

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of the Eligibility of:

CLAIMANT

and

INLAND REGIONAL CENTER,

Service Agency

OAH No. 2019110981

DECISION

Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on January 6, 2020.

Claimant's father represented claimant, who was present at the hearing.

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

The matter was submitted on January 6, 2020.

ISSUE

Is claimant eligible for regional center services under the Lanterman Act based on a diagnosis of Autism Spectrum Disorder (ASD)?

FACTUAL FINDINGS

Jurisdictional Matters

1. Claimant is a 38-year-old man who was employed for 17 years until he lost his job in August 2019. Claimant lives with his father in the family home. On October 8, 2019, IRC notified claimant that he was not eligible for regional center services. IRC made this decision based on records it reviewed and decided that intake services were not warranted.

2. In a fair hearing request dated November 20, 2019, claimant's father appealed IRC's decision and this hearing ensued.

3. In his fair hearing request, claimant stated the following reasons why he is eligible for regional center services:

We submitted forms from Doctor & School Records [s/c] stating Autism and learning disability. [Claimant] does have a developmental Disability [s/c] for most of his life. He's gotten worse over the last 10 yrs. Talks to himself and has had a problem with Anger [s/c]. Was told he has Aspergers [s/c] which is part of Autism. (Autism-spectrum). He (claimant) needs to be tested by a specialist, so he may

excepted [*sic*] at IRC and receive benefits due to him. Needs to be tested for: High-functioning end of the Autism-Spectrum.

Diagnostic Criteria for Autism Spectrum Disorder

4. Official notice was taken of excerpts from the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition (DSM-5), which was referenced during the hearing and in records submitted as evidence. The 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 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.

IRC's Evidence

5. Paul Allen Greenwald, Ph.D., is employed by IRC as a staff psychologist and has held that position since October 2008. Dr. Greenwald received his Ph.D. in Psychology from California School of Professional Psychology in 1987. His responsibilities at IRC include performing psychological assessments of children and adults for a determination of whether those individuals are eligible for services at IRC on the basis of a diagnosis of Intellectual Disability and/or ASD. Dr. Greenwald's assessments consist of reviewing available records, administering, scoring, and

interpreting test data, as well as drafting reports of his psychological assessments. In his reports Dr. Greenwald submits recommendations regarding his diagnostic conclusions and whether those conclusions conform to the requirements of the Lanterman Developmental Disability Services Act regarding eligibility for services at IRC. Dr. Greenwald is part of a team of professionals at IRC who evaluates individuals for eligibility at IRC. Dr. Greenwald reviewed all of the documents received into evidence and testified at the hearing. The following factual findings are based upon Dr. Greenwald's testimony and documents received into evidence, which were part of IRC's record review in this matter.

6. Dr. Greenwald did not perform any psychological testing on claimant for IRC's evaluation. Instead, IRC relied upon documents submitted by claimant for a record review to determine claimant's eligibility and whether further testing is needed. Specifically, the following documents were considered and received into evidence: five Individualized Education Program (IEP) report forms dated October 31, 1995, October 10, 1996, October 29, 1997, October 26, 1999, and February 25, 2000; a psychological evaluation dated February 12, 1987 from Whittier Area Cooperative Special Education Program; Psycho-Educational Summary dated November 7, 1990, from West End Special Education Local Plan Area (SELPA); three Reports of Psychoeducational Assessment from West End SELPA dated March 13, 1992, October 25, 1994, and October 13, 1997; a "Psychological Evaluation" by Thomas F. Gross, Ph.D. of IRC dated November 21, 1996; and a Kaiser Permanente "After Visit Summary" dated August 22, 2019.

7. Claimant received special education services from the West End SELPA in San Bernardino County when he attended school. He was evaluated by the school district for his progress and IEP reports documented why he received special education

services. Five of these reports were received in evidence and reviewed. The first IEP report for claimant was dated October 31, 1995, when claimant had just turned 14 years of age. The document shows claimant received special education services for a primary handicapping condition of "SDL," which Dr. Greenwald explained means a speech and language disability. The document further stated that claimant "prefers to be alone and work on his own" and he is "trying not to be intimidated by other students." The document also stated that claimant "takes care of his own needs . . . moves about school campus independently and makes purchases at the school cafeteria." Dr. Greenwald explained that this document shows that claimant has no issues with self-care and shows no concerns regarding characteristics typical of a person with ASD.

The second IEP report dated October 10, 1996, provided an evaluation of claimant when he was 15 years old. The document shows claimant received special education services under a primary disability of "severe disorder of language" and further notes under "social/behavioral" that claimant "adheres to classroom/school rules" and is "respectful of adults and peers." Under the category of "Adaptive physical education" it was noted that claimant "participates in a mainstream 'regular' P.E. class with age appropriate behavior and ability." Notably, under the category of "self-help" it was noted that claimant "cares for personal needs at school, i.e. grooming, hygiene, cafeteria/school store purchases" and he "navigates [the school] campus independently" and no goals were needed for self-help. Dr. Greenwald explained there was nothing in this document to suggest any concerns that may be attributable to ASD.

The third IEP report dated October 29, 1997, was completed when claimant was 16 years old and shows he received special education services under the category of

"severe language handicapped." The document notes that claimant "is being mainstreamed into regular education classes for three periods a day." The document further shows under the category of "social/behavioral" that claimant "has difficulty expressing his feelings, especially anger." Under the category of "adapted physical education" it states that claimant participates "in 'regular ed.' P.E. classes with appropriate skills and behavior." Under the category of "self-help" the document provides that claimant "cares for his personal grooming/hygiene needs" and "navigates [the school] campus independently, and makes cafeteria/school store purchases on his own." Dr. Greenwald opined that this document provided no indication that claimant showed any characteristics of ASD and no such concerns were noted.

The fourth IEP report dated October 26, 1999, was completed three days before claimant's 18th birthday and he was attending a private Montessori school at that time in general education classes. The purpose of this IEP report was for a determination of whether claimant should be returned back to a special education program. The document shows claimant was to be evaluated for eligibility for special education services under two categories which were hand-marked from a list of type-written possibilities on a form. The box of "emotionally disturbed" was checked, and a box next to a blank line where the words "Asperger's Syndrome" was handwritten was also checked as the basis for special education eligibility. Notably, the box corresponding to the type-written word "autism" was not checked. The document states in the comments portion in part as follows:

[Claimant] demonstrates severe delays in the expressive and receptive language domains. He also has significant difficulties in social/emotional function and demonstrates

multiple symptoms representative of Asperger's Syndrome or Autism. He needs to be assessed for a specific clinical diagnosis that takes into account his social-emotional, as well as learning difficulties. The team will refer [claimant] to County Mental Health as an AB2726 referral for assessment. . . .

The fifth and final IEP report dated February 25, 2000, was completed when claimant was 19 years and three months old and attending the Montessori school. The document states that claimant received special education services under two categories which were hand-marked from a list of type-written possibilities on a form. The boxes of "specific learning disability" and "other health impaired" were checked as the basis for special education eligibility, but the box of "autism" was not marked. The document shows that the purpose of this IEP report was to review the report received by the Department of Behavioral Health regarding the assessment conducted on claimant. The document further shows that based upon that assessment by the Department of Behavioral Health, he was diagnosed with "Depression Disorder NOS", which Dr. Greenwald explained stands for "not otherwise specified", Chronic Learning Disability, and Schizoid Personality Disorder. The IEP team recommended that claimant continue to receive services from the Department of Behavioral Health to determine claimant's "personality structure to consider the extent of his socially isolative behaviors." Dr. Greenwald noted that each of these diagnoses are mental health disorders, which are excluded as diagnoses for which claimant may be eligible for services from IRC. He further explained that nothing in this document or any of the previous IEP reports reviewed indicates that claimant has a diagnosis of ASD.

8. The Whittier Area Cooperative Special Education Program Psychological Evaluation dated February 12, 1987, shows the results of a psychological assessment of claimant when he was five years old. The document shows that four tests were conducted, specifically the Leiter International Performance Scale, Normative Adaptive Behavior Checklist (NABC), Visual-Motor Integration Test (VMI), and Goodenough Draw-a-Person. The document states that claimant's cognitive functioning "is in the average range of nonverbal intellectual ability" and he has "difficulty with memory tasks that involves sequencing and pattern repetition." The document also stated "Adaptive behavior as reported by his mother in the NABC, reflects average adaptive ability." The document also noted that claimant has "receptive language delays," which "may be responsible" for behavioral issues. In the summary conclusion portion of the document the psychologist conducting the evaluation stated that claimant's "current cognitive functioning is in the average range of nonverbal intellectual ability" and his "[a]daptive behavior and sensorimotor skills are commensurate with his cognitive skills." Dr. Greenwald's review of this document showed no indication of an ASD diagnosis of claimant, and no characteristics indicative of ASD.

9. The West End SELPA psycho-educational summary dated November 7, 1990, provides an assessment by a school psychologist of claimant when he was nine years old. The reason for this assessment was for a triennial re-evaluation of claimant for special education services. The document shows that the psychologist administered the Wechsler Intelligence Scale test to claimant and the results showed a full-scale score of 84, with above-average scores in the non-verbal area and extremely low scores in the verbal areas, consistent with claimant's language disability. No adaptive skills testing was conducted for this evaluation. However, observations were noted under the "self-help/pre-vocational" section of the report that claimant had "no difficulties with basic self-help skills," "can make change up to \$1.00," "is involved in

the Boy Scouts," and "would like to be an 'eye doctor' because 'I like to see the eyes.'" Under the "socioemotional" section of the report the document notes claimant is "seen as immature and passive-dependent" and "elects to be more distanced from peers during recess." The document further noted under this section that claimant's "profile suggests (1) significant deficits in social-interpersonal skills, and (2) reflects an immature and passive-dependent personality." In the conclusion section of the document the clinician stated that claimant "evidences mild developmental delays in several areas, especially in interpersonal and personal socioemotional maturity, general language development, and academic skill development." Dr. Greenwald's clinical interpretation of this document was that claimant has a language disability with strong visual cognitive functioning and significant emotional concerns. However, Dr. Greenwald saw no indication in this document that claimant suffers from ASD.

10. Three reports of psychoeducational assessments conducted by the West End SELPA of claimant dated March 13, 1992, October 25, 1994, and October 13, 1997, were reviewed and received into evidence. The first assessment dated March 13, 1992, was conducted when claimant was 10 years old by a school psychologist. The document shows the psychologist performed four tests on claimant, namely the Weschler Intellectual Scale Revised (WISC-R), Human Figure Drawing, Kinetic Family Drawing, and the Devereux Child Behavior Rating Scale. The results of the WISC-R showed that claimant's verbal IQ score was 65, which is considered low, and his performance IQ score was 125, which is considered in the superior range of functioning. The psychologist concluded that claimant is considered "unusually bright" with a "severe disability in the verbal aspects of cognitive functioning." Under the "behavior during assessment" section of the report, the psychologist noted that claimant "came to relax and enjoy the one-to-one interaction inherent in the assessment" and his "eye contact was appropriate." Dr. Greenwald explained the

importance of this observation because both of these characteristics are contraindicative of an ASD diagnosis because most people with ASD avoid eye contact and do not enjoy one-to-one interaction with people. Under the "social/emotional" section of the report, the psychologist noted claimant is "experiencing emotional distress" and is "withdrawn" and "solemn." The psychologist concluded that claimant "is not considered disabled by serious emotional disturbances as defined by current special education law." Dr. Greenwald found nothing in this document to support that claimant suffers from ASD.

The second assessment dated October 25, 1994, was conducted when claimant was 13 years old by a school psychologist. The document shows the psychologist performed five tests on claimant, namely the Weschler Intellectual Scale III (WISC-III); a test of reading, spelling, and arithmetic abbreviated WRAT-R; a reading comprehension test abbreviated PIAT-R; Developmental Test of Visual-Motor Integration; and Motor Free Visual Perception Test. The results of claimant's WISC-III test show that his full-scale IQ score was 84, his performance IQ score was 100, and his verbal IQ score was 72. The psychologist wrote that claimant's cognitive functioning is estimated in the average range with strengths in non-verbal skills and his "profile continues to suggest severe language delays." Under the "social/emotional functioning" section of the report, the psychologist noted that claimant is aloof, quiet and "seeks group companionship although tends to remain in the periphery of the group." The psychologist concluded that claimant meets special education eligibility based upon "exceptional needs in the language domain." Dr. Greenwald again found no information in this document to suggest claimant suffers from ASD.

The third assessment dated October 13, 1997, was conducted when claimant was 15 years and 11 months old by a school psychologist. The document shows the

psychologist performed two tests on claimant, namely the WISC-III and the Beery Developmental Test of Visual-Motor Integration. The document noted that claimant's mother died in Fall 1994 and his primary caretaker is his father. The WISC-III results show that claimant's full-scale IQ score was 97, his verbal IQ score was 80, and his performance IQ score was 119. Under the "test behavioral observation" section of the report, the psychologist noted that claimant "made eye contact and smiled occasionally." The psychologist concluded that claimant's cognitive ability is in the average range with strengths consistently in the non-verbal skills. Under the section "social/emotional functioning" the psychologist noted that claimant is quite, aloof, and prefers to be alone, and that claimant's drawings suggest a "desire to suppress disturbing thoughts" and "feelings of inadequacy." The psychologist concluded that claimant receive special education services based upon his "exceptional needs in the language domain." Again, Dr. Greenwald saw no indication in this document that claimant suffers from ASD.

11. A psychological evaluation of claimant was conducted by Thomas F. Gross, Ph.D., a staff psychologist at IRC, on November 21, 1996, when claimant was 15 years old for a determination of whether claimant is eligible for services because his "[f]amily is concerned about possible autism." Dr. Gross administered two tests, namely the Vineland Adaptive Behavior Scale, and the WISC-III. Dr. Gross noted that during the assessment claimant was quiet and solemn, showed good eye contact, exhibited no odd or repetitious behaviors, and was socially appropriate throughout the evaluation. Dr. Gross noted in his report that the results of the WISC-III show claimant's verbal IQ score was 64, his performance IQ score was 100 and his full-scale score was 79. Dr. Gross also noted that claimant is "independent in all aspects of toileting, dressing, bathing, and grooming." He also wrote that claimant "cooks a variety of foods and follows a recipe for cookies," and "reports having friends and a

best friend (Brandon)." Dr. Gross concluded in his report that claimant does not qualify for regional center services "on the basis of autism or mental retardation¹ or a condition similar to mental retardation that would require treatment similar to that required of a person experiencing mental retardation." Dr. Gross further wrote that in his opinion claimant "doesn't experience autism" and "it is clear he experiences oral communication deficits" but that "such deficits appear related to a developmental language disorder rather than deficient semantic function associated with autism."

12. The final document reviewed and received into evidence is an "After Visit Summary" from a visit claimant made to Dr. Harry Garnet Lewis of Kaiser Permanente on August 22, 2019. The document showed that the purpose of the visit to Dr. Lewis was to address the issue of "autism spectrum disorder." The document provided that Dr. Lewis prescribed a medication to claimant, and claimant had no further upcoming appointments scheduled. No further information regarding any assessment or diagnosis of claimant was provided on this document.

13. Dr. Greenwald reviewed all of the above documents and met with the team at IRC to discuss the eligibility of claimant for services at IRC on October 1, 2019. Based on Dr. Greenwald's and the team's review of all information provided, the team concluded that claimant is not eligible for services under any of the five categories, including ASD. Dr. Greenwald testified and the IRC documents confirm that claimant

¹ The term "mental retardation" has since been replaced in the DSM-5 with the term "intellectual disability," and for the purposes of this decision the terms are interchangeable.

does suffer from “emotional distress” and other mental health impairments. However, none of those diagnoses qualify respondent for services.

14. On cross-examination, Dr. Greenwald explained that Asperger’s Syndrome is not a DSM-5 diagnosis, but it used to be considered a “variation of ASD” in previous versions of the DSM. He further explained that Asperger’s Syndrome was never typically a qualifying condition for services at IRC because those individuals would typically not meet the “substantial disability” requirement. Asperger’s Syndrome is colloquially known as “high functioning” autism, and those individuals previously characterized as having Asperger’s Syndrome do not demonstrate substantial disability based upon consideration of the seven factors considered: self-care, language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency.

Testimony of Claimant’s Father

15. Claimant’s father testified at the hearing. He stated that some of the information in the documents reviewed regarding claimant’s abilities are either exaggerated or incorrect. Specifically, claimant did not play sports and cannot cook. While claimant may be able to make a sandwich, that is the extent of his cooking ability. Claimant’s father believes that he was in denial about claimant’s disabilities, particularly after claimant’s mother died in September of 1994, after which claimant’s father became his sole caretaker. Claimant’s father stated he had claimant tested in 1999 by his wife’s aunt, who is an audiologist, and this is the first time “someone brought up the issue of Asperger’s Syndrome” to him. Claimant’s father stated that claimant rocks and talks to himself, has trouble communicating, has strange reactions in social settings, and has intense focus on one topic. Claimant’s father described claimant as a “high functioning individual.” In 2002, claimant began working at a job

after completing “a program.” According to claimant’s father, claimant worked at this job for 17 years and then lost his job in August 2019 because of an “incident at work” where a police officer came to claimant’s home. Claimant’s father stated that the police officer asked him if claimant was autistic because of claimant’s behaviors.

16. Claimant’s father expressed his deep concern for his son, his need to obtain services to help him, and frustrations he has had getting the services his son needs. He detailed claimant’s troubling behaviors. Claimant’s father believes that services from IRC will benefit claimant greatly.

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.

3. Welfare and Institutions Code section 4501 states:

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.

4. Welfare and Institutions Code section 4512, subdivision (a), defines "developmental disability" as follows:

"Developmental disability" means a disability which originates before an individual attains age 18; continues, or can be expected to continue indefinitely; and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with

intellectual disability, but shall not include other handicapping conditions that are solely physical in nature.

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

(a) "Developmental Disability" means a disability that is attributable to mental retardation,² 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

² The regulation still uses the term "mental retardation"; the DSM-5 uses the term "intellectual disability."

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. 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.

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. 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

8. Claimant failed to prove by a preponderance of the evidence that he has ASD or that he otherwise qualifies for services at IRC.

This decision is based on the findings and opinions contained in the documents addressed above, and Dr. Greenwald's uncontroverted expert testimony that claimant does not meet the requisite criteria based on these documents. As detailed in these documents, claimant suffers from a severe language deficit and mental health issues

that leave him with symptoms that appear to resemble the difficulties with social interaction found in persons with ASD. None of the documents reviewed and received show claimant has a diagnosis of ASD or that claimant suffers from symptoms associated with ASD. To the contrary, the 1996 evaluation of claimant by Dr. Gross specifically assessed claimant for eligibility based on autism and found no evidence to support that diagnosis. Also, claimant has displayed behaviors that are not consistent with the behaviors found in persons who typically have ASD, such as maintaining eye contact and engaging in one-on-one interactions.

Claimant's father was sincere and his testimony heartfelt. He is clearly motivated by his desire to help his son and obtain services that he believes are necessary to allow him to function in the world; he undoubtedly has his son's best interest at heart. However, claimant has the burden of proving that he is eligible for regional center services. That is, he must prove it is more likely than not that he has a qualifying developmental disability. The weight of the evidence presented at hearing did not establish that claimant is substantially disabled because of ASD, or any other qualifying condition. As such, claimant failed to satisfy his burden of demonstrating eligibility for regional center services under the Lanterman Act.

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ORDER

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

DATED: January 21, 2020

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 90 days.