

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

v.

INLAND REGIONAL CENTER,

Service

Agency.

OAH No. 2018110722

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter in San Bernardino, California, on January 9, 2019.

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

Claimant is represented by Marlene Leuck, Stand Out Advocates. Ms. Leuck did not appear. Katherine Hayward, Care Coordination Manager, appeared on Ms. Leuck's behalf to request a continuance, which was denied.

The matter was submitted on January 9, 2019.

ISSUE

Is claimant eligible for regional center services under the Lanterman Act based on a diagnosis of Intellectual Disability, Autism Spectrum Disorder (autism), cerebral palsy, epilepsy, or a disabling condition closely related to an intellectual disability that required similar treatment as an individual with an intellectual disability (fifth category)?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

Procedural Background

1. Claimant is a thirteen-year-old boy. On November 5, 2018, IRC notified claimant's parents that claimant is not eligible for regional center services because the records provided to IRC did not establish that claimant had a substantial disability as a result of an intellectual disability, autism, cerebral palsy, epilepsy, or a disabling condition closely related to an intellectual disability that required similar treatment as an individual with an intellectual disability. The Notice of Proposed Action also stated:

On October 23, 2018, a phone call was received to our staff psychologist, Dr. Sara deLeon, indicating the psychological evaluation for [claimant] would be cancelled. A message was left on your voicemails on October 24, 2018 in efforts to reschedule the evaluation. On October 25, 2018, I received a phone call from your advocate at Stand Out Advocates, LLC requesting clarification of the need for a psychological evaluation. On October 26, 2018, I received another phone call from two advocates at Stand Out Advocates, LLC, demanding an immediate eligibility determination solely based on records. On October 29, 2018, a record review was completed by my program manager, Mary-Joseph Bacon. Inland Regional Center (IRC) determined that further assessment is needed in order to make an eligibility determination due to inconsistency and substantial discrepancies in the multiple evaluations on file. Your

advocate requested to file an appeal regarding IRC's decision to conduct further testing/assessments to determine eligibility. At this time, IRC is again offering to schedule a psychological assessment at IRC in order to make a final decision regarding eligibility. If this is agreeable, please contact me at (909)890-3079.

2. Claimant's authorized representative, Marlene Leuck, refused to permit claimant to undergo a psychological evaluation at IRC, and filed a fair hearing request on November 9, 2018. In the portion of the form that asks, "Reasons for requesting a fair hearing," Ms. Leuck wrote, "claimant denied regional center services." In the portion of the form that asks, "Describe what is needed to resolve your complaint," Ms. Leuck wrote, "Claimant [sic] to be approved for Regional Center Services. Ms. Leuck did not state under what category claimant should be considered for services.

3. A Notice of Hearing setting the hearing for January 9, 2019, at 10:00 a.m., was served on the parties by OAH on December 5, 2018.

4. Welfare and Institutions Code section 4712, subdivision (d), requires the parties exchange a witness list and copies of all potential documents to be introduced at the hearing at least five days prior to the hearing. On December 27, 2018, IRC sent Ms. Leuck a copy of all exhibits and all witnesses it intended to call at the hearing. Delivery was confirmed via certified mail. Ms. Leuck, however, never provided IRC with a list of exhibits or a witness list, and never identified any expert witnesses she may have intended to call at hearing.

5. On January 8, 2019, Ms. Leuck called IRC to request a continuance because of an emergency. IRC instructed Ms. Leuck to contact OAH, as only OAH can grant a continuance.

6. On January 8, 2019, at approximately 4:30 p.m., Ms. Leuck contacted OAH and said she intended to file a continuance request. OAH informed Ms. Leuck that any request would also need to include a signed time waiver, which was not on file. No representations were made to Ms. Leuck that the continuance would be granted.

7. On January 9, 2019, at approximately 9:00 a.m., an individual named Chelsea Agagon, from Stand Out Advocates, sent a letter to OAH, which identified herself as Ms. Leuck, and requested a continuance. The letter stated:

Due to unforeseen circumstances, our expert witness will not be able to attend tomorrow's hearing and give testimony. Her testimony is vital to our case. We are requesting a continuance of hearing for [claimant's] case. We will await for a new hearing date to be set."

The letter did not state whether Ms. Leuck had met and conferred with IRC, or even notified IRC regarding the request.

8. On January 9, 2019, at approximately 10:00 a.m., IRC was contacted by the undersigned administrative law judge, and IRC stated it had not yet received the above-referenced letter. IRC was instructed to set up a telephonic status conference between Ms. Zermeño and Ms. Leuck. A telephonic status conference was held between Ms. Zermeño and Katherine Hayward, the Care Coordination Manager at Stand Out Advocates, as Ms. Zermeño was unable to reach Ms. Leuck. Ms. Hayward stated that she had limited knowledge of the case, but would help answer any questions to the best of her ability. Ms. Zermeño stated that IRC opposed the request for a continuance because no expert witness had been disclosed, and in fact, no witnesses or documentary evidence at all had been disclosed at least five days prior to the hearing as required by law. Ms. Hayward indicated that although she was unaware of the entire history of the

case, she knows that Stand Out Advocates had been trying to contact “Dr. Su¹” since early December and had not been able to secure her testimony for the hearing. She also indicated that they had intended to have the expert testify telephonically, even though no request to permit telephonic testimony had ever been made. Ms. Hayward did not have any other information or proof that the expert had been *timely* secured and disclosed prior to the hearing. Based on the vague request letter and insufficient information to constitute good cause, the request for a continuance was denied. Ms. Hayward was instructed to contact Ms. Leuck and instruct her that she would still be required to appear at the 1:00 p.m. hearing, and would be permitted to further argue her request for a continuance, if desired. The telephonic status conference ended at approximately 10:30 a.m.

9. The matter was called for hearing at approximately 1:24 p.m. Ms. Leuck was not present. Ms. Hayward was present. Ms. Hayward understood that she was not the authorized representative but was permitted to testify as a witness on claimant’s behalf. Ms. Hayward renewed the request for a continuance but did not have any additional information to constitute good cause. Ms. Hayward did say she was able to get a hold of Ms. Leuck, who lives in the Santa Clarita area, and that Ms. Leuck told her to go to the hearing and request the continuance since Ms. Hayward was closer to the hearing location. So, Ms. Hayward did as she was requested to do.

Good Cause for a Continuance Did Not Exist

10. It is noted that the Santa Clarita area is less than a two-hour drive from IRC, and given that the continuance request had been denied at approximately 10:30 a.m.,

¹ The spelling of the alleged expert witness is unknown since no witness list was ever provided and no expert of that name was identified to IRC prior to the hearing.

there was ample time for Ms. Leuck to attend the hearing. It is further noted that, when a party files a request for a continuance, it is only a *request* – and the hearing remains set until a judge from OAH has issued a written order granting or denying the request. In other words, all parties *must be prepared to proceed* to hearing regardless of what the anticipated ruling on the order may be. Ms. Leuck’s unilateral decision not to appear, even after Ms. Hayward timely advised her that the hearing would proceed, indicates that Ms. Leuck never had any intention on appearing at the hearing and casts doubt on the veracity of her initial continuance request.

Cases concerning regional center eligibility are governed by the Welfare and Institutions Code. Although the hearing need not be conducted pursuant to technical rules as it relates to the admissibility of evidence and testimony of witnesses (Welf. & Inst. Code, § 4712, subd. (i)), the legislature was very specific with respect to ground for a continuance (Welf. & Inst. Code, § 4712, subd. (n).) Here, the Notice of Hearing was served on the parties on December 5, 2018. There is no evidence that claimant’s representative made arrangements with any expert witness to testify. No subpoenas or other documentary evidence showed that an expert witness was prepared to testify. IRC was not provided with any notification, written or oral, concerning an expert witness prepared to testify. When discovery was exchanged five days prior to the hearing as required, no expert witness was disclosed. Even assuming that claimant’s authorized representative planned on calling an expert witness to testify, the request for a continuance is untimely, as the expert should have been confirmed at least five days prior to the hearing. If the expert was not secured at least five days prior to the hearing, a continuance request should have been made at that time. In other words, the vague basis of an “unforeseen circumstance” of an unnamed witness never disclosed to IRC the day before the hearing does not constitute good cause for a continuance.

Ms. Hayward was given approximately 20 additional minutes to attempt to

contact Ms. Leuck in order to have Ms. Leuck possibly appear telephonically. She was unable to reach Ms. Leuck, who should have been available given that she was aware the continuance request had earlier been denied. The hearing proceeded with Ms. Hayward appearing as a witness for claimant, and not an authorized representative.

DIAGNOSTIC CRITERIA FOR AUTISM²

11. The *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5) identifies criteria for the diagnosis of Autism Spectrum Disorder. 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 autism spectrum disorder to qualify for regional center services under autism.

EVIDENCE PRESENTED BY IRC

12. 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

² Ms. Leuck did not specify in the fair hearing request on what basis claimant was seeking eligibility. However, none of the records presented have to do with intellectual disability, epilepsy, cerebral palsy, or show that claimant was attempting to seek services under the fifth category. Therefore, only autism was considered.

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 the Lanterman Act.

The records submitted by claimant included: claimant's most recent Individualized Education Plan (IEP); a Triennial Evaluation conducted in September 2017 by claimant's school district when claimant was 12 years old; a psychological assessment conducted by claimant's school district in December 2012 when claimant was 7 years old; a clinical note from claimant's medical records dated February 3, 2014; progress notes from claimant's medical records dated November 2015 when claimant was 10 years old; progress notes from claimant's medical records dated December 2015 when claimant was 10 years old; progress notes from claimant's medical records dated June 2017 when claimant was 12 years old; a developmental consultation report dated July 14, 2017, when claimant was 12 years old; progress notes from claimant's medical records from October 2017 when claimant was 12 years old; and a neuropsychological report from May 5, 2018, when claimant was 13 years old. Dr. Greenwald reviewed all the above-referenced documents. Below is a summary of his testimony and the documents.

Claimant currently receives special education services through his school district. Claimant is served under the categories of Emotional Disturbance and Other Health Impairment, neither of which qualify a person for regional center services. When school districts conduct assessments for special education, they use different criteria than the DSM-5; it is much easier to qualify a person under the category of autism for special education because the district only need to make a determination that a child has "autistic like" features as opposed to all of the diagnostic criteria for a DSM-5 diagnosis of autism. Given that claimant did not qualify for special education services under the category of autism, it is highly unlikely that he would meet the diagnostic criteria for autism under the DSM-5, which has more stringent standards.

The Triennial Evaluation conducted by claimant's school district included the following assessments: Wechsler Abbreviated Scale of Intelligence (WASI); a test of auditory and visual processing skills; Behavioral Assessment System for Children and Adolescents/Second Edition; Autism Spectrum Rating Scales (ASRS); Childhood Autism Rating Scale (CARS); Piers-Harris 2 Children's Self-Concept Scale; Scales for Assessing Emotional Disturbance; Wechsler Individual Achievement Test, Third Edition; and interviews. In the observation portion, it was noted that claimant was pleasant, friendly, cooperative, established good rapport, answered questions quickly, and had a positive attitude. Dr. Greenwald explained that these are definitely not characteristic of a person with autism. Other characteristics, such as being "squirmy" and "giving up easily," also tend to be indicative of Attention Deficit Hyperactivity Disorder (ADHD) or Oppositional Defiance Disorder (ODD), as opposed to autism. Most of claimant's test results varied widely within the subsets of each test, from average to low average. Claimant exhibited some features of autism on the ASRS, but on the CARS, he tested solidly within the "non-autistic" range.³

Five years prior to the Triennial Evaluation, a psychoeducational evaluation was conducted by claimant's school district. The primary reason for claimant's referral was behavioral concerns as well as his inability to stay on task. The results showed claimant initiated and participated in conversations and made good eye contact. Claimant's mother reported that claimant was intelligent, social, humorous, imaginative, and interacted well with peers at church. Claimant sought out playmates, but had difficulty playing if children did not want to follow his lead. Claimant had a good relationship with family members and tended to form better relationships with adults. Claimant was

³ The CARS assigns scores from 15 to 30 for non-autistic; 30 to 37 for mildly autistic; and 37 to 60 for severely autistic. Claimant scored a 20.

noted as a very talkative child, but one whose mood changed very quickly when someone exercised authority over him (i.e. telling him to sit down, stop running, etc.) At that point, claimant could become very rude, disrespectful, and violent. These features all tended to be suggestive of ADHD or ODD, but were inconsistent with autism. As with the Triennial Evaluation, claimant's testing results also varied between average and below average. The evaluator noted claimant fell within the "very elevated" range for a diagnosis of ADHD. In another assessment, his ADHD quotient was noted as "above average." On the Kruger Asperger's Disorder Index, claimant's score indicated he did not meet the criteria for autism. On the Asperger Syndrome Diagnostic Scale, claimant's scores were scattered – they ranged from very unlikely to very likely for Asperger's Syndrome. On the Gilliam Autism Rating Scale, Second Edition, claimant's scores showed he was unlikely to have autism. Most important, the evaluator concluded claimant did not meet the criteria for autistic-like behavior.

Claimant's progress notes do not contain any additional relevant testing showing a diagnosis of autism, other than noting a diagnosis by history. In the February 2014 progress note, the doctor mentioned claimant had also been diagnosed with ADHD. The progress note from November 2015 noted claimant was diagnosed with "high functioning" autism at age eight, but did not include any of the underlying testing information showing how that diagnosis was reached. The November 2015 progress note documented continuing "meltdown" behavior but also noted claimant got along well with peers and friends. Claimant was described as impulsive, anxious and irritable at times, but also described as cooperative, talkative, and normal with respect to his thoughts.

Progress notes from February 2016 contained a psychological evaluation where the Autism Diagnostic Observation Scale (ADOS) was administered. The ADOS is known as the "gold standard" of autism diagnosis. The evaluator found claimant not to fall with

the diagnostic criteria for autism on the ADOS. The evaluator also concluded claimant had variable cognitive skills from the average to borderline range and social skill deficits that were consistent with a "previous diagnosis" of ODD.

Further progress notes from June 2017 show claimant has been diagnosed with Mood Disorder, Sensory Disorder, ODD, and ADHD. The only mention of autism is that claimant was diagnosed with autism outside of Kaiser "by a neurologist."

A letter entitled, "Kaiser Permanente Lakeview Medical Office Developmental Consultation," dated July 14, 2017, recounted claimant's medical history, diagnoses, and included observations. Again, as with previous accounts, claimant was observed to have a wide range of facial expressions, good eye contact, and the ability to pick up on other people's emotions and body language. Dr. Greenwald explained that people with autism have difficulty with expressive and receptive communication, so these characteristics are not consistent with autism. The evaluator listed the diagnostic criteria for autism under the DSM-5 in various boxes, which were then checked to indicate whether claimant exhibited the corresponding feature by history, by observation, or did not exhibit the corresponding feature. The evaluator did not, however, conduct any additional assessments to determine whether claimant had autism; nonetheless, based on history and observations, the evaluator concluded claimant "meets criteria" for autism. Claimant also met the diagnostic criteria for ADHD.

Finally, a May 5, 2018, letter from a neuropsychological center, which consisted of three and a half pages, stated claimant had a "history and clinical presentation consistent with the diagnosis of autism" and recommended him for regional center services. The letter did not, however, include any new assessments; it was merely a recounting of past medical and psychological records and it recounted the history of all previous assessments. The letter included a one-page CARS assessment which assigned claimant a score of 36, placing him in the "severe" category for autism.

13. Katherine Hayward is a special needs parent who works at Stand Out Advocates. She testified generally that she did not think it was fair to conclude in this case that claimant's affection or ability to interact with some people in a satisfactory manner but not with others was a sufficient basis to deny eligibility. She further stated that autism is a spectrum and autistic people are not devoid of feelings; how they express themselves depends on the person with whom they are interacting. Ms. Hayward explained that Stand Out Advocates, along with claimant's parents, made the decision not to have claimant undergo another assessment by IRC because claimant had already had so many assessments. Further psychological assessments, they reasoned, would cause undue harm and stress to claimant and they did not see the benefit or fairness of having claimant undergo an evaluation.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. In a proceeding to determine eligibility, the burden of proof is on the claimant to establish he or she meets the proper criteria. The standard is a preponderance of the evidence. (Evid. Code, § 115.)

STATUTORY AUTHORITY

2. The Lanterman Act is set forth at Welfare and Institutions Code section 4500 et seq. Welfare and Institutions Code section 4501 provides:

The State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. Affecting hundreds of thousands of children and adults directly, and having an important impact on the lives of their families, neighbors and whole

communities, developmental disabilities present social, medical, economic, and legal problems of extreme importance ...

An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community. To the maximum extent feasible, services and supports should be available throughout the state to prevent the dislocation of persons with developmental disabilities from their home communities.

3. 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 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.*)

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

(a) "Developmental Disability" means a disability that is attributable to mental retardation⁴, cerebral palsy,

⁴ Although the Lanterman Act has been amended to eliminate the term "mental

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.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy

retardation" and replace it with "intellectual disability," the California Code of Regulations has not been amended to reflect the currently used terms.

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."

5. 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

6. The burden was on claimant to establish his eligibility for regional center services. Claimant did not meet his burden.

The ADOS, which is the gold standard of autism testing, showed claimant did not have autism. The CARS screening conducted during a comprehensive battery of tests by claimant's school district during his Triennial Evaluation showed claimant scored only a 20 – well outside the range for autism. Virtually all of the records indicate claimant can make eye contact, can interact with people, can be cooperative, and is pleasant – until he is confronted by authority or someone who does not want to do what he would like to do. At that point, he becomes defiant and difficult. Claimant shows a history of ADHD, ODD, Mood Disorder, and also did not meet the criteria for autistic-like features for special education; he is served under Emotional Disturbance and Other Health Impairment. The overwhelming majority of the medical records, psychological assessments, claimant's IEP, and other documentary evidence presented at hearing therefore did not establish that claimant meets the diagnostic criteria for autism under the DSM-5.⁵ Dr. Greenwald reviewed the documentary evidence and similarly concluded claimant was not eligible for regional center services.

Even assuming claimant did have autism, a diagnosis of autism under the DSM-5 alone is not sufficient to qualify a person for regional center services. Claimant's medical records note that his diagnosis of autism at age eight was "high functioning" autism,

⁵ The May 2018 letter wherein claimant screened in the "severe" range for autism was given little weight, because it is wholly inconsistent with the more comprehensive prior Triennial Assessment conducted by claimant's school district where he scored only a 20 on the CARS– placing him well outside the autism range, and is not as reliable as the ADOS, which also placed claimant outside of the range for autism.

and the characteristics observed across all the documentary evidence do not show claimant has *significant* functional limitations in receptive and expressive language; learning; self-care; mobility; or self-direction. Thus, even if he met the diagnostic criteria for autism, claimant still would not be eligible for regional center services.⁶

ORDER

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

DATED: January 15, 2019

KIMBERLY J. BELVEDERE

Administrative Law Judge

Office of Administrative Hearings

⁶ The issue of claimant's request to appeal from IRC requesting a further psychological assessment noted in the Notice of Proposed Action letter need not be addressed and is moot given the conclusion herein. However, it is noted that Welfare and Institutions Code sections 4642 specifies a regional center's obligations in evaluating a person for services, and this evaluation may include further psychological assessment. If a regional center decides further assessment is needed, the legislature required regional centers to conduct that assessment within 120 days of the initial intake evaluation. Nothing permits a person seeking eligibility for services under the Lanterman Act to impede a regional center from fulfilling its statutorily mandated obligations. In sum, there was nothing inappropriate about IRC requiring further psychological assessment in order to reach its eligibility decision.

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.