

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2018090051

DECISION

On February 6, 2019, Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on February 6, 2019, in San Bernardino, California.

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

Claimant's mother, his legal guardian, represented claimant, who was present.

Oral and documentary evidence was introduced, and the matter was submitted on February 6, 2019.

ISSUES

Is claimant eligible for services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) on the basis of a diagnosis of Autism Spectrum Disorder (ASD)?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. Claimant is a 21-year-old man who received services from IRC from 2007 to 2016 based upon a diagnosis of ASD.

2. On June 21, 2016, a team of professionals at IRC met to review all information and assessments of claimant to determine whether claimant continued to be eligible for services from IRC under the Lanterman Act.

3. On June 22, 2016, IRC notified claimant that he was no longer eligible for regional center services based on a review of all his records, including a May 17, 2016, psychological assessment from IRC psychologist Paul Greenwald, Ph.D., because he does not have a disability that qualifies him to receive IRC services, and the previous determination that claimant has a developmental disability was not correct.

4. On June 30, 2016, claimant's mother filed a fair hearing request appealing IRC's decision. October 11, 2016, a hearing was held regarding the fair hearing request.

5. On October 24, 2016, a Decision resulting from the October 11, 2016, fair hearing was issued wherein claimant's appeal from IRC's determination that he is not eligible for regional center services on a basis of a diagnosis of autism was denied, and claimant's appeal from IRC's determination that it would not provide a second psychologist and/or a second testing of claimant to reassess his eligibility was denied.

6. Sometime during 2018 claimant provided IRC with additional documents not considered during the previous evaluations of claimant by IRC or during the October 11, 2016, hearing for consideration of eligibility of claimant for IRC services under a diagnosis of ASD. On August 2, 2018, IRC notified claimant by letter that IRC had reviewed the additional documents and determined that no additional "intake" services for claimant would be provided and that claimant was not eligible for services from IRC on the basis of ASD.

7. On August 27, 2018, claimant's mother filed a fair hearing request appealing IRC's decision. This hearing followed.

DIAGNOSTIC CRITERIA FOR ASD

8. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5) identifies criteria for the diagnosis of ASD. The diagnostic criteria include 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 ASD that is substantially disabling in order to qualify for regional center services under the category of ASD.

TESTIMONY OF SANDRA BROOKS, PH.D.

9. Dr. Sandra Brooks received her Ph.D. in Clinical Psychology from Loma Linda University in 2006. Dr. Brooks has worked as a staff psychologist at IRC since January 2007. Her duties include reviewing records and conducting evaluations to assist the multidisciplinary team to determine if potential clients are eligible for services.

10. Dr. Brooks was tasked with reviewing all records available for claimant to determine whether he is eligible for IRC services. As part of that process, Dr. Brooks reviewed all prior records in claimant's file, including a report from Dr. Paul Greenwald of IRC dated May 17, 2016, the East Valley SELPA Individualized Education Program (IEP) dated April 7, 2014, the Redlands Unified School District Psycho-Educational Report dated January 23, 2012, and the September 14, 2007, report of the Diagnostic Center in Los Angeles, as well as all additional documents provided by claimant in 2018.

11. Dr. Brooks testified that after her review of all the records available, she agreed with Dr. Greenwald's prior assessment summarized in his report dated May 17, 2016, that claimant is not eligible for services under a diagnosis of ASD based on Dr. Greenwald's assessment of all of the documents available at that time. Dr. Brooks testified that the school records and testing conducted at the Diagnostic Center in Los Angeles on September 14, 2007, she reviewed that were also summarized in Dr. Greenwald's report show that claimant was administered the Autism Diagnostic Observation Schedule (ADOS), a diagnostic tool for use in diagnosing autism, with scores that fell within the diagnostic range for ASD, but claimant did not meet the full criteria for a diagnosis of ASD. Dr. Brooks agreed with Dr. Greenwald's assessment that claimant had an inflated ADOS test score because of mental health issues and/or an ADHD diagnosis rather than autism. She stated that claimant does meet the criteria for a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD), which can manifest with symptoms which can be similar to ASD. She noted that the September 14, 2007, report also showed that claimant was attention-seeking, enjoyed playing with friends and sought social interaction, which are traits that are inconsistent with a diagnosis of ASD. However, she understands how claimant was previously diagnosed with ASD based on confusion of his symptoms as presented when he was younger.

12. With regard to the additional documents claimant provided to IRC in 2018, Dr. Brooks testified that these documents consist of a decision by the Social Security Administration (SSA) dated August 3, 2017, multiple school records from claimant's childhood not previously considered, a speech language assessment of claimant, and medical records of claimant. Dr. Brooks stated that after her review of all these documents, she concluded that claimant does not have a diagnosis of ASD and therefore is not eligible for services from IRC.

Dr. Brooks stated that the decision from SSA dated August 3, 2017, determined claimant was disabled under the Social Security Act and accordingly may receive SSA benefits. She noted that the basis for his disability in that decision was that claimant suffered from a combination of impairments, including mental impairments, ADHD, social communication disorder, and autism, such that he was eligible for SSA benefits. Dr. Brooks also emphasized that the SSA decision used different criteria for eligibility than IRC and that claimant was found to have an overall impairment based on multiple diagnoses so as to qualify him for SSA benefits, and his SSA eligibility was not based on a single diagnosis. She again stated she does not agree that claimant was properly diagnosed with ASD, but that the SSA decision was not based exclusively on that previous diagnosis.

13. Dr. Brooks also reviewed an Individualized Education Plan (IEP) from the East Valley Special Education Local Plan Area (SELPA) dated September 28, 2007, when claimant was in the fifth grade. This document indicates that claimant was receiving special education services under a diagnosis of autism and specific learning disorder. However, Dr. Brooks emphasized that school districts use a different set of criteria for eligibility for special education services than IRC. Additionally, Dr. Brooks noted that this document shows that claimant demonstrated a number of characteristics that contradict a diagnosis of ASD. Specifically, the document notes that claimant craved individual attention and enjoyed playing and interacting with his peers, characteristics not typical of ASD. Furthermore, the document notes that claimant frequently required re-direction after going off-task, which is typical of claimant's diagnosis of ADHD. Dr. Brooks explained that some characteristics typical of ADHD can overlap with those of ASD sometimes causing confusion. In claimant's situation, Dr. Brooks explained that ADHD can impede a person's social interaction, which can be confused with characteristics of ASD. However, she further noted that his overall behavior as he has gotten older has

improved, and based on the entirety of information she reviewed, she believes that claimant's early diagnosis of ASD was erroneous. She stated that the document shows that claimant had pressured speech, mood swings and tantrums, which were attributed to autism. However, she explained that those characteristics are not typically associated with autism but can be associated with other psychological disorders.

An addendum to the September 28, 2017, IEP noted that claimant had less frequent and severe outbursts in class and he was capable of self-redirection. Dr. Brooks noted that self-redirection is not a characteristic of ASD, but instead it speaks to an ability to monitor himself. Additionally, the document notes that claimant was worried about going to a new school because he did not know anyone there, which indicates he was interested in social interactions with his peers, a characteristic not typical of ASD.

14. Dr. Brooks also reviewed a Speech and Language Assessment of claimant conducted on March 25, 2002, when claimant was four years and eight months old. She explained that the document shows that claimant's mother was concerned about claimant's stuttering, which she noted would improve after claimant returned home to his mother after visiting his father. The document also notes that claimant was taking medication to modulate his ADHD, and that claimant's voice and articulation were developmentally appropriate. Dr. Brooks explained that stuttering is not a characteristic associated with ASD and this document provided no information regarding any diagnosis of ASD.

15. Dr. Brooks also reviewed a Speech and Language Progress Report dated May 31, 2002, when claimant was four years and 10 months old. She stated that the document showed that claimant was evaluated for his stuttering and that he was frequently distracted and required frequent verbal cues to stay on task, which is typical for a diagnosis of ADHD. Dr. Brooks again explained that this document did not provide any evidence that claimant had a diagnosis of autism and made no reference to ASD.

16. Dr. Brooks also reviewed two Occupational Therapy Reports from the East Valley SELPA, dated March 14, 2003, and November 3, 2003. Both reports were created when claimant was five years old. Dr. Brooks testified that both documents show that claimant exhibited sensory and fine motor issues. She noted that claimant was cooperative during testing for both reports, but he demonstrated impulsivity and difficulty remaining on task. The documents also show that claimant became frustrated and was self-aware of his difficulties. Dr. Brooks explained that the impulsivity, frustration and difficulty remaining on task are characteristics typical of an ADHD diagnosis. She explained that while sensory issues are typical of ASD, those difficulties are also associated with ADHD. She stated that claimant's behaviors described in these documents sounded more like ADHD than ASD and that claimant always wanted to be involved socially, but his impulsivity negatively impacted his social relationships. She explained that the impulsivity associated with ADHD would cause issues with claimant keeping friends, but he was always interested in having friends, which is not typical of a diagnosis of ASD.

17. Dr. Brooks also reviewed a Language, Speech and Hearing Assessment dated September/October 2008, when claimant was in the sixth grade. She stated that this report gave a comprehensive assessment of claimant's spoken language and claimant scored in the average range in non-literal language and pragmatic judgment. Dr. Brooks explained that this information is significant because persons with ASD typically have difficulty with non-literal language and pragmatic judgment. Accordingly, these findings are not consistent with a diagnosis of ASD. Dr. Brooks also noted that claimant was able to understand and skillfully answer the question "what does 'she feels like an icebox' mean?" showing that claimant understood that non-literal language in the average range, which is not indicative of a diagnosis of ASD. The document also showed that claimant had difficulty with peer relationships, but he continued to seek

attention from his peers, which are characteristics contrary to a diagnosis of ASD and appear to be problems more closely associated with ADHD.

18. Dr. Brooks reviewed an Educational Evaluation dated January 20, 2012, when claimant was in the ninth grade. This document noted that claimant “can be disrespectful and defiant towards teachers and staff.” Dr. Brooks opined that the act of being disrespectful or defiant reflects a degree of intentionality and ability to manipulate by pushing buttons, which are characteristics that are not consistent with a diagnosis of ASD. Specifically, the diagnosis of ASD is typically associated with a lack of social awareness, which would make these acts of disrespect or defiance difficult or impossible.

19. Dr. Brooks also reviewed multiple medical records for claimant, which originated from a licensed clinical social worker and a psychiatrist from the years 2007 to 2009. The documents note a diagnosis of ADHD and “Asperger’s Disorder.”¹ The documents note that claimant presents as hyperactive, but responsive to directions. Claimant was provided medication for his diagnosis of ADHD and as a result he was less irritable and obsessive. Dr. Brooks noted that there appears to be an emotional component to claimant’s behaviors because his behaviors became worse when he was with his father. Dr. Brooks also noted some inconsistencies with these documents. Specifically, claimant sought the attention of others, including the therapist when he

¹ Asperger’s Disorder is a term not used in the DSM-5, but was a term used in previous version of the DSM. Specifically, the term Asperger’s Disorder was added to the DSM-IV to indicate it was a separate disorder from autism. The DSM-5 replaced Asperger’s Disorder and other pervasive developmental disorders with the umbrella diagnosis of ASD.

asked the therapist to play with him. Claimant also stole money and jewelry from his grandmother and told his mother he took it from a kid at school, indicating a level of sophistication to manipulate situations. Also, claimant joked with the doctor by telling him he had “killed and eaten his family,” but afterwards clarifying that he was just kidding. She explained that all of these behaviors are inconsistent with a diagnosis of ASD. She explained that the ability to make jokes is not consistent with ASD. Furthermore, claimant had a few friends at school but was being teased, which concerned him. She noted that these documents overall do not support a diagnosis of ASD.

20. Dr. Brooks also reviewed a Psychological Evaluation conducted by IRC on July 11, 2002, by psychologist Dr. Thomas F. Gross, Ph.D., for a determination of whether claimant was eligible for services from IRC. Dr. Brooks noted that Dr. Gross found that claimant was not eligible for services on the basis of ASD or any other diagnosis. Dr. Gross noted that claimant had a diagnosis of ADHD. Dr. Gross administered the Childhood Autism Rating Scale to claimant and claimant’s score was 23, which is below the cut-off for a diagnosis of ASD. Dr. Brooks stated that Dr. Gross noted in his report that claimant participated well socially, but had difficulty keeping friends because he was impatient. Dr. Brooks explained that this is a common theme for claimant and demonstrates a correct diagnosis of ADHD, rather than ASD. She also noted that claimant had sensory issues such as sensitivity to sound and a high pain tolerance, which are characteristics that are typically associated with ASD. However, she explained that these characteristics are also associated with ADHD and that claimant’s other behaviors, such as his ability to play imaginatively, were not consistent with a diagnosis of ASD.

21. Dr. Brooks also reviewed five Psychoeducational Reports from East Valley SELPA dated September 16, 2002, October 10, 2005, October 2008, April 2009, and

January 2012, for claimant. She noted that each of these five documents show that claimant was talkative and had difficulty controlling his impulses, would brag, was interested in interacting with others, used fantasy and imagination, and had difficulty maintaining friendships due to his impulses. Dr. Brooks noted that these characteristics are not consistent with ASD, but overall indicate that claimant is correctly diagnosed with ADHD. In one of these documents, claimant was given a personality test, which showed he was on the lower extreme of showing emotion and the examiner stated that this was indicative of ASD. Dr. Brooks disagreed with this statement because in her view his responses to the questions on that exam indicated that claimant had a social awareness and could recognize the emotional state of others, which are characteristics that are inconsistent with a diagnosis of ASD.

22. Dr. Brooks summarized and concluded that claimant is not eligible for IRC services under the diagnosis of autism because he did not meet the criteria for a diagnosis of ASD based on her review of all the records as a whole. Dr. Brooks stated that she understands that claimant was diagnosed in 2007 with ASD based on the Diagnostic Center Report, which was the reason claimant originally received IRC services. However, she believes that based on the overall record that claimant's 2007 diagnosis of ASD was erroneous. Dr. Brooks concluded that ASD is not a proper diagnosis for claimant and claimant does not have a diagnosis that would qualify him for services at IRC.

TESTIMONY OF CLAIMANT'S MOTHER

23. Claimant's mother is employed by IRC. She testified that claimant was evaluated in September 2007 by the Diagnostic Center where he received a diagnosis of ASD. She explained that based only on this document claimant originally began receiving services from IRC in 2007. She explained that when claimant was re-evaluated the next year by IRC for eligibility, IRC only considered the same September 2007

document and based on that document, IRC continued providing services to claimant. Then, in 2009, claimant was re-evaluated by IRC for eligibility and again the only document considered was the 2007 Diagnostic Center document. As a result, claimant continued to receive services from IRC. Claimant's mother stated that in 2009 IRC made the determination that claimant did not need a further evaluation for eligibility for services from IRC. Claimant continued to receive services until 2016 when Dr. Greenwald evaluated claimant for eligibility. Claimant's mother explained that the only reason Dr. Greenwald evaluated claimant was because claimant was in the process of an appeal with SSA regarding his SSA benefits. She stated that claimant received services from IRC from July 2007 to October 2016.

24. Claimant's mother stated that claimant does have sensory vulnerabilities indicative of ASD. She stated that during the time that claimant received services from IRC he received behavioral therapy that improved his ability to control his behavior and taught him how to interact with others. Claimant's mother believes that these services benefited claimant greatly. As a result, and as claimant has gotten older, claimant has learned to become more adapted to do what is socially acceptable, but she believes he remains autistic.

25. Claimant's mother further testified that she believes that when claimant hit puberty he developed other mental disorders, which she stated is common with a diagnosis of ASD. She does not deny that claimant has ADHD and other mental disorders, but she also believes he has ASD.

26. Claimant's mother stated that claimant received services from IRC for almost 10 years and IRC decided that he did not need to be reassessed for eligibility in 2009. Accordingly, she believes that IRC should continue to provide services to claimant, and it is unfair for him to no longer receive services, particularly as she believes that his diagnosis of ASD is correct and he continues to suffer from ASD.

THE PARTIES' ARGUMENTS

27. IRC argued that Dr. Brook's review of all records failed to establish that claimant has a diagnosis that would qualify him for services from IRC, specifically claimant does not have a diagnosis of ASD.

28. Claimant's mother disagreed with IRC's position that claimant has no indicators to show that he is autistic, and she believed that IRC should continue to provide services to claimant because he continues to suffer from ASD.

LEGAL CONCLUSIONS

THE BURDEN AND STANDARD OF PROOF

1. In a proceeding to determine whether an individual is eligible for 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 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 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 retardation², 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 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.

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a

need for treatment similar to that required for mental retardation.

6. When an individual is found to have a developmental disability as defined under the Lanterman Act, the State of California, through the regional center, accepts responsibility for providing services and supports to that person to support his or her integration into the mainstream life of the community. (Welf. & Inst. Code, § 4501.)

7. “Services and supports” for a person with a developmental disability can include diagnosis and evaluation. (Welf. & Inst. Code, § 4512, subd. (b).)

8. 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. 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.

EVALUATION

9. Claimant’s mother asked for a fair hearing to contest the determination by IRC that claimant is not eligible for services from IRC under a diagnosis of ASD. She believed that claimant continues to suffer from ASD and benefitted for 10 years from services from IRC such that he has been able to adapt to his disability. However, she believes he should continue to receive services from IRC based on his previous diagnosis of autism.

10. The psychological reassessment performed by Dr. Greenwald in 2016, as well as Dr. Brooks’s review of all records provided, including those provided to IRC in 2018 supports the conclusion that claimant is not eligible for regional center services

under a diagnosis of ASD. Claimant's school records and assessments, as well as medical records show that claimant suffers from ADHD and mental health disorders that likely affected his previous scores on the ADOS test administered to him in 2007 from which his original diagnosis of autism disorder arose. Claimant's most recent evaluation and tests demonstrate that he does not meet the diagnostic criteria for ASD and all the additional records provided in 2018 by claimant's mother do not provide any further evidence to show that an ASD diagnosis is proper. The weight of the evidence established that claimant does not have a condition that makes him eligible for regional center services.

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ORDER

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

DATED: February 20, 2019

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.