

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2018061070

DECISION

Susan J. Boyle, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on September 10, 2018, in San Bernardino, California.

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

Claimant and/or his representatives did not appear.

The matter was submitted on September 10, 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 6-year-old child who lives with his mother, father, and younger sister. He has been diagnosed with Sotos Syndrome. Sotos Syndrome is an

“autosomal dominant genetic condition” that is “characterized by a distinctive facial appearance (broad and prominent forehead, sparse frontotemporal hair . . . long and narrow face, long chin) learning disability . . . and overgrowth . . . .” Other features of Sotos Syndrome can, but do not necessarily, include behavior problems, advanced bone age, cardiac anomalies, and seizures. As a toddler, claimant participated in the Early Start program as a child who was at-risk for having a developmental delay.

2. Individuals having a developmental disability that result 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 found claimant ineligible for regional center services on August 12, 2015, July 18, 2016, and February 21, 2018.

4. Sometime prior to April 26, 2018, claimant again sought to receive services and supports from IRC. Pursuant to claimant’s request for services, IRC reviewed claimant’s records and conducted an assessment. IRC’s Notice of Proposed Action dated May 23, 2018, stated that claimant was found to be ineligible for regional center services and supports because he did “not currently have a ‘substantial handicap’ as a result of Autism . . . and [he did not] appear to have a handicapping condition closely related to intellectual disability or to need treatment similar to what individuals with an intellectual disability need.”

5. Claimant’s mother signed a Fair Hearing Request on June 13, 2018. In the Fair Hearing Request, claimant’s mother sought Applied Behavioral Analysis (ABA) therapy and respite care based on her statement that claimant “has Autism behavioral issues, has issues with self-care, [and is] academically delayed due to severe behavior.”

## NOTICE OF THE ADMINISTRATIVE HEARING

6. On June 26, 2018, the Office of Administrative Hearings (OAH) mailed a Notice of Hearing to claimant's address of record. The Notice of Hearing advised claimant that a hearing on his Fair Hearing Request would be held on August 6, 2018, at 10:00 a.m. at IRC's offices located at 1365 South Waterman Avenue, San Bernardino, CA 92408. The notice of hearing provided a contact telephone number should claimant have any questions or seek to continue the hearing. The notice also included email addresses for three IRC representatives.

7. On July 7, 2018, IRC filed a motion to continue the August 6, 2018, hearing because its expert was going to be out of the state for the week of the scheduled hearing. Claimant did not oppose the request for continuance and signed a time waiver allowing the hearing to be held at a later time.

8. On July 20, 2018, OAH mailed an Order Granting Continuance and Notice of Hearing to claimant at his address of record. The order provided that the fair hearing would be held on September 10, 2018, at 10:00 a.m. at IRC offices. On September 4, 2018, IRC mailed to claimant the exhibits it intended to present at the hearing and reaffirmed that the hearing would be held on September 10, 2018, at 10:00 a.m.

9. Claimant did not request a continuance of the September 10, 2018, hearing date.

## RESPONDENT'S DEFAULT

10. On September 10, 2018, the matter of claimant's Fair Hearing Request was called by Administrative Law Judge Susan J. Boyle at 1365 South Waterman Avenue, San Bernardino, CA 92408. Neither claimant nor his representative was present in the hearing room when the case was called. The matter was trailed in order to provide claimant sufficient time to appear or communicate with IRC.

11. At approximately 10:20 a.m., Ms. Zermeño telephoned claimant's mother to inquire if she was on her way to the hearing; however, the call went to an answering machine, and Ms. Zermeño left a message.

12. The matter was called again by the Administrative Law Judge at approximately 10:40 a.m. Claimant was not in the hearing room and had not made contact with IRC or OAH.

13. Claimant was properly served with the notice of hearing. Good cause was not shown for claimant's failure to appear at the noticed hearing. IRC's request to proceed with a default prove-up hearing was granted. Claimant failed to appear at any time during the default prove-up hearing.

#### CLAIMANT'S RECORDS

14. Claimant began receiving special education services from his school district in 2015 when he was almost three-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 (IEP Team) 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. Assessments and determinations of eligibility for regional center services and supports are independently made by IRC, although IRC may consider information obtained from school and special education determinations in its assessment of a prospective client.

May 26 and 29, 2015, Preschool Transdisciplinary Assessment

15. On May 26 and 29, 2015, a transdisciplinary team from claimant's public school district performed an evaluation of claimant. Claimant's parents and IRC requested the evaluation to aid in claimant's transition from the Early Start Program to his public school district. The transdisciplinary team consisted of a school nurse and speech-language pathologist, who were not named, and Kirstin McCann, School Psychologist. Ms. McCann wrote the report that summarized the team's findings. Claimant was two years and nine months old at the time of the assessment.

16. Members of the transdisciplinary team administered the Bayley Scales of Infant and Toddler Development, 3rd Edition (Bayley), Developmental Profile 3 parent interview (DP3), Vineland Adaptive Behavior Scales, 2nd Edition (Vineland II), and the Autism Spectrum Rating Scales, Short Form (ASRS). They also interviewed claimant's parents and observed claimant. Ms. McCann noted that, although he was not feeling well on the first day of the assessments, claimant "often presented with a positive smiling affect, he established and maintained direct eye contact, and he participated in some direct assessments tasks. He also played with a variety of toys appropriate to function."

17. Ms. McCann wrote that the results of the Bayley assessment showed that claimant's cognitive skills were within the "Expected Level range" and were not an area of educational concern at that time. She also found that his preacademic skills were in the average range and were not an area of educational concern; however, his communicative functioning was below the expected level and was an area of educational concern. Claimant's motor skills were age appropriate and not an area of educational concern. Similarly, his self-help skills were age appropriate and not an area of educational concern.

18. Ms. McCann found claimant's social skills to be below the level expected and that he had "educationally significant delays of at least 30%" in this area. Claimant did, however, demonstrate friendship seeking behaviors with others his age, a desire to please others, concern for others, and he played pretend games with others and was able to share his toys. He was not able to name a friend he spent time with, and he did not demonstrate a clear preference for playing with others rather than playing by himself. He did not engage in small talk and did not label feelings. Ms. McCann opined that claimant's social skills were an area of educational concern.

19. Ms. McCann did not observe characteristics of autism when she assessed claimant, nor were any reported to her. Nonetheless, to insure that potential difficulties were not overlooked, she administered the ASRS. The scores from the ASRS were in the average range and showed that claimant had "few if any" characteristics of ASD.

20. The transdisciplinary team found that claimant should be considered for special education service under the Speech or Language Impairment (SLI) category. The team specifically found that claimant had not met the criteria to receive services under the autism or intellectual disability categories.

June 3, 2015, IEP

21. On June 3, 2015, claimant's elementary school district held an initial IEP meeting to determine if claimant met eligibility criteria to receive special education services. The IEP that resulted from that meeting provided that claimant qualified for special education services under a primary disability of SLI. No secondary disability was listed on the IEP.

22. Notes in the IEP indicated that claimant "enjoys books, arts and crafts, and Batman." His strengths included "pretend" play. Claimant's parents reported that their primary concern was claimant's communication delay. The IEP noted that claimant's preacademic skills were not a concern at that time. It also stated that claimant could

engage in play activity with another person for at least one minute and use appropriate eye contact, and he “demonstrate[d] friendship seeking behaviors with others the same age.” A psychoeducational assessment of claimant did not indicate claimant had significant cognitive delays, and “[a] non-significant score was obtained on the measure used to assess for behaviors related to autism.” Claimant was expected to spend 100 percent of his school day in a regular class environment.

May 11, 2016, IEP

23. On May 11, 2016, claimant’s elementary school district held an annual IEP meeting to determine if claimant met eligibility criteria for school services, review the special education services provided to claimant, and assess his progress. Claimant was almost four years old and in preschool. The complete records from this IEP were not provided at the fair hearing; only the goals and objectives from the IEP were provided.

24. Notes in the IEP indicated that claimant “continue[d] to be curious, playful and active. [Claimant] enjoys imaginary play using mommy and baby animals or dinosaurs where he creates voices for the animals. . . . [He] enjoys being helpful and pleasing his teacher.” He happily greets his teacher when he arrives to the class. He plays with peers in teacher-led play and enjoys running and playing with peers outside. Claimant was able to perform adaptive daily living tasks commensurate with his age. His goals were related primarily to speech and language tasks. Claimant’s parents reported their primary concern was related to claimant’s ability to participate in sports and their interest in continuing to see progress in his speech. Claimant was expected to spend 100 percent of his school day in a regular class environment.

October 19 and 21, 2016, Preschool Transdisciplinary Assessment

25. On October 19 and 21, 2016, claimant’s school district’s transdisciplinary team conducted a re-evaluation of claimant. The team consisted of a school nurse,

occupational therapist, and speech/language pathologist, who were not named, and Ms. McCann. Claimant was four years and two months old at the time of the re-assessment. The re-evaluation was requested by claimant's parents after claimant had been diagnosed with Sotos Syndrome and his parents were attempting to obtain IRC services for him. Claimant's parents expressed concerns that claimant could have ASD and/or intellectual disabilities. Ms. McCann wrote a report summarizing the team's findings.

26. The re-evaluation consisted of a review of claimant's records, interviews, direct observations of claimant in his class, and administration of a battery of standardized tests. For the re-evaluation assessment, Ms. McCann administered the Kaufman Assessment Battery for Children – 2nd Edition (KABC-II), Bracken School Readiness Assessment – 3rd Edition (Bracken SRA-3), DP3 parent interview, Connors Early Childhood – Parent Assessment Report (Connors-Parent), Connors Early Childhood Global Index (Connors-Global), Development Milestones Scales (DMS), Connors Early Childhood – Behavior, Teacher/Childcare Provider Assessment Record (Connors – teacher/childcare), and ASRS.

27. Ms. McMann observed that claimant came into the examination room willingly and was interested in the toys there. "He easily interacted with this examiner, engaged in spontaneous and reciprocal conversation, and played with toys appropriate to function. [He] presented with a positive affect, he demonstrated a social smile with those around him, and he established and maintained direct eye contact." He was "socially engaging" during the assessments, although he swatted at Ms. McCann on occasion if she did not permit him to do what he wanted to do.

28. During a classroom observation, claimant recognized Ms. McCann, gave her a verbal greeting, smiled, and asked why she was in his classroom. Ms. McCann observed claimant in "circle time" during which he left the circle on two occasions, but returned. He maintained attention and gave "visual attention to each child [in the circle]

as they shared what they brought” to the class. Ms. McCann brought claimant to his teacher’s office to administer a test. During that time, claimant smiled, engaged in conversation, was playful and giggled at times that were appropriate.

29. Cognitively, Ms. McCann found claimant scored below average in the KABC-II; however, the score was not consistent with intellectual disability. She did not find his cognitive skills to be an area of educational concern. Claimant’s preacademic and self-help skills were also found not to be areas of educational concern. Ms. McCann opined that claimant’s communication skills, motor skills, and social skills were, or could be, areas of educational concern.

30. As related to whether claimant could be eligible for special education services as a student with ASD, Ms. McCann noted that claimant did not exhibit behaviors typical to individuals with ASD during her assessment. However, because he demonstrated deficiencies in other areas, she gathered additional information from claimant’s parents and teachers, and administered the ASRS. Ms. McCann concluded that claimant’s score of 50 on the ASRS, which fell within the average score range, “in conjunction with [his] age appropriate intent to communicate and engage socially with those around him,” supported a finding that claimant was not eligible for special education services as a student with ASD. She stated, however, that claimant demonstrated “a significant number of behavior difficulties that are having a negative effect on his ability to build friendships with peers as well as function meaningfully in an educational setting.”

31. The transdisciplinary team found that claimant should be considered for special education service under the SLI and Other Health Impairment (OHI) categories. The team specifically found that claimant had not met the criteria to receive services under the autism or intellectual disability categories

September 7, 2017, IEP

32. On September 7, 2017, claimant's elementary school district held what was described as a 30 day review of claimant's IEP to review the goals and objectives adopted at the May 3, 2017, IEP. At this meeting benchmark dates were added and some goals were modified. Notes from the IEP indicated that claimant's behaviors at school were appropriate and his parents did not have concerns at that time.

October 23, 2017, IEP

33. On October 23, 2017, claimant's elementary school district held an IEP meeting to discuss "concerns regarding [claimant's] behavior. IEP notes indicated that claimant was progressing well academically; however, he occasionally refused to get on the school bus and ran to the street. Additional services were considered to address this behavior.

34. IEP notes indicated that claimant plays with his classmates and rides a tricycle. It stated he enters his class happily but he occasionally gets upset and engages in aggressive behavior. Claimant's teachers found that allowing him to be a helper decreased his inappropriate behaviors.

November 2, 2017, IEP

35. On November 2, 2017, claimant's elementary school district held an IEP meeting to discuss referring claimant for behavior intervention services. The IEP notes indicated that claimant engaged in daily "negative behavior which include[d] biting, kicking, hitting and throwing of chairs [sic], flipping desks, and spitting." Claimant's mother told the IEP team that claimant engaged in the same negative behavior at home. The IEP team suggested that the school set up a quiet area in claimant's classroom for claimant to go to when he is upset.

February 6, 2018, Prescription Pad Entry

36. On a page of a prescription pad bearing claimant's name, Terrence E. Liu, M.D., wrote, "Sotos Syndrome, Global Developmental Delay, Autistic Spectrum, Regional Center referral." This document was emailed to IRC on February 16, 2018, presumably with regard to claimant's request for services that IRC denied on February 21, 2018. No other information regarding Dr. Liu's interaction with claimant or his method of assessment was provided at the fair hearing.

April 26, 2018, Psychological Assessment

37. Paul Greenwald, Ph.D. received a doctorate in clinical psychology from the California School of Professional Psychology in 1987. He has been licensed in California as a clinical psychologist since 2001. He has served as a staff psychologist for IRC since 2008. He has extensive experience assessing, evaluating and developing treatment plans for persons diagnosed with, or identified as being at risk for, autism, intellectual disabilities and psychological disorders. Dr. Greenwald is qualified to review and evaluate claimant's records, conduct an assessment, and to form an opinion whether claimant is eligible for IRC services.

38. On April 26, 2018, Dr. Greenwald conducted a psychological assessment of claimant as part of the intake services to determine if claimant was eligible for regional center services as an individual with ASD. Dr. Greenwald prepared a report of his findings and testified at the hearing.

39. Dr. Greenwald reviewed claimant's prior records and assessments, observed claimant, and administered the ADOS-2 and CARS-2. Dr. Greenwald testified that the criteria for finding a student eligible for special education services was more inclusive than the criteria used to determine eligibility for IRC services. To diagnose an individual with ASD, Dr. Greenwald and IRC rely upon the *Diagnostic and Statistical Manual, 5th Edition (DSM-5)*, the provisions in the Lanterman Act, and the California

Code of Regulations, title 17. He noted that eligibility for regional center services is authorized only for individuals with a developmental disability described in the Lanterman Act and who had demonstrated adaptive deficits that result from the developmental disability.

40. Dr. Greenwald did not observe claimant engage in repetitive movements typical to ASD. Claimant was attracted to toys and objects in the examination room, and he engaged with Dr. Greenwald in conversation and play activities.

41. Claimant received a score of one on the ADOS which fell in the "minimal to no evidence" of ASD. On the CARS-2, claimant scored 23.5, which equated to "minimal to mild" evidence of ASD. In addition to the scores obtained from standardized tests, Dr. Greenwald considered observations of others who have evaluated claimant that claimant engages in imaginary play, wants to please his teacher, interacts with students his age, and maintains eye contact with others as additional evidence that claimant does not have ASD. Dr. Greenwald pointed out that claimant was not found eligible for special education services based on ASD even under the more inclusive definitions used for educational purposes. Dr. Greenwald concluded that claimant was not eligible for IRC services based on ASD as there were no documented tests, medical diagnoses, or observation records that support claimant has ASD. Additionally, claimant has no record of having adaptive deficits necessary for a finding of IRC eligibility.

## 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>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 become seriously impaired as an integral manifestation of the disorder.

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<sup>1</sup> The regulations have not been amended to replace "mental retardation" with "intellectual disability."

(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.

#### EVIDENCE PRESENTED BY CLAIMANT

10. Claimant and/or his representatives did not appear at the hearing and no evidence was presented in support of his appeal.

#### EVALUATION

11. 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 and that he has adaptive deficits that result from the developmental disability. Claimant asserted he was eligible to receive regional center services as an individual with ASD. Claimant bears the burden of proving that a preponderance of the evidence supports his claims.

12. Other than an unexplained note on a prescription pad, there was no evidence that claimant was ever diagnosed with ASD. The records confirm that he was never provided special education services under the more inclusive standards for eligibility found in the California Code of Regulations, title 5.

13. Dr. Greenwald conducted a psychological evaluation of claimant. IRC's eligibility team reviewed all of the available documentation and determined that claimant was not eligible for services. Determinations regarding eligibility for regional center services 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.

14. Based on this record, claimant is not eligible to receive regional center services.

## ORDER

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

DATED: September 14, 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.**