 (ADOS – 3) and the Gilliam Autism Rating Scales, 2<sup>nd</sup> Edition (GARS-2). She described claimant as “a delightful

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<sup>2</sup> The 2012 IEP indicated an IEP meeting was held on February 8, 2011. The IEP for that meeting was not provided at the fair hearing.

child." Dr. Neikirk determined that under the GARS-2, the probability claimant had autism was "very likely"; however, he did not score within the autistic range in the ADOS-3. Dr. Neikirk's administration of the WISC-IV was not completed because claimant "demonstrated limited interest in the test materials."

22. Dr. Neikirk reported on claimant's social and emotional functioning and concluded that claimant's "behavioral presentation met the DSM-IV-TR [Diagnostic and Statistical Manual, Fourth Edition, Text Revision] criteria for both Attention-Deficit/Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder (ODD)." Dr. Neikirk opined that claimant was not eligible for IRC services under any of the criteria described in the Lanterman Act. Her recommendations included appropriate classroom placement, psychological interventions and evaluation by a psychiatrist.

July 22, 2014, Evaluation by Kaiser Physician, Debra Suzanne Demos, M.D.

23. Although not provided at the Fair Hearing, reports and testimony referenced an evaluation performed at Kaiser Permanente by Debra Suzanne Demos, M.D. Dr. Demos determined that claimant did not meet DSM-5 criteria for ASD. Dr. Demos noted that claimant is communicative with his mother, engages in conversation, had good eye contact and spoke of developing friendships.

November 5, 2014, Psychological Services Assessment Report

24. Prior to November 5, 2014, Leslie Ryan, School Psychologist, conducted a psychological services assessment and prepared a report that was to be considered at claimant's November 2014 IEP meeting. Claimant was 12 years old and in the sixth grade. Her report stated that claimant's mother had requested an "updated assessment to determine if [claimant] qualifies for special education services as a student with Autism." The report provided that claimant was receiving special education services under "Other Health Impairment" and "Speech or Language Impairment," and



“counseling services to address and support social/emotional/behavioral functioning.”

Ms. Ryan noted that claimant had previously qualified for special education services as a student with autism.

25. To conduct her assessment, Ms. Ryan reviewed claimant’s records, conducted interviews with claimant’s teachers, administered the BASC-2 and GADS, and observed claimant in class and outside of class. Ms. Ryan wrote that claimant’s parents did not provide updated information for her assessment, either by returning health and development forms or completing the BASC-2 or GADS scales.

26. Ms. Ryan observed claimant in his science and math classrooms. She observed that he lost focus at times and required a high degree of support from an aide, but he engaged in conversations with other students. Ms. Ryan observed claimant for 15 minutes during a morning break. She saw him briefly interact with another student, but he spent the majority of the break by himself.

27. Claimant’s social studies, math, and science teachers completed GADS rating scores. Claimant’s social studies and math teachers rated claimant as “low/not probable” and his social studies teacher rated him as “high/probable.” Two of claimant’s language arts/social studies teachers and his science teacher completed BASC-2 rating scales. The results from the rating scales indicated “elevated levels (At Risk and/or Clinically Significant) of maladaptive behaviors” for anxiety, depression, adaptability, leadership, internalizing problems and adaptive skills. Ms. Ryan stated that the behaviors associated with items identified by the teachers “may adversely impact [claimant’s] educational progress.”

28. Ms. Ryan concluded that claimant did not “meet the educational criteria for special education under the category of Autism.” She stated he did not “appear to be presenting autistic like characteristics to a significant degree across all classroom settings.” She attributed his difficulties in school to his mental health conditions. Ms.

Ryan recommended that claimant's primary eligibility criteria remain as Other Health Impairment and ODD and his secondary remain as speech or language impairment.

November 5, 2014, IEP Meeting

29. On November 5, 2014, claimant's elementary school held an annual IEP meeting<sup>3</sup> to review claimant's then current IEP. Claimant was 12 years old and in the sixth grade. The IEP stated one of its purposes was to consider a change of placement for claimant.

30. The IEP that resulted from that meeting provided that claimant qualified for special education services under a primary disability of Other Health Impairment (OHI) based on his ODD and a secondary diagnosis of Speech or Language Impairment (SLI). It noted that claimant had difficulty listening, following instructions and working independently and that "his ability to function socially and academically" was impaired. The IEP team agreed to retain claimant in his then placement where he was in the special day class for 996 minutes weekly. They also stated that claimant continued to require mental health services "for his behavior problems in class and on campus."

Medical Records from March 25 through November 11, 2015

31. In March 2015, claimant was hospitalized because of behavior related to his ADHD, mood disorder and ODD. Beginning on March 25, 2015, through November 11, 2015, claimant was seen by Sai Chundu, M.D. Claimant had been experiencing severe tantrums, agitation, decreased concentration, mood swings and irritability. Dr. Chundu wrote that claimant was seeing the doctor "to address worsening symptoms" and to "get established." Dr. Chundu diagnosed claimant as having ADHD and ODD

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<sup>3</sup> The 2014 IEP indicated that claimant's last evaluation occurred on March 19, 2013. Information relating to this evaluation was not provided at the hearing.

“(worsening)” and noted he has bi-polar disorder. In some of the records, Dr. Chundu referred to claimant’s diagnosis of “Psychoses, Early Childhood Active (Asperger’s Disorder.)” Dr. Chundu appeared to be primarily involved in regulating claimant’s medications.

#### October 2015 Triennial Assessment Report

32. Prior to October 7, 2015, in preparation for his triennial IEP meeting, Ms. Ryan performed a triennial assessment of claimant and wrote a report. Claimant was 13 years old and in the seventh grade. Her report stated that the assessment was to determine ongoing eligibility and services. The report provided that claimant was receiving special education services under OHI and SLI.

33. To conduct her assessment, Ms. Ryan reviewed claimant’s records, conducted interviews with claimant’s teachers and administered the BASC-2, Conners Attention Rating Scale, 3rd Edition (Connors-3), Children’s Autism Rating Scale (CARS-2), Scales for Assessing Emotional Disturbance, 2nd Edition (SAED-2), Reynolds Adolescent Depression Scale, 2nd Edition (RADSD-2), Cognitive Assessment System, 2nd Edition (CAS-2), Motor Free Visual Perceptual Test, 3rd Edition (MVPT-3), Test of Auditory Processing, 3rd Edition (TAPS-3), and WIAT-III.

34. Claimant’s mother reported to Ms. Ryan that claimant was very emotionally sensitive, had tantrums when he was disciplined, did not like to go outside to play with others, preferred to be alone, angered easily, had abrupt mood changes and required reminders to perform daily grooming activities. Ms. Ryan wrote that claimant came to the testing willingly and that he presented as friendly with a positive attitude. However, he was “fidgety,” easily distracted, and often required that instructions be repeated.

35. Ms. Ryan found that claimant’s intellectual functioning had fallen to the below average range in all areas assessed with the exception of low average scores in

some math and reading tests. She concluded, however, that he was not a student with a specific learning disability. She also opined that claimant did not qualify for special education services under the category of autism because he did not present with "autistic-like characteristics to a significant degree across all classroom settings or consistently within classroom settings." She stated that his poor behaviors "may be attributed to" his multiple mental health conditions. Ms. Ryan further noted that claimant had recently undergone a medical evaluation, and she found that he did not meet the DMS-5 criteria for Autism. Ms. Ryan opined claimant was eligible for special education as a student with OHI with diagnoses of ADHD, ODD, Obsessive Compulsive Disorder (OCD), and a mood disorder, and as a student with an Emotional Disturbance (ED).

#### October 7, 2015, IEP Meeting

36. On October 7, 2015, claimant's middle school held an annual/triennial IEP meeting to review claimant's then current IEP. Claimant was 13 years old and in the seventh grade.

37. For the reasons outlined in Ms. Ryan's assessment, the IEP that resulted from that meeting provided that claimant qualified for special education services under a primary disability of ED and a secondary disability of OHI. Claimant's mother disagreed with the IEP team's conclusions and insisted that claimant fell within the autism spectrum. She requested another IEP meeting to review reports expected to be received from private therapists.

38. The IEP noted that claimant had difficulty listening, following instructions and working independently and that "his ability to function socially and academically" was impaired. The IEP team agreed to retain claimant in his then placement where he was in a special day class for 996 minutes weekly. The team also stated that claimant

continued to require mental health services “for his behavior problems in class and on campus.”

November 9, 2015, IEP Review

39. On November 9, 2015, claimant’s school held an IEP meeting to discuss claimant’s “parent/physician” request that claimant receive home instruction. Home instruction was approved as a temporary placement.

Temecula Mental Health Services October through December 2015

40. On October 29, 2015, Dennis Alters of Temecula Mental Health Services (TMHS) performed intake services for claimant. Mr. Alters’s qualifications are unknown other than he is described in documents as the “diagnosing clinician.”<sup>4</sup> Claimant was 13 years old and in seventh grade. The file notes provided that claimant was engaging in dangerous behavior. He was described as extremely emotional and fearful. Claimant was reported to have daily explosive outbursts. Claimant’s mother advised Mr. Alters that claimant was unable to engage in daily self-care activities such as dressing himself, showering or feeding himself. The records indicated Mr. Alters diagnosed claimant with ASD although he also noted that intake was only partially completed because claimant was “too disruptive” and Mr. Alters’s computer crashed during intake. The records from this date do not indicate the basis for the ASD diagnosis; there is no indication Mr. Alters administered any standardized tests or rating scales. In notes dated November 23, 2015, Mr. Alters stated claimant was under the care of a psychiatrist<sup>5</sup> but was being seen at TMHS for a second opinion. On December 14, 2015, Mr. Alters noted that claimant’s

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<sup>4</sup> In a 2018 report, Pedro Olvera, Psy.D., refers to Mr. Alter as Dr. Alter.

<sup>5</sup> Records from that psychiatrist were not offered at hearing.

file was reviewed to prepare a letter to IRC to confirm claimant's diagnosis of ASD. None of claimant's records from TMHS provide information about how its diagnosis of ASD was determined.

April 7, 2016, Letter From Wilhelmina Hernandez, M.D.

41. In a letter dated April 7, 2016, Wilhelmina Hernandez, M.D., wrote that she had conducted a "thorough history and assessment" of claimant and determined that he met the DSM-5 criteria for ASD. She based her diagnosis on finding claimant had "sensory issues," and deficits in both the social communication (limited social communication, nonverbal communication, and understanding of relationships) and restricted interests (rituals, repetitive and sensory.)" Dr. Hernandez's letter did not describe what, if any, standardized assessments she administered to claimant to reach her diagnosis.<sup>6</sup>

January 15, 2016, IEP Review

42. On January 15, 2016, claimant's school held an IEP meeting to review his home instruction placement. The IEP amendment that resulted from the meeting noted that home instruction had been suspended because of claimant's "severe behavior and the unsafe environment within the home." Claimant's mother advised that home supports and counseling had stopped because "they did not work out and she [was] looking for something else." The IEP team decided that claimant would return to school for a partial school day (one hour 45 minutes).

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<sup>6</sup> This letter is included in the exhibit containing Dr. Ryan's assessment of claimant in preparation for his triennial IEP held on October 5, 2015. The inclusion in this exhibit of the letter, written six months after the IEP, was not explained.

August 10, 2016, Psychological Assessment

43. On August 10, 2016, Sandra Brooks, Ph.D., Staff Psychologist for IRC, performed a psychological assessment of claimant to determine if he was eligible for IRC services and supports. Dr. Brooks interviewed claimant's mother, reviewed file documents, observed claimant and administered the Vineland Adaptive Behavior Scales – Second Edition (VABS-2), CARS-2, and she attempted to administer the ADOS-2.

44. Claimant's mother completed the VABS-2 rating scale. The result indicated claimant had "severe symptoms" of ASD. Dr. Brooks was unable to calculate a test score for the ADOS-2 because claimant provided only "limited cooperation." Dr. Brooks observed claimant to "blow spit bubbles and allow drool to fall on his shirt," cling to his mother, growl, pace, engage in destructive behaviors with toys in the room, "squeal or yell in an unusual manner," and grunt. Claimant used words to communicate when he wanted a drink or snack; however, his voice was "grunt-like, and he did not communicate at the level expected for a child his age." Dr. Brooks observed claimant to be "very rough and abusive towards his mother." He grabbed medication bottles from his mother, dumped the pills in the bottles into the garbage can, "laughed and sneered in a mocking manner while doing so," and "began to play with the bottles of medications in an odd manner." Dr. Brooks opined that claimant demonstrated social awareness when he looked at her or his mother while he engaged in this destructive behavior. He appeared to want to see Dr. Brooks's and his mother's reactions to his conduct.

45. Despite her observations of claimant on the day of the assessment and her interview with claimant's mother, Dr. Brooks opined that claimant did not qualify for IRC services as being a child with ASD. She noted that prior evaluations of claimant did not report the extreme behaviors claimant engaged in during Dr. Brooks's evaluation. Further, claimant's behavior varied depending upon the setting. For example, in classes

he liked, claimant behaved properly, and in classes he did not like, he engaged in autistic-like behaviors. Past evaluations of claimant reported that claimant demonstrated social interest and awareness that were inconsistent with a diagnosis of ASD. Dr. Brooks concluded that "[t]he significant decline in [claimant's] functioning and the excessiveness of his behaviors relative to his past behaviors suggest that [claimant] is experiencing a worsening mental health condition, rather than a developmental disorder." Dr. Brooks recommended claimant undergo a comprehensive psychiatric evaluation.

#### October 24, 2017, IEP Meeting

46. On October 24 2017, claimant's school held an IEP meeting to review "assessments including ERMHS." The IEP amendment referenced an IEP dated October 3, 2017. Some documents that related to the October 3, 2017, IEP meeting were included with the October 24 2017 amendment; however, it was not clear what was specifically discussed at this IEP. Documents relating to an ERMHS assessment were not provided at the fair hearing. The IEP team discussed claimant's progress in home instruction and with in-home supports. All IEP team members who had direct interaction with claimant reported that claimant was not cooperating with, or benefiting from, the services that were designed to assist him. Some team members disclosed that claimant made threatening comments and engaged in aggressive conduct when they tried to provide services to him. The IEP team members recommended that placement in a residential treatment facility be considered. Claimant's mother, however, refused permission for the IEP team to explore residential treatment options. Claimant's mother continued to be hopeful that claimant would benefit from in-home instruction and supports.



November 29, 2017, IEP Meeting

47. On November 29, 2017, claimant's school held an IEP meeting to discuss recent evaluations of claimant, eligibility for special education services, and appropriate educational placements.<sup>7</sup> The IEP comment page notes from this meeting indicate that Ms. Baird<sup>8</sup>, school psychologist, had performed a psychoeducational evaluation of claimant and that a language and speech evaluation was attempted by Mr. Rice<sup>9</sup>, SLP, WSMS. Documents relating to these evaluations were not provided at the fair hearing. Mr. Rice indicated he tried to administer part of the evaluation, but claimant refused to complete it. Mr. Rice returned to attempt the evaluation on another day, but claimant refused to cooperate and threw ice at Mr. Rice.

48. The IEP team noted that claimant had "characteristics of [ASD and emotional disturbance] and agreed that he [was] eligible under the handicapping condition of [ASD]." The team also noted that claimant had "a lot of co-morbid mental health issues including OCD and anxiety." The IEP team concluded that claimant could not be educated within the home or in a public school setting and recommended residential placement. Two IEP team members had visited a particular placement and believed it was an appropriate placement for claimant. Claimant's mother did not agree or disagree with the offered residential placement but said she wanted to visit the facility. It is not known if claimant's mother visited the recommended residential facility, but claimant remained in his home at the time of the fair hearing.

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<sup>7</sup> The IEP notes from this meeting were included in the exhibit relating to the October 24, 2017 IEP meeting.

<sup>8</sup> First name unknown.

<sup>9</sup> First name unknown.

April 27, 2018, Neuropsychological/Psychoeducational/Social Emotional Report

49. On March 2, 2018, and April 6, 2018, Pedro Olvera, Psy.D, performed a Neurocognitive/Social Emotional evaluation of claimant. Claimant was 15 years, eight months old and in ninth grade. He conducted the evaluation as an Independent Educational Evaluation. He was tasked with providing opinions about claimant's cognitive and academic strengths and limitations, his eligibility criteria for special education services, and recommendations to optimize claimant's educational performance. Dr. Olvera reviewed claimant's records, conducted interviews and administered tests and rating scales. Dr. Olvera provided the following to claimant's mother and claimant's home hospital teacher, Daniella Bride: Conners-3; Comprehensive Executive Functioning Inventory (CEFI – Spanish); Children's Depression Inventory-2nd Edition (CDI-2); Multidimensional anxiety Scale for Children 2nd Edition (MASC-2); ASRS; and Rating Scale of Impairment.

50. As part of his evaluation, Dr. Olvera interviewed claimant's mother. Claimant's mother stated she agreed with claimant's eligibility based on ED and OHI, but wanted claimant tested for ASD as she believed he qualified for services under that category. She stated her desire that claimant receive services at home where he is happy and his environment is structured to his needs.

51. Dr. Olvera interviewed Ms. Bride. Ms. Bride reported that claimant will come out of his room, but he will not go downstairs. He will do first grade work in his room and then give it to Ms. Bride. She said claimant will not do any higher level thinking. She reported many emotional and behavior problems she experienced working with claimant.

52. Dr. Olvera was unable to administer any standardized assessments to claimant because claimant would not come out of his room when Dr. Olvera was there. He wrote that claimant had a "complex neurocognitive profile that is influenced by the

following neurological conditions: autism, ADHD, anxiety, OCD, mood disorder, ODD, ED, and possible bipolar.” Dr. Olvera opined that claimant’s complex profile severely impacted his ability to function and that, as a result, “a direct measure of [claimant’s] cognitive and academic [status] is not possible given these severe neurological impacts. Behaviors should be brought to a stable baseline before direct standardized testing is attempted.” Therefore, his evaluation and recommendations were based solely on his interviews of claimant’s mother and teacher, the rating scales they completed, and a review of claimant’s records.

53. Dr. Olvera concluded that claimant met the educational eligibility criteria for ASD based on claimant’s mother’s and Ms. Bride’s responses to the rating scales, the 2015 diagnosis by Mr. Alters, and the references in past IEPs and evaluations to symptomology of ASD. Dr. Olvera also found claimant met the eligibility criteria for OHI, and ADHD. Dr. Olvera did not recommend residential placement; he recommended a gradual return to a classroom setting.

#### TESTIMONY OF RUTH STACY

54. Ruth Stacy, Psy.D., 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 autism and in the assessment of individuals for IRC services.

55. Dr. Stacy reviewed all of claimant's records summarized above and opined that claimant did not meet the eligibility criteria under ASD to receive IRC services and supports. Dr. Stacy acknowledged that claimant's school district vacillated between finding claimant eligible for educational services as a student with ASD and finding he was not eligible under that category. Dr. Stacy emphasized that the criteria for finding a student eligible for special education services differs significantly from the criteria required to find an individual eligible for services and supports under the Lanterman Act.

56. Dr. Stacy testified that a licensed educational psychologist is not qualified to diagnose an individual as having ASD. A licensed educational psychologist may opine only that a student has symptoms that suggest ASD. Clinical psychologist and medical doctors are qualified to assess and diagnose ASD. Dr. Stacy stated that her record review showed that only one medical doctor, Dr. Hernandez, diagnosed claimant with ASD, but Dr. Hernandez did not provide any support for her diagnosis.

57. Dr. Stacy noted that in earlier years, claimant was described as a friendly child, he related to his examiners, and he was observed to interact with other students and teachers in school. Claimant has been diagnosed with several mental health conditions that, according to Dr. Stacy, have caused or contributed to claimant's regression in academics, behavior and social interactions. Dr. Stacy testified that some characteristics claimant displays may be similar to those displayed by an individual with ASD and may add to the confusion in claimant's educational assessments; however, claimant's symptoms are manifestations of his mental health conditions and do not support a medical diagnosis of ASD.

#### TESTIMONY OF CLAIMANT'S MOTHER

58. Claimant's mother testified to claimant's behaviors and the symptoms she observed that have convinced her that claimant has ASD. Claimant's mother has

remained steadfast in her assertion throughout claimant's school interactions and with IRC that claimant has ASD and, therefore, must be entitled to services and supports from IRC. She believes claimant needs services based on his ASD and she will continue to present her case to obtain help for her son.

59. Claimant's mother testified that claimant is now 16 years old. She stated he stays at home and does not interact with others. She said claimant does not independently care for his daily grooming and cleanliness needs. He does not shower on his own, he soils his clothing, talks to himself and distances himself from all people. Claimant's mother said noises bother claimant to such degree that he will not ride in a car because of the noise. While claimant can speak, he cannot express his feelings. She stated his symptoms have worsened with time.

60. 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 an individual is eligible for regional center services, the burden of proof is on the claimant to establish that he or she has a qualifying developmental disability. 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 retardation<sup>10</sup>, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to

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<sup>10</sup> The regulations have not been amended to replace “mental retardation” with “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. . . .



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. 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

10. To be eligible for regional center services, claimant must prove that he has a substantial disability that is attributable to a developmental disability recognized under the Lanterman Act that originated before the age of 18. Claimant asserted he was eligible to receive regional center services based on a diagnosis of ASD. Establishing eligibility cannot be based upon handicapping conditions that are solely learning disabilities or psychiatric disorders. (Cal. Code Regs., tit. 17 § 54000, subd. (c)(1), (2).) Claimant bears the burden of proving that a preponderance of the evidence supports his claims.

11. The fact that claimant was sometimes 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.

12. IRC's eligibility team reviewed all of the available documentation and determined that claimant was not eligible for services. These determinations have been described as difficult and complex. (*See 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.) The evidence claimant presented does not support overturning IRC’s determination that claimant is ineligible for IRC supports and services.

13. Although claimant’s mother’s motives are laudable, claimant has not met his burden to prove he has ASD. Claimant has not proven he has a disabling condition that originated before the age of 18 that was not solely the result of a learning disability or psychiatric disorder. Claimant has not proven by a preponderance of the evidence that he meets the criteria for a diagnosis of ASD under the Lanterman Act. Claimant’s records are consistent with a finding that any academic delays and social and emotional symptoms exhibited by claimant are caused by mental health conditions and/or other health impairments not covered by the Lanterman Act.

14. Based on this record, claimant does not have a substantial disability on the basis of ASD, and he is not eligible to receive regional center services.

## ORDER

Claimant’s appeal from Inland Regional Center’s determination that claimant was not eligible for services because he did not have a substantial developmental disability as defined in the Lanterman Act is denied.

DATED: September 12, 2018

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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.**