

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

**In the Matter of:**

**CLAIMANT**

**and**

**INLAND REGIONAL CENTER, Service Agency**

**OAH No. 2021020359**

**DECISION**

Alan R. Alvord, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on March 25, 2021, by telephone due to the ongoing coronavirus pandemic public health emergency.

Stephanie Zermeño, Fair Hearings Representative, represented the service agency, Inland Regional Center (IRC).

Claimant's authorized representative did not appear.

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on March 25, 2021.

## **ISSUES**

Is claimant eligible for regional center services under any of the eligibility criteria in the Lanterman Developmental Disabilities Services Act (Lanterman Act.) Did IRC correctly determine that no further assessment of claimant is necessary?

## **SUMMARY**

Claimant presented enough evidence to conclude that further assessment is necessary to determine if claimant has a substantially disabling developmental disability that makes him eligible for regional center services.

## **FACTUAL FINDINGS**

### **Jurisdictional Matters**

1. On a date that was not established in the evidence, claimant submitted a request for services to IRC. On January 19, 2021, IRC sent claimant a Notice of Proposed Action notifying claimant that IRC found him ineligible for services.
2. On February 3, 2021, IRC received claimant's Fair Hearing Request.
3. IRC filed the matter with the Office of Administrative Hearings (OAH) on February 8, 2021. On March 5, 2021, OAH served a Notice of Hearing notifying the parties of a telephone hearing to be held on March 25, 2021 at 1:00 p.m.
4. Notice of the hearing was properly served on claimant. On March 25, 2021, at 1:30 p.m. the record was opened. IRC's representative appeared for the

service agency. There was no appearance on behalf of claimant after waiting 30 minutes from the noticed hearing start time. IRC requested to proceed on the merits despite claimant's failure to appear at the hearing. Notice to claimant having been properly served, IRC's request was granted under Welfare and Institutions Code section 4712, subdivision (a), which requires a hearing to be held within 50 days of the date a claimant's fair hearing request is filed, unless good cause is found to continue the matter. Here, no good cause to continue the hearing was presented.

5. Jurisdictional documents were introduced; documentary evidence and sworn testimony were received from IRC. The matter was submitted for decision on March 25, 2021.

### **Claimant's Background**

6. Claimant is a 26-year-old male. He lives with his adoptive parents, who are also his aunt and uncle.

7. The record contained portions of a psychosocial and medical history prepared at the time of claimant's adoption when he was five years old. It included what was known about his birth parents' medical history. The records showed claimant's birth parents had a history of methamphetamine and alcohol abuse and domestic violence; claimant was declared a dependent of juvenile court after his parents were found under the influence of drugs and the home dirty and unsafe for a child. Significant information in these documents include reports that claimant's birth mother received prescription medications for depression and bipolar disorder.

## **Educational Assessments and Services**

8. A May 2000 educational assessment report when claimant was in kindergarten noted that claimant scored below the first percentile in early reading and in the 14th percentile in early math. The assessment stated:

Since beginning medication [claimant] has shown some decreases in impulsive outbursts, tantrums, physical inappropriate responses and destructive behaviors. His attention span and frustration levels are low. He has some preoccupation with cleanliness and cannot put his hands in "gooshy" stuff like play dough or finger paint.

9. On May 30, 2000, at age five, D. Robert Hamilton, MFT, wrote a letter to Riverside County DPSS indicating claimant was diagnosed with attention deficit hyperactivity disorder (ADHD) and dysthymic disorder (depression). The letter stated:

Some of these symptoms include depressed/irritable moods, angry outbursts, oppositional behavior, low self esteem, hyperactivity, easily distracted, and impulsive behavior. It is recommended that [claimant] continue in therapy in order to address these issues fully and to be successful academically and in his family.

10. In 2009, when claimant was in 10th Grade, his school district conducted a psychoeducational assessment (2009 assessment). The report stated that claimant was qualified in Head Start for speech services. In 2nd Grade, his qualification changed to specific learning disability. In 7th Grade, his eligibility was changed to emotional disturbance (ED) due to behavior difficulties in the classroom. It noted claimant was

taking two prescription medications for impulse control and ADHD. On a standardized behavior assessment, claimant was measured in the at-risk range for sense of inadequacy, somatization, social stress, depression, self-reliance and relations with parents. In a standardized teacher behavior assessment, several of claimant's scores were in the clinically significant range; however, the report did not detail the subject areas for these scores.

11. The 2009 assessment reviewed claimant's previous assessment results and results of current testing. He received scores in the normal range on IQ and academic achievement scales in 2nd and 7th grades. The 2009 assessment noted:

Cursory examination of [claimant's] self-help skills does not provide cause for concern in these areas. He enjoys video games and watching television. At home he is responsible for helping take out the trash and cleaning the kitchen.

12. The 2009 assessment noted scores on the Wechsler Individual Achievement Test (WIAT-2), a standardized academic achievement test in the below average range. The 2009 assessment reviewed the five behavioral characteristics for emotional disturbance that must have existed for at least six months, to a marked degree, and have adversely affected his educational performance. These characteristics all met the diagnostic criteria for emotional disturbance.

13. In November 2009, based on the 2009 assessment, the school district developed an Individualized Education Plan (2009 IEP). The 2009 IEP showed claimant's primary disability as emotional disturbance. The plan placed him in a special education class for ED for 68% of educational time and in a general education classroom for 32% of educational time. His scores on the WIAT-II were below average for reading,

borderline for writing and extremely low for math. On social/emotional/behavior skills, the plan noted claimant "is often alone on campus and says that he has a difficult time interacting with other students on campus," and "seems to lack many interpersonal skills necessary in order to develop relationships with peers on campus."

The 2009 IEP noted that claimant was diagnosed with attention deficit disorder and received medication at home, and that he "cares for his personal needs sufficiently."

14. In 2012, at 17 years old, claimant's school district developed a new IEP (2012 IEP). The plan continued claimant's program of special education class for ED students. It noted that he "is able to communicate his needs, wants, and desires appropriately," and "at times becomes withdrawn and unmotivated to complete assignments and dress out at PE and class." The 2012 IEP stated he "takes care of his personal needs appropriately." On strengths/interests/learning preferences, the 2012 IEP also stated claimant "is trustworthy. He shows compassion to people he cares for." His cognitive abilities were noted as "not an area of suspected disability."

## **2020 Kaiser Permanente Assessment**

15. In December 2020, when claimant was 26 years old, a clinical psychologist with Kaiser Permanente performed "diagnostic testing to assess for the possibility of Autism Spectrum Disorder (ASD)." The evaluation report stated that claimant was previously evaluated for ASD in October 2011 – at age 17 – and was not found to meet criteria for ASD at that time. The details of that 2011 evaluation such as the instruments use and behavioral observations, were not provided.

16. The 2020 Kaiser evaluation report noted:

Around 7th or 8th grade, a school counselor told [claimant's] mother that he believed [claimant] had Pervasive Developmental Disorder. His mother explained that she had to teach [claimant] how to understand sarcasm and facial expressions. She reported that he did not understand social cues and he continues to struggle with this.

17. The Kaiser report's significant behavioral observations were: Claimant was talkative and friendly throughout the evaluation. He spoke in a loud tone and used frequent swear words with little awareness of the social context and appropriateness of language. His eye contact was occasional and fleeting. He acknowledged that eye contact is uncomfortable for him. He endorsed having social difficulties throughout his life. He stated that he was bullied in school and did not get along with peers. He acknowledged he is uncomfortable talking about his feelings. He disclosed that he sometimes rocks back and forth because it helps him feel relaxed. When exiting the evaluation room, he did not want to leave through a different exit, stating that he wanted to take the route he was comfortable with.

18. The Kaiser examiner used the Autism Diagnostic Observational, Schedule-2 (ADOS-2), which was modified to comply with social distancing guidelines due to COVID-19 precautions. Because the testing procedure was modified, the examiner did not include ADOS scores in the report. Instead, she interpreted behavioral observations during the ADOS as part of her diagnosis. The Kaiser examiner also used the Childhood Autism Rating Scale, 2nd Edition. The examiner found that claimant meets the diagnostic criteria for ASD. She observed persistent deficits in social communication and social interaction, restricted, repetitive patterns of behavior,

interests, or activities, that were present in early childhood, which caused clinically significant impairment in social, occupational, or other areas of current functioning, and are not better explained by intellectual disability or global developmental delay.

## **IRC Eligibility Determinations**

19. An IRC eligibility determination document dated August 16, 2010 shows that IRC considered claimant for eligibility when he was 15 years old. The single page eligibility determination stated that claimant was not eligible under any of the developmental disability categories. The form contained the comments:

Special ed under "spec. learning disability" &/or "emo disturbance." No evidence of an autism spectrum disorder.  
Cog. skills are not in MR range; send appeal packet"

20. An IRC eligibility determination form dated July 16, 2020 similarly found claimant ineligible.

## **Expert Testimony – Paul Greenwald, Ph.D.**

21. Paul Greenwald, Ph.D. is a licensed clinical psychologist in Florida and California and a staff psychologist at IRC. Dr. Greenwald participated in IRC's most recent eligibility determination. He determined that the records claimant submitted did not support a finding of eligibility and that further evaluation of claimant was not necessary to reach the eligibility decision.

22. Dr. Greenwald noted that claimant has received special education services since an early age. He testified that he would expect signs of autism to be picked up by school special education teams and evaluations performed; however, it is possible that school evaluators could miss a diagnosis of autism spectrum disorder

during school age. The school districts assessed claimant several times throughout his developmental years and no suspicion of ASD was raised in the school records.

23. Dr. Greenwald highlighted places in the school record that showed claimant's behavior to be inconsistent with typical autistic spectrum behavior. For example, the 2012 IEP stated that he is able to communicate needs, wants, and desires appropriately, takes care of his personal needs appropriately, and shows compassion to people he cares for. For Dr. Greenwald, these are signs that there was no evidence of autism.

24. Dr. Greenwald was critical of the 2020 Kaiser assessment that diagnosed ASD because the examiner's behavioral observations showed claimant had an introspective self-awareness of his dysphoric feelings from social isolation. He acknowledged that claimant's reported lack of eye contact in the Kaiser assessment could be consistent with autism symptoms but are also consistent with shyness. The report that claimant rocks back and forth for comfort, which could be consistent with autism symptoms, but also observed claimant's level of self-awareness and insight. He stated that the CARS assessment by itself is not sufficient to make an autism spectrum disorder diagnosis. Claimant's score on the CARS placed him in the low to moderate risk for autism category. The ADOS in the 2020 Kaiser assessment was not scored because of COVID-modified testing procedures and cannot be used to diagnose autism.

25. Dr. Greenwald also noted the report that an autism evaluation was performed in 2011 and found that claimant did not to meet the criteria. The diagnostic criteria at that time would have been the *Diagnostic and Statistical Manual, 4th Edition-Text Revision* (DSM-IV-TR). The current diagnostic criteria for autism spectrum disorder are found in the *Diagnostic and Statistical Manual, 5th Edition* (DSM-5).

26. Dr. Greenwald noted the evidence that claimant's birth mother likely had bipolar disorder placed claimant at a higher risk for bipolar disorder. Prenatal risk to substances such as methamphetamine increases claimant's risk for ADHD and learning disabilities. He opined that claimant's early childhood trauma and exposure to drugs places him at risk for reactive attachment disorder and post-traumatic stress disorder. Both of these have some symptoms that look like autism.

27. For Dr. Greenwald, the clinical picture presented by the records up to the 2020 Kaiser assessment were consistent; minimal evidence of autism symptoms could be explained by other conditions that do not qualify for regional center services. In addition, there was insufficient evidence that claimant was substantially handicapped, which is also required for eligibility.

28. Dr. Greenwald found no evidence in the record that claimant has intellectual disability. All of the measures during the developmental period showed his cognitive function in the below average to average range. He also found no evidence of a condition closely related to intellectual disability requiring similar treatment.

29. Dr. Greenwald further found no evidence in the record that claimant has epilepsy or cerebral palsy.

## **LEGAL CONCLUSIONS**

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

2. The State of California accepts responsibility for persons with developmental disabilities and provides an array of services and supports to meet the needs and choices of each person with developmental disabilities. (Welf. & Inst. Code, § 4501). Developmental disability is defined as a substantially disabling disability that originates before age 18, continues or can be expected to continue indefinitely, and includes the conditions intellectual disability, cerebral palsy, epilepsy, autism, and a disabling condition closely related to intellectual disability or requires treatment similar to that required for individuals with intellectual disability. It does not include handicapping conditions that are solely physical in nature, solely psychiatric disorders, or solely learning disabilities. (Welf. & Inst. Code, § 4512, subd. (a); Cal. Code Regs., tit. 17, § 54000.)

3. Substantial disability is defined as a significant functional limitation in three or more areas of major life activity, including self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency. (Welf. & Inst. Code, § 4512, subd. (l)(1).)

4. The purpose of the Lanterman Act is 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." (Welf. & Inst. Code, § 4501; *Association of Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

5. The Lanterman Act enumerates legal rights of persons with developmental disabilities. A network of 21 regional centers is responsible for determining eligibility, assessing needs and coordinating and delivering direct services to individuals with developmental disabilities and their families within a defined geographical area. Designed on a service coordination model, the purpose of the

regional centers is to “assist persons with developmental disabilities and their families in securing those services and supports which maximize opportunities and choices for living, working, learning, and recreating in the community.” The Department of Developmental Services allocates funds to the regional centers for operations and the purchasing of services, including funding to purchase community-based services and supports. (*Capitol People First v. Department of Developmental Services* (2007) 155 Cal.App.4th 676, 682-683.)

6. Any resident of California believed to have a developmental disability is eligible, upon applying to a regional center, for initial intake, diagnostic and counseling services, and a determination regarding the need for assessment. Eligibility for ongoing regional center services after intake and assessment is contingent upon the determination that the person has a substantially disabling disability as defined in the Lanterman Act. (Welf. & Inst. Code, §4642.) Any individual deemed ineligible may appeal the decision under the Lanterman Act’s appeal procedures. (Cal. Code Regs. tit. 17, § 54010.)

7. California courts have repeatedly underscored that an expert’s opinion is only as good as the facts and reasons upon which that opinion is based. (*Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 924.) “Like a house built on sand, the expert’s opinion is no better than the facts on which it is based. . . . [W]here the facts underlying the expert’s opinion are proved to be false or nonexistent, not only is the expert’s opinion destroyed but the falsity permeates his entire testimony.” (*Ibid.*)

8. An expert witness “does not possess a carte blanche to express any opinion within the area of expertise. [Citation.]” (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117.) “Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters

which are not reasonably relied upon [by] other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value. [Citations.]” (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135-36.)

## **Evaluation**

9. The records that IRC reviewed contain evidence that claimant had autistic-like symptoms as early as five years old. He had sensory sensitivities to “gooshy” substances. He insisted on sameness and had difficulty with transitions. He lacked eye contact. He had difficulty with social-emotional reciprocity, communication, both understanding others and being understood, and deficits in developing, maintaining, and understanding relationships.

10. There is evidence in the records that claimant had, and continues to have, some level of functional limitations in receptive and expressive language, learning, self-direction, capacity for independent living, and economic self-sufficiency, and that his deficits contribute to these functional limitations.

11. Claimant was labeled at school with emotional disturbance and that label followed him throughout his developmental period. School records do not show any effort to evaluate claimant for ASD as an alternative explanation or a co-morbidity with emotional disturbance. Dr. Greenwald speculates that the lack of evaluation for autism at school means the concern was not present. However, the school records contain observations of autistic-like symptoms. Concern was great enough in claimant’s teen years for him to be tested for autism outside of school at age 17. IRC was not given the details of that testing, only the conclusion that autism was not found.

12. In 2011, when claimant was first tested for autism, the condition carried a more restricted definition under the DSM-IV-TR. Conditions such as Asperger's or pervasive developmental disability, not otherwise specified (PDD-NOS), were excluded from the clinical definition of autism. The American Psychological Association expanded the clinical definition of ASD to include the previously excluded Asperger's and PDD-NOS with publication of the DSM-5 in 2013. Because the details of claimant's 2011 autism evaluation were not provided, it cannot be determined whether he was diagnosed in 2011 with one of these previously excluded conditions that would qualify for ASD under current criteria. Suspicion for PDD-NOS was reported to have arisen before the age of 18.

13. Dr. Greenwald emphasized the records' descriptions of claimant's introspective self-awareness, dysphoric feelings from social isolation. While these are not typical of someone with autism spectrum disorder, nothing in the DSM-5 criteria states that the presence of self-awareness, compassion, or introspection by itself excludes a diagnosis of autism. While Dr. Greenwald emphasized these less common characteristics in his opinion, he minimized the significance of more common symptoms such as self-soothing (rocking), sensory sensitivities, lack of eye contact, and insistence on sameness. Dr. Greenwald also speculated that claimant's emotional disturbance was related to early childhood trauma, neglect, and his mother's drug use and mental health issues. He did not support this opinion with adequate reasoning or evidence.

14. Most importantly, Dr. Greenwald did not adequately justify his decision not to perform an additional assessment to rule out ASD. He simply stated that the data in the record does not conform to the clinical diagnostic criteria. This is not, and should not, be the test to determine whether further assessment is needed. Based on

the evidence, there is an indication that claimant has significant functional limitations in three or more areas of major life activities to constitute a "substantial disability" based on autism spectrum disorder. (Cal. Code Regs., tit. 17, § 54001.) Therefore, a preponderance of the evidence established that an assessment under section 4643 is warranted.

15. IRC has a duty under the Lanterman Act to evaluate claimant fully for autism spectrum disorder based on the information in this record. IRC's decision that claimant does not have a developmental disability in any of the other Lanterman Act categories was supported by the evidence.

## **ORDER**

Claimant's appeal is granted. Inland Regional Center shall authorize, and cause to be performed, an assessment of claimant, under the Lanterman Act, to determine whether claimant is eligible for regional center services under autism spectrum disorder.

DATE: April 6, 2021

ALAN R. ALVORD  
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.