

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

v.

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2018061056

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter in San Bernardino, California, on August 28, 2018.

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

There was no appearance on behalf of claimant.

The matter was submitted on August 28, 2018.

ISSUE

Is IRC's original determination finding claimant eligible for regional center services under a diagnosis of autism spectrum disorder (autism) clearly erroneous in light of IRC's most recent comprehensive reassessment?

## FACTUAL FINDINGS

### DIAGNOSTIC CRITERIA FOR AUTISM

1. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5) identifies criteria for the diagnosis of autism. The diagnostic criteria includes persistent deficits in social communication and social interaction across multiple contexts; restricted repetitive and stereotyped patterns of behavior, interests, or activities; symptoms that are present in the early developmental period; symptoms that cause clinically significant impairment in social, occupational, or other important areas of function; and disturbances that are not better explained by intellectual disability or global developmental delay. An individual must have a DSM-5 diagnosis of autism to qualify for regional center services under the category of autism.

2. Claimant is a 7-year-old boy currently receiving regional center services as a result of a 2014 determination by IRC. Claimant had also been receiving Early Start services at San Gabriel/Pomona Regional Center prior to becoming an IRC consumer. Claimant was exposed to drugs in utero, and has experienced behavioral problems such as defiance and outbursts throughout his developmental period. Claimant has received speech and language services and behavioral services through regional centers and/or his school since he was a toddler.

3. IRC staff psychologist Paul Greenwald, Ph.D., conducted a comprehensive reassessment of claimant on May 8, 2018. He concluded claimant no longer met the DSM-5 diagnostic criteria for autism.

4. On June 8, 2018, IRC notified claimant that he was no longer eligible for regional center services.

5. Claimant's father and step-mother filed a Fair Hearing Request stating:

We do not agree that [claimant's] ASD diagnosis was or is erroneous. [Claimant] has been diagnosed by several doctors since the age of 2 years old that he is autistic and has problems with his social skills and aggressive behaviors.

6. Claimant's parents were notified of the August 9, 2018, hearing date by OAH at the address provided on the Fair Hearing Request. On July 6, 2018, OAH granted claimant's parents' request for a continuance of the August 9, 2018, hearing and rescheduled the hearing for August 28, 2018. The Continuance Order was properly served on claimant's parents at their address of record. On August 10, 2018, IRC sent claimant's parents a letter identifying the witnesses it intended to call at hearing, and providing claimant's parents with a copy of the exhibits IRC intended to present at hearing. The letter also reminded claimant's parents of the August 28, 2018, hearing date. The letter was sent via certified mail, and records show the letter and exhibits were received.

7. Notice of the hearing was proper. On August 28, 2018, when the matter was called for hearing, claimant's parents did not appear, nor did they provide any documentation to IRC or OAH seeking a continuance of the hearing for good cause.

8. IRC elected to proceed with a default prove-up hearing.

#### COMPREHENSIVE REASSESSMENT OF CLAIMANT

9. Dr. Greenwald has been a licensed psychologist since 1987. He is licensed in California and Florida. He has been a staff psychologist at IRC since 2008. Dr. Greenwald has extensive experience in conducting psychological assessments of children and adults suspected of having developmental disabilities that may qualify them for regional center services. He also supervises psychological assistants who conduct similar assessments. Dr. Greenwald is an expert in the field of psychology, as it

relates to the diagnosis of autism under the DSM-5 and eligibility for regional center services under the Lanterman Act. Dr. Greenwald testified about his reassessment of claimant. The following is a summary of his testimony and the report he completed memorializing his reassessment.

#### Claimant's Psychological Records

10. Prior to meeting with claimant, Dr. Greenwald reviewed the following documents: Early Start Clinic Evaluation by San Gabriel/Pomona Regional Center dated October 28, 2013; Psycho-Educational Report by Chris Davidson, Licensed Educational Psychologist and Board-Certified Behavioral Analyst, dated September 6, 2016; Psycho-Educational Assessment Summary by Upland Unified School District, dated May 11, 2017; Multi-Disciplinary Team Assessment Report by Kaiser Permanente, dated November 3, 2017; and Psychological Evaluation by Robin Morris, Psy.D., dated March 1, 2018.

All the records reviewed by Dr. Greenwald demonstrate that claimant experiences a variety of difficult behaviors, including outbursts. Dr. Davidson's report diagnosed claimant with autism, Attention Deficit Hyperactivity Disorder, Bipolar Disorder, and Emotional Disturbance. However, Dr. Davidson's report showed claimant had average to superior intelligence, and did not show that claimant had significant functional limitations in three or more areas of major life activity as appropriate for his age at the time, which is required to be eligible for regional center services under the Lanterman Act.

The Psycho-Educational Assessment Summary by Upland Unified School District, dated May 11, 2017, concluded claimant did not meet the criteria to be served under "autistic-like" behaviors for purposes of special education services. The report further concluded that claimant was no longer eligible for speech and language services, and he was not found eligible for special education services under the category of "other health

impairment.” Finally, claimant was not found eligible for special education services under the categories of emotional disturbance or specific learning disability. The report described claimant as highly intelligent but who suffers from defiance and behavioral problems, yet is able to access the generalized school curriculum without specialized instruction.

The Multi-Disciplinary Team Assessment Report by Kaiser Permanente, dated November 2, 2017, showed claimant was well-groomed and interacted appropriately with his examiners. He did not exhibit echolalia and displayed “relatively complex” speech patterns. Claimant showed insight into social-emotional relationships but showed mild deficits in the area of social and emotional reciprocity. No unusual sensory interests were noted, and claimant did not exhibit any anxiety. No maladaptive behaviors were observed. Nonetheless, the report concluded claimant met the DSM-5 diagnostic criteria for autism. The only actual assessment completed in this report was the Childhood Autism Rating Scale, which is merely an assessment that shows whether a person might have autistic behaviors. The observations of claimant were inconsistent with a person who has autism. Dr. Greenwald explained that, even assuming the diagnosis was correct and claimant did have autism, nothing in the school’s report showed claimant has significant functional limitations in three or more major life activities, which is also required under the Lanterman Act.

The Psychological Evaluation by Robin Morris, Psy.D., dated March 1, 2018, concluded claimant had autism. However, as with the 2017 assessment, the ADOS was not administered. Dr. Morris found that claimant’s intelligence was in the average or high average range. Claimant’s scores on the Wechsler Individual Achievement Test – Third Edition, were found to be scattered but “largely” in the average range. With regard to the teacher and parent reporting on claimant’s behaviors, the report noted that the teacher reported no elevated concerns or deficits in any areas, while the parent reported

concerns with memory, attention, emotional control, repetitive behaviors, and social awareness. In sum, the report did not evidence that claimant meets the diagnostic criteria for autism under the DSM-5, despite the evaluator's conclusion that he did.

#### Dr. Greenwald's Assessment

11. Dr. Greenwald utilized the following measures in conducting his assessment: The Childhood Autism Rating Scale – Second Edition (CARS2); Autism Diagnostic Observation Scale – Second Edition (ADOS-2); Adaptive Behavior Assessment System – 3<sup>rd</sup> Edition (ABAS3); and school observation. On the CARS2, claimant scored mildly impaired in a few areas, but overall, his scores showed his functioning to be age appropriate. On the ADOS-2, claimant scored below the cutoff for autism. On the ABAS3, claimant scored in the average range across all areas.

Dr. Greenwald observed claimant to be alert, overactive, and neatly attired. Claimant exhibited good eye contact, appropriate social and emotional reciprocity, and engaged in conversations. Claimant's sentence structure and vocabulary were exceptional. He utilized appropriate gestures for the topic of conversation and engaged in interactive play with Dr. Greenwald. Dr. Greenwald explained that claimant's excellent adaptive skills, even if he had autism, meant he would not qualify for IRC services under the Lanterman Act. In conclusion, Dr. Greenwald presented several "rule-out" diagnoses that might explain claimant's difficult behaviors and any other challenges he faces. Those diagnoses were: attention Deficit Hyperactivity Disorder (ADHD); Oppositional Defiance Disorder; Conduct Disorder; and Unspecified Bipolar Disorder. None of these diagnoses, if confirmed, qualify claimant for regional center services.

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## LEGAL CONCLUSIONS

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

2. Welfare and Institutions Code section 4643.5, subdivision (b), provides:

An individual who is determined by any regional center to have a developmental disability shall remain eligible for services from regional centers unless a regional center, following a comprehensive reassessment, concludes that the original determination that the individual has a developmental disability is clearly erroneous.

3. In a proceeding to determine whether a previous determination that an individual has a developmental disability "is clearly erroneous," the burden of proof is on the regional center to establish that the individual is no longer eligible for services. The standard is a preponderance of the evidence. (Evid. Code, § 115.) Thus, IRC has the burden to establish by a preponderance of the evidence that its previous eligibility determination "is clearly erroneous."

4. Welfare and Institutions Code section 4512, subdivision (a), defines developmental disability as a disability that originates before an individual attains 18 years of age; continues, or can be expected to continue, indefinitely; and constitutes a substantial disability for that individual. A developmental disability also includes "disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability." (*Ibid.*) Handicapping conditions that are "solely physical in nature" do not qualify as developmental disabilities under the Lanterman Act. (*Ibid.*)

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

(a) "Developmental Disability" means a disability that is attributable to mental retardation<sup>1</sup>, 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:

(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

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<sup>1</sup> Although the Lanterman Act has been amended to eliminate the term "mental retardation" and replace it with "intellectual disability," the California Code of Regulations has not been amended to reflect the currently used terms.



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. Although claimant has a history of an autism diagnosis under the DSM-5, as claimant progressed in age, he did not exhibit symptoms and characteristics of a person with autism. Claimant has also had diagnoses in the past such as ADHD, Emotional Disturbance, and Bipolar Disorder, which may explain his challenging behavior. None of those conditions qualifies a person for regional center services. Claimant has had many interventions over time through the Early Start program, IRC, and his school. Those interventions may have helped claimant achieve his current level of adaptive functioning. Finally, Dr. Greenwald's comprehensive reassessment showed claimant was below the cutoff for autism on the ADOS-2 and did not have maladaptive functioning at the level that would qualify him for regional center services.

Accordingly, IRC met its burden. The original determination by IRC finding claimant eligible for regional center services under a diagnosis of autism is clearly erroneous in light of Dr. Greenwald's comprehensive reassessment.

## ORDER

Claimant's appeal from the Inland Regional Center's determination that he is no longer eligible for regional center services is denied.

DATED: September 4, 2018

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KIMBERLY J. BELVEDERE

Administrative Law Judge

Office of Administrative Hearings

## NOTICE

**This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety days.**