

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2018081161

DECISION

On November 21, 2018, Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California.

Keri Neal, Consumer Services Representative, Fair Hearings and Legal Affairs, represented the Inland Regional Center (IRC).

Claimant is seven years old and is represented by his mother. No one appeared at the hearing on claimant's behalf.

Oral and documentary evidence was introduced, and the matter was submitted on November 21, 2018.

ISSUE

Is claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) on the basis of a diagnosis of autism spectrum disorder (ASD) or intellectual disability (ID)?

## FACTUAL FINDINGS

### JURISDICTIONAL MATTERS

1. On July 30, 2018, IRC notified claimant that he was not eligible for regional center services based on a review of his records because he does not have a “substantial handicap” of ASD or ID that qualifies him to receive such services.

2. On August 20, 2018, claimant’s mother signed a fair hearing request (request) appealing IRC’s decision. The request challenged IRC’s determination that claimant was not eligible for regional center services. The request asserted that claimant was eligible for regional center services and that claimant “needs to be observed at school” and “it may not be autism but something is not right.”

3. This matter was set for hearing on October 3, 2018, at 10:00 a.m. The Notice of Hearing was mailed to the address provided by claimant’s mother in the request.

4. On September 14, 2018, an Order Granting Continuance of the Hearing was issued based upon claimant’s request due to an additional assessment on claimant to be performed at the end of September. The order set the hearing date for November 21, 2018, at 10:00 a.m. The order was mailed to the address provided by claimant’s mother in the Request for Fair Hearing form.

5. On November 21, 2018, Administrative Law Judge Debra D. Nye-Perkins called the case for hearing. Ms. Neal represented IRC. No one appeared at the hearing on behalf of claimant. After waiting 30 minutes beyond the time when the hearing was set to commence, the case was heard without a representative for claimant present.

6. The burden rests on claimant to establish by a preponderance of the evidence that he suffers from a qualifying, substantial developmental disability. (Evid. Code, § 115.) By failing to appear, claimant failed to establish his eligibility.

7. Additionally, the burden is on claimant to diligently prosecute his appeal/fair hearing request. Claimant and his representative were properly notified of the date, time

and place of hearing and failed to appear for the hearing. Consequently, claimant is deemed to have abandoned his appeal/fair hearing request. Despite claimant's failure to appear at the hearing, IRC presented evidence at the hearing regarding its denial of claimant's request for services.

#### TESTIMONY OF PAUL ALLEN GREENWALD, PH.D.

8. Paul Allen Greenwald, Ph.D., is a licensed clinical psychologist and received his Ph.D. in Clinical Psychology from the California School of Professional Psychology in 1987. Dr. Greenwald has worked as a staff psychologist at IRC since October 2008. His duties include reviewing records and conducting evaluations to assist the multidisciplinary team to determine if potential clients are eligible for services.

9. Dr. Greenwald testified that IRC has a clinical team responsible for reviewing all documents, including medical and psychological reports, relevant to a claimant's eligibility to receive services at IRC in order for the team to make a determination on whether a claimant is eligible. Dr. Greenwald is a member of claimant's eligibility team. Dr. Greenwald stated that he participated in an in-person meeting with claimant and his mother on June 25, 2018, during which it was determined that claimant's eligibility could not yet be determined and a school observation of claimant was scheduled. Dr. Greenwald also reviewed all documents provided by claimant regarding an eligibility determination, performed a school observation of claimant, and performed his own assessment of claimant and summarized his results in his report provided to the IRC eligibility team. Dr. Greenwald stated that Borhaan Ahmad, M.D., who was also a member of claimant's eligibility team, reviewed claimant's records and determined that claimant did not meet eligibility criteria for services based upon a diagnosis of either cerebral palsy or epilepsy.

10. Dr. Greenwald opined that claimant is not eligible for IRC services on the basis of intellectual disability because he does not meet the requirement of an

intellectual disability and because he does not have a substantial disability as defined in the Lanterman Act. (Welf. & Inst. Code § 4512, subd. (l); Cal. Code Regs., tit. 17, § 54001, subd. (a).) Dr. Greenwald explained that in order to have a diagnosis of intellectual disability under the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5), a person must have onset of symptoms during the developmental period - before the age of 18 - that includes both intellectual and adaptive functioning deficits that meet the following three criteria: (1) deficits in intellectual functions confirmed by clinical assessment and individualized, standardized intelligence testing; (2) deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility (such adaptive functioning deficits must limit functioning in one or more activities such as communication, social participation, and independent living); and (3) onset of intellectual and adaptive deficits during the developmental period.

11. Dr. Greenwald explained that the DSM-5 also identifies the criteria for diagnosis of ASD. The diagnostic criteria include persistent deficits in social communication and social interaction across multiple contexts; restricted repetitive and stereotypical 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 documented DSM-5 diagnosis of ASD prior to the age of 18 years to qualify for regional center services under the category of ASD.

12. Dr. Greenwald also explained that in order to determine whether a diagnosis of a developmental disability is substantially disabling so as to qualify for services from IRC, there must be significant functional limitations in at least three of the seven life activities listed in California Code of Regulations, section 54001, which are

"self-care," "receptive and expressive language," "learning," "mobility," "self-direction," "capacity for independent living," and "economic self-sufficiency." He stated that because claimant is only seven years old, the last two of these life activities do not apply. He explained that his assessment of claimant and his review of claimant's records indicate that claimant does not have a diagnosis of intellectual disability or autism, and that claimant does not have any significant functional limitations in any of the seven listed life activities.

13. Dr. Greenwald reviewed all of claimant's records, including school and medical records. He noted that claimant receives special education services at his school under the classification of autism. Dr. Greenwald explained that the school district criteria for providing special education services for autism are far less strict than the criteria applicable to the regional center. This is because the school district could provide special education services if claimant displayed "autistic-like" behaviors, even if the child does not meet all of the criteria required for a diagnosis of ASD. Dr. Greenwald stated that claimant's school records show that claimant displays appropriate communication, including articulation, language, voice and fluency for his age, and that these are inconsistent with a diagnosis of ASD. Those school records further show claimant likes to work in small groups of children, likes to be involved, enjoys school, has a good vocabulary, is learning to acknowledge his feelings, uses his words to express himself, and has improved behavior with his peers, all of which are inconsistent with a diagnosis of ASD. Dr. Greenwald further noted that claimant's behavioral issues described in his school records can occur with other diagnoses than ASD.

14. Dr. Greenwald reviewed a psychoeducational assessment report summarizing an assessment conducted on December 15, 2016, by Regina Edmon, a school psychologist at Alta Loma School District. At the time of the assessment, claimant was five years and four months of age. Dr. Greenwald testified that Dr. Edmon

administered to claimant the Wechsler Preschool and Primary Scales of Intelligence-Fourth Edition (Wechsler-4). The results of that examination showed that claimant had a full-scale standard score of 110, which is in the high average range. Dr. Greenwald explained that claimant's I.Q. score of 110 is not consistent in any way with a diagnosis of intellectual disability. Other tests administered by Dr. Edmon were the Autism Diagnostic Observation Schedule, Second Edition (ADOS-2) and the Autism Spectrum Rating Scales (ASRS). Dr. Greenwald testified that the ASRS assessment is dependent on answers to questions from a child's parent and teacher. Dr. Greenwald noted that the score resulting from the answers provided by claimant's mother was 63, which is considered "slightly elevated" but not at the threshold score of 70, whereas the teacher's score was 99. The parental and teacher scores were thus markedly different. With regard to the ADOS-2 results, Dr. Greenwald noted that Dr. Edmon found "mild to moderate abnormalities" for claimant, with a total score in the autistic range. However, Dr. Greenwald explained that this could be a "false positive" result because the ADOS-2 requires cooperation from claimant, so that if a claimant is uncooperative, depressed or anxious, this can cause elevated scores. Additionally, Dr. Greenwald referred to Dr. Edmon's observations that claimant "was able to express himself adequately," and that he had age-appropriate "expressive and receptive language," which are not characteristic of a diagnosis of ASD. Furthermore, Dr. Edmon noted that claimant's "adaptive living/self-help skills are age appropriate," and claimant "seeks affection" and "engages in reciprocal affection," all of which are characteristics inconsistent with ASD.

15. Dr. Greenwald also reviewed a psychological assessment of claimant conducted by Nicole Young, Psy.D. on September 24, 2018, when claimant was seven years and one month of age. Dr. Young administered the Wechsler Intelligence Scale for Children, Fifth Edition (Wechsler-5) to claimant and the results showed claimant had a composite I.Q. score of 118 in the high average range. Dr. Greenwald again explained

that an I.Q. score of 118 is inconsistent with a diagnosis of ID. Dr. Young also administered to claimant the ADOS-2 and the results in her report show that claimant's performance was "suggestive of moderate symptoms of Autism Spectrum Disorder." Dr. Young further noted that "[g]iven [claimant's] abilities, he received an ADOS-2 comparison score of 6, which places [him] within the Autism classification." Dr. Greenwald noted Dr. Young's conclusions regarding the ADOS-2 were internally inconsistent with her earlier observations in her report regarding claimant's communication, cooperation, and play. Specifically, earlier in the report she noted under the "communication" section that claimant "understands jokes and sarcasm," which is inconsistent with a diagnosis of ASD. Dr. Young also noted that claimant used gestures to show how one would brush one's teeth (which reflects good non-verbal communication skills), engaged in joint interactive playing, engaged in questions and instructions with Dr. Young, enjoyed the story telling and impersonated characters in the book. Dr. Greenwald noted that these described characteristics are inconsistent with the ADOS-2 scores and are not consistent with a diagnosis of ASD.

16. Dr. Greenwald also conducted his own assessment of claimant on June 25, 2018, and observed claimant at his school on July 16, 2018. He summarized his conclusions in his report. Dr. Greenwald administered to claimant the Kaufman Brief Intelligence Test Second Edition (KBIT-2) and the results of that examination showed that claimant had an I.Q. composite score of 112, which is in the high average range. Dr. Greenwald explained that this I.Q. score is completely inconsistent with a diagnosis of ID or a condition that is closely related to intellectual disability or a condition requiring treatment similar to a person with intellectual disability (fifth category). Dr. Greenwald also administered to claimant the Autism Diagnostic Interview-Revised (ADIR) and the results show that claimant "approached an autism cut-off overall," but that he did not meet the autism cut-off in two of the three categories tested. Dr. Greenwald explained

that the ADIR test was based upon a clinical interview of claimant's mother. He stated that the overall result of the ADIR show that while claimant "approached" the autistic range, he was not within the autistic range of results.

17. Dr. Greenwald testified the documents he reviewed from both school and medical records provide no indication that claimant has any global impairment of intellectual functioning, a condition that is closely related to intellectual disability, a condition requiring treatment similar to a person with intellectual disability, or ASD. He further noted that none of those records show that claimant has a substantial disability from those conditions.

18. In conclusion, Dr. Greenwald stated that claimant does not meet the DSM-5 diagnostic criteria for ID or ASD; there is no evidence to indicate that claimant has any substantial disability resulting from those conditions. Dr. Greenwald concluded that the evidence therefore did not support a finding that claimant was eligible for regional center services under any diagnosis.

## 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 diagnosis. 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. Pursuant to the Lanterman Act (Welf. & Inst. Code, § 4500, et seq.), the State of California accepts responsibility for persons with developmental disabilities. The purpose of the Act is to rectify the problem of inadequate treatment and services for the developmentally disabled 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 can establish that he or she is suffering from a substantial disability that is 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 intellectually disabled individuals. (Welf. & Inst. Code, § 4512, subd. (a).) A qualifying condition must also start before the age of 18 and be expected to continue indefinitely. (Welf. & Inst. Code, § 4512.)

5. California Code of Regulations, title 17, section 54000, also 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

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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. 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 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. That a school providing services to a student under an autism disability is insufficient to establish eligibility for regional center services. Regional centers are governed by California Code of Regulations, Title 17. Title 17 eligibility requirements for services are much more stringent than those of Title 5.

8. Welfare and Institutions Code section 4512, subdivision (l), 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:

- (1) Self-care.
- (2) Receptive and expressive language.
- (3) Learning.
- (4) Mobility.
- (5) Self-direction.
- (6) Capacity for independent living.
- (7) Economic self-sufficiency.

Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.

California Code of Regulations, title 17, section 54001, subdivision (a), also defines "substantial disability" and requires "the existence of significant functional limitations, as determined by the regional center, in three or more of the ... areas of major life activity" listed above.

## EVALUATION

9. The information contained in claimant's records reviewed by IRC, as well as Dr. Greenwald's evaluation of claimant, did not show by a preponderance of the evidence that claimant suffers from a qualifying developmental disability, including ID or ASD. Claimant failed to appear and present any evidence to support his contention that he is eligible for regional center services. The evidence presented by IRC established that claimant does not have a condition that makes him eligible for regional center services. Therefore, claimant failed to meet his burden of proof to establish that he is eligible to receive services under the Lanterman Act based on any substantially disabling diagnosis.

## ORDER

Claimant's appeal from IRC's determination that he is not eligible for regional center services and supports is denied.

DATED: December 6, 2018

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DEBRA D. NYE-PERKINS

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.**