

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

In the Matter of:

CLAIMANT

v.

INLAND REGIONAL CENTER, Service Agency

OAH No. 2020040251

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on May 7, 2020.¹

¹ In light of the President's declaration of a national emergency over the COVID-19 pandemic; the Governor's proclamation of a State of Emergency and Executive Orders N-25-20 and N-33-20 pertaining to the pandemic; the declarations of county and city public health emergencies throughout the State; the directives from state and local officials to ensure social distancing and sheltering-in place; and in order to protect the health and safety of all public and OAH personnel, this matter was heard telephonically.

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

Claimant's guardian represented claimant.

Oral and documentary evidence was received. The record was closed and the matter submitted for decision on May 7, 2020.

ISSUE

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

FACTUAL FINDINGS

Background

1. On February 12, 2020, IRC's eligibility team, which is comprised of a psychologist, program manager, and medical doctor, made an eligibility determination based on documents provided by claimant's guardian that claimant, a six-year-old boy, was not eligible for regional center services under the categories of autism, intellectual disability, or the fifth category. On February 24, 2020, IRC sent claimant's guardian a Notice of Proposed Action regarding their eligibility determination.

2. On March 18, 2020, claimant's guardian filed a Fair Hearing Request challenging IRC's eligibility determination.

Diagnostic Criteria for Autism

3. 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 based on autism.

Diagnostic Criteria for Intellectual Disability

4. The DSM-5 contains the diagnostic criteria used for intellectual disability. Three diagnostic criteria must be met: deficits in intellectual functions, deficits in adaptive functioning, and the onset of these deficits during the developmental period. Intellectual functioning is typically measured using intelligence tests. Individuals with intellectual disability typically have intelligent quotient (IQ) scores in the 65-75 range.

Diagnostic Criteria for Fifth Category

5. Under the fifth category, the Lanterman Act provides assistance to individuals with a disabling condition closely related to an intellectual disability or that requires similar treatment as an individual with an intellectual disability but does not include other handicapping conditions that are "solely physical in nature." (Welf. & Inst. Code, § 4512, subd. (a).) A disability involving the fifth category must also have

originated before an individual attained 18 years of age, must continue or be expected to continue indefinitely, and must constitute a substantial disability.

Evidence Presented at Hearing

6. Ruth Stacy, Psy.D., testified on behalf of IRC. Dr. Stacy is a staff psychologist at IRC. She has also held positions at IRC such as Senior Intake Counselor and Senior Consumer Services Coordinator. She has been involved in assessing individuals who desire to obtain IRC services for over 27 years. In addition to her doctorate degree in psychology, she also holds a Master of Arts in Counseling Psychology, a Master of Arts in Sociology, and a Bachelor of Arts in Psychology and Sociology. She has also had training from Western Psychological Services in the administration of the Autism Diagnostic Observation Scale (ADOS) and training from IRC in the administration of the Autism Diagnostic Interview (ADIR). Dr. Stacy qualifies as an expert in the diagnosis of autism and intellectual disability, and in the determination of eligibility for IRC services based on autism, intellectual disability, and the fifth category.

7. Dr. Stacy reviewed reports pertaining to claimant. Those reports included: claimant's August 28, 2019, Individualized Education Program (IEP); a November 13, 2018 Mental Health Referral; an October 15, 2019, Physical Therapy Visit Log; a May 21, 2018, Psychological Assessment; a March 5, 2019, Health and Education Passport; an August 28, 2019, Multidisciplinary Evaluation Report; and an October 9, 2019, Emotionally Related Mental Health Assessment. The following is a summary of Dr. Stacy's testimony and the above-referenced documents.

Dr. Stacy explained that, in order for a child to qualify for regional center services under the Lanterman Act, a child must suffer from a qualifying condition (i.e.

autism or intellectual disability) in addition to a substantial disability in three or more major life activities, as appropriate for the child's age, and in accordance with applicable law. The DSM-5 is used to diagnose conditions that render a person eligible for regional center services under the Lanterman Act. For the fifth category, a person must have a condition that is closely related to an intellectual disability or requires treatment similar to a person with an intellectual disability. Treatment is something needed to make a person better, such as a medication to alleviate a condition. Services are not the same as treatment. Services are something that are put in place to support an individual but not treat the underlying condition. For example, as in the case of a person who is ill, treatment would be an antibiotic used to eliminate the bacterial infection. Services would be helping to cook or do laundry to support them while they are ill. Any person, whether disabled or not, can benefit from services but not be eligible for regional center services because the support they receive does not actually treat the condition. In other words, the fact that someone might benefit from regional center services does not mean they are eligible for services.

According to claimant's August 28, 2019, IEP, claimant receives special education services in the categories of emotional disturbance and other health impairment. The IEP notes that claimant has previous diagnoses of Disruptive Mood Dysregulation Disorder, Major Depressive Disorder, Attention Deficit Hyperactivity Disorder (ADHD), Obsessive Compulsive Disorder (OCD), and Post Traumatic Stress Disorder (PTSD). These are all mental health conditions that are not developmental disabilities. None of these conditions qualify a person for regional center services under the Lanterman Act. Claimant requires academic and behavioral intervention to participate in general curriculum. Claimant has made friends that he sits with at lunch, but does not follow directions very well. Claimant does make eye contact and can communicate with his teacher regarding what is bothering him and what he needs to

feel better. When claimant gets upset, he will cry and sometimes walk around the classroom.

The November 13, 2018, Mental Health Referral showed that claimant was referred for evaluation because he had previously been diagnosed with Disruptive Mood Dysregulation Disorder, Major Depressive Disorder – recurrent with psychotic symptoms, and ADHD. The report notes many disruptive behaviors like kicking, spitting, biting, and tantrums.

The October 25, 2019, Psychological Therapy Visit Log showed claimant was receiving various psychotropic medications to treat the previously mentioned mental health disorders, which do not qualify a person for regional center services.

The May 21, 2018, Psychological Assessment was completed when claimant was four years old. The examiner administered the Wechsler Preschool and Primary Scale of Intelligence, Third Edition (WPPSI-3); the Autism Diagnostic Observation Scale – Second Edition (ADOS-2); the Vineland Behavioral Scales – Third Edition (Vineland); the Child Behavioral Checklist for ages 1 ½ to 5 (CBC); and the Social Responsiveness Scale, Second Edition (SRS-2). The purpose of the assessment was, primarily, to rule out autism. The Assessment noted that claimant was severely neglected as a baby, and that his biological parents had a history of mental illness.

On the WPPSI-3, claimant's overall cognitive skills tested in the low average range. Thus, claimant would not meet the diagnostic criteria for intellectual disability.

The ADOS-2 is a semi-structured and standardized test designed to assess communication and social interaction in order to determine if a person has characteristics of autism. The results place a person in one of three categories: autism, autism spectrum disorder, or non-spectrum. The rating ranges from 1 to 10. Claimant

received a score of one, the lowest a person can score on the ADOS, placing him in the non-spectrum range. The assessment notes that claimant's language and eye contact were acceptable for his age and claimant engaged the examiner in play. Claimant displayed functional and pretend play during the assessment and also integrated physical gestures with his language when prompted by the examiner to respond to a question. These are all behaviors that are inconsistent with autism. Claimant also did not display any routinized or compulsive behavior or restricted/repetitive interests. These behaviors would be consistent with autism.

On the Vineland, which was an individual assessment of adaptive behavior completed by claimant's guardian, claimant scored a 75. A score of 75 is in the moderately low range for adaptive behavior, but, well above the adaptive scores typically expected of someone who would meet the criteria for the fifth category. In other words, claimant's adaptive skills show he has some challenges, but does not require treatment similar to a person who is developmentally disabled.

The March 5, 2019, Health and Education Passport did not show anything pertinent regarding any potential qualifying condition under the Lanterman Act.

The August 28, 2019, Multidisciplinary Education Report completed by claimant's school district mentioned claimant's previous multiple mental health diagnoses (Major Depressive Disorder with severe psychotic symptoms, and Disruptive Mood Dysregulation Disorder) and provided a historical review of assessments claimant had undergone. On the various measures administered in this assessment, claimant showed age-appropriate expressive and receptive communication, adaptive skills ranging from the extremely low range to average range, and academic achievement in the very low to low average range. Nothing in the assessment was indicative of autism or intellectual disability. Ultimately, based on claimant's earlier

history and this assessment, claimant's school district found he was eligible for special education services in the areas emotional disturbance and speech or language impairment, neither of which qualify a person for regional center services.

The October 9, 2019, Emotionally Related Mental Health Assessment recounted claimant's multiple previous mental health diagnoses, but did not conduct any new assessments that would evaluate claimant's cognitive skills or whether he met the DSM-5 criteria for autism or intellectual disability. Based on claimant's history and her observations of his behavior, the evaluator concluded claimant has a "mental health need that is impairing his ability to learn."

Based on the records presented, Dr. Stacy concluded claimant did not qualify for regional center services under any qualifying category, and therefore concurred with IRC's determination that claimant was ineligible for regional center services.

8. Claimant's guardian's testimony is summarized as follows: Claimant needs stabilization. The information provided by claimant's school regarding claimant's mental health diagnoses is not indicative of what is really going on with claimant. She believes claimant suffers from fetal alcohol syndrome and is "definitely on the spectrum." Claimant has wrap around services from the Department of Mental Health and is seeing both a psychologist and therapist. However, claimant is not getting "better" and was referred to IRC. Claimant is a slow learner and delayed in all areas of his learning. Claimant has difficulty bathing, wiping, tying his shoes, and toileting. He is socially awkward and wanders away from his classroom at school. Claimant will not interact with other children and inflicts harm on himself. Claimant rocks back and forth, hits his head on things, and has a short attention span. Claimant has no self-direction skills and does not understand the concept of danger. Claimant does not have any memory retention.

Claimant's guardian would like to adopt him, however, she needs to know there will be services in place to help claimant. Without services, she cannot adopt him. Claimant's guardian's testimony showed concern for claimant's well-being and development, and was also sincere, credible, and heartfelt.

LEGAL CONCLUSIONS

Applicable Law

1. The Legislature enacted a comprehensive statutory scheme known as the Lanterman Act (Welf. & Inst. Code, § 4500 et seq.) to provide a pattern of facilities and services sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life. The purpose of the statutory scheme is twofold: To prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community, and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community. (*Assn. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 388.) Welfare and Institutions Code section 4501 outlines the state's responsibility for persons with developmental disabilities and the state's duty to establish services for those individuals.

2. The Department of Developmental Services is the public agency in California responsible for carrying out the laws related to the care, custody and treatment of individuals with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4416.)

3. 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.

4. 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.*)

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

(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) 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

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.

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. 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. In a proceeding to determine whether an individual is eligible for regional center services, the burden of proof is on the claimant to establish by a preponderance of the evidence that he or she meets the proper criteria. (Evid. Code, §§ 115; 500.)

Evaluation

8. Although claimant does have many behavioral challenges and suffers from multiple mental conditions (Disruptive Mood Dysregulation Disorder, Major Depressive Disorder – recurrent with psychotic symptoms, ADHD, OCD, PTSD), mental or emotional health challenges do not constitute a developmental disability. The only expert who testified was Dr. Stacy. Based on the records provided, Dr. Stacy's uncontested expert opinion was that claimant does not meet the DSM-5 diagnostic criteria for autism or intellectual disability, and similarly did not qualify under the fifth category. Moreover, nothing in any records showed claimant is substantially disabled within the meaning of applicable law. While claimant's guardian is certainly commended for seeking all available avenues to assist claimant with his development, based on the records provided, a preponderance of the evidence did not establish that claimant is eligible for regional center services under any qualifying category.

ORDER

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

DATE: May 20, 2020

KIMBERLY J. BELVEDERE

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.