

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

In the Matter of:

CLAIMANT

v.

INLAND REGIONAL CENTER

Service Agency

OAH No. 2022100639

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on December 6, 2022.

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

Claimant's mother represented claimant, who was not present.

Oral and documentary evidence was received. The record was closed and the matter submitted for decision on December 6, 2022.

ISSUE

Is claimant eligible for regional center services pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act) under the category of autism spectrum disorder (autism)?

FACTUAL FINDINGS

Background

1. On September 22, 2022, IRC issued a notice of proposed action indicating that, following its intake evaluation and assessment, it determined claimant, then an eight-year-old boy, was not eligible for regional center services under the category of autism. On that same day, claimant's mother filed a fair hearing request contesting the determination.

2. On October 27, 2022, claimant's mother met telephonically with representatives from IRC to discuss the fair hearing request. Following the informal meeting, IRC adhered to its determination that claimant was not eligible for regional center services under the category of autism. In a letter memorializing its decision, IRC wrote:

At this time, IRC is standing by its decision that [claimant] is not eligible for regional center services. In the assessment conducted by Gunn Psychological Services, report date February 18, 2022, although [claimant] was diagnosed with Autism Spectrum Disorder, Level 1, he did not exhibit restrictive, repetitive behaviors. This is crucial to a diagnosis

of ASD. Additionally, when Dr. Swigart completed an evaluation for IRC, his profile indicated a minimal probability of ASD with no deficits in social affective functioning nor stereotyped and repetitive behaviors. Furthermore, you endorsed that [claimant]'s behavioral presentation is not consistent daily. This is not indicative of a child with a substantially handicapping condition of ASD.

3. This hearing followed.

Diagnostic Criteria for Autism

4. 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.

Evidence Presented by IRC

5. The following factual findings are made based on the testimony of Sandra Brooks, Ph.D., and documentary evidence.

6. Dr. Brooks obtained her Ph.D. in clinical psychology in 2006 from Loma Linda University. She also has a bachelor of arts in English and Psychology and a Master of Science in Experimental Psychology. Dr. Brooks has been a staff psychologist at IRC since 2010, and specializes in the assessment and diagnosis of persons for the purpose of determining eligibility for regional center services under the Lanterman Act. Prior to becoming a staff psychologist, Dr. Brooks was a psychological assistant at IRC from 2007 to 2009. Prior to her position as a psychological assistant, Dr. Brooks held many different positions across the country related to psychology, including pediatric neuropsychology. She has been involved with many professional presentations in the field of psychology and attended countless trainings and workshops in her field. During her graduate education, Dr. Brooks worked as a teaching assistant where she instructed graduate students on the correct administration of the various assessments used to determine cognitive ability, among other things. Dr. Brooks is an expert in the assessment of individuals for regional center services.

7. According to an April 18, 2022, Individualized Education Program plan (IEP), claimant receives special education services through his school district under the categories of autism and specific learning disability. Specific learning disability is not an eligible condition for regional center services. Although claimant qualifies for special education under the category of autism, the criteria for special education eligibility is different than the criteria to qualify for regional center services under the Lanterman Act. The criteria for special education under the category of autism requires only "autistic-like" features and does not require a full autism diagnosis under the DSM-5, which is required to establish eligibility for regional center services. Moreover, eligibility for special education does not require a finding of "substantial disability," which is required under the Lanterman Act to be found eligible for regional center

services. Thus, while the IEP is considered in reaching a determination, it is not dispositive of regional center eligibility.

According to the school's assessment accompanying the IEP, claimant exhibited "age-appropriate skills in articulation, voice, fluency, receptive, expressive, and pragmatic language." Claimant participated in activities with his peers. His fine and gross motor skills were age appropriate. These are not characteristics of someone with autism, which include substantial deficits in expressive and receptive language. Moreover, it is telling that claimant was noted not to have problems in pragmatic language, which is social language, because a person who is autistic will always have problems with pragmatic language and social interaction. Even if a person has "high functioning" autism, he or she will still have idiosyncrasies in their language skills such as unusual speech patterns or sounds. Claimant has none of those features. Finally, the school did not note any adaptive concerns in the IEP, which would be required for a finding of substantial disability.

8. Priscilla Hsieh, Psy.D., from Gunn Psychological Services, conducted a psychological evaluation of claimant on February 10, 2022. Dr. Hsieh's curriculum vitae was not submitted and her level of expertise is unknown. It is also not known whether Dr. Hsieh is aware of the qualifying criteria for regional center services under the Lanterman Act.

Dr. Hsieh administered a number of measures, including the Autism Diagnostic Observation Scale, Second Edition (ADOS-2), and the Childhood Autism Rating Scale, Second Edition, High Functioning (CARS-2 HF). Because masking was required at the time of the assessment due to the COVID-19 pandemic, the ADOS-3 was not scored because that measure is not meant to be administered while wearing masks. But, the qualitative data can still be used to aid in the determination of whether a person is

eligible for regional center services. During the ADOS administration, claimant spoke in complex sentences, showed social intent in his speech, spoke with an appropriate tone, and did not demonstrate repetitive language or idiosyncratic use of words or phrases. On the CARS-2 HF, which is administered to individuals who have an IQ score of 80 or above, claimant's score placed him in the "minimal to no symptoms of autism" range.¹ Claimant's presentation on the ADOS and CARS-2 HF, therefore, were inconsistent with a person who has autism and did not support Dr. Hsieh's diagnostic impression that claimant had autism – Level 1.

9. Records from Kaiser Permanente dated March 24, 2022, when claimant was seven years old, show claimant had some weaknesses in his speech and could be difficult to understand. The doctor at Kaiser administered the Oral and Written Language Scales – Second Edition (OWLS-2), which is designed to assess listening and comprehension skills as well as language skills. Overall, although claimant displayed some difficulties in certain areas, claimant's speech was found to be in the low average range. The records also show claimant was imaginative, good at pretend play, and although he could be physically aggressive, he was able to make polite requests and demonstrate good eye contact while communicating. None of these characteristics indicate a diagnosis of autism. Further, no autism specific assessments were administered. Thus, the listed diagnosis at the end of the report, which indicates a diagnosis of autism, appeared to have been carried over from other records or

¹ Dr. Brooks pointed out that claimant's score as reported by Dr. Hsieh fell in the "minimal to no" symptoms of autism, but Dr. Hsieh made an error in reporting the category, as she stated it was "mild to moderate."

documented “by history,” since the Kaiser records did not contain anything to show how that diagnosis may have been reached.

10. A psycho-educational assessment administered in April 2022 by claimant’s school psychologist, when claimant was seven years old, utilized a measure called the autism spectrum rating scales (ASRS), which is just a screening measure. The ASRS is not used at IRC because it is just an evaluation filled out by the parent or caregiver as opposed to a standardized assessment administered by a professional. Thus, often a person with attention deficit hyperactivity disorder or some other disorder can score high on the ASRS, when, in fact, their score is not attributable to autism. Based on claimant’s teacher’s reporting, claimant scored in the “very elevated” range. This was based on claimant displaying behaviors such as inattention, poor impulse control, emotional responses in social situations, being intolerant of changes in routine, overreacting to sensory stimulation, using language in an atypical manner, and engaging in stereotypical behaviors which were not described. The evaluator noted that the score on the ASRS was merely indicative that claimant “may” be exhibiting features of autism; it was not a diagnosis. The evaluator also noted that claimant displayed “autistic-like” behaviors, which met eligibility criteria for special education, but this is not the same standard as that required for regional center eligibility. Finally, claimant’s adaptive skills were found to be age-appropriate. As with prior reports, this report does not indicate claimant has autism nor does it indicate claimant is substantially disabled.

11. A speech and language report completed by claimant’s school district in March 2022, when claimant was seven years old, concluded claimant did not meet eligibility criteria for speech and language disorder. On the OWLS-2, claimant’s oral and written expression skills were found to be in the average range. Claimant was

noted to be able to understand nouns, pronouns, prepositional phrases, adjectives, and adverbs. He demonstrated understanding of words with various meanings. Claimant's receptive and expressive language skills were found to be age-appropriate and "not areas of concern." One of the hallmark features of autism as detailed in the DSM-5 is difficulty with both expressive and receptive language. Thus, this report does not indicate claimant has autism.

12. After reviewing the above records, IRC contracted with Theodore Swigart, Ph.D., to conduct a psychological assessment. Dr. Swigart conducted that assessment on September 19, 2022, when claimant was seven years old. Dr. Swigart reviewed claimant's previous records and administered the ADOS-2, CARS-2 HF, and the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-5).

During the examination, claimant did not exhibit any restrictive or repetitive behaviors. He was very verbal and conversational with the examiner. On the ADOS-2, claimant's overall standardized score was "0," placing him in the non-autistic range. On the CARS-2 HF, claimant's scores were even lower than the previous time he was administered the CARS-2 HF by Dr. Hsieh, still placing him well outside the autistic range, within the category of "minimal to no symptoms" of autism. Claimant also obtained a full scale IQ score of 81 on the WISC-5, which places him in the low average range of intelligence. Therefore, the results on the assessments do not show claimant meets the DSM-5 diagnostic criteria for autism. Finally, Dr. Brooks noted that during the interview of claimant's mother, Dr. Swigart wrote that claimant's mother reported claimant started to exhibit behaviors of concern at age six; Dr. Brooks stated this is not typical of a child with autism because with autism the characteristic behaviors are noted much earlier than age six. Dr. Swigart concluded claimant did not meet the diagnostic criteria for autism, and he was not intellectually disabled.

13. Based on a review of all the above-referenced records, Dr. Brooks concluded that the records as a whole do not demonstrate claimant meets the DSM-5 diagnostic criteria for autism. While claimant may exhibit difficulties in some areas, overall, for the reasons noted above in conjunction with each report, claimant does not have autism and even if he did, he is not substantially disabled within the meaning of applicable law.

Dr. Brooks explained that while claimant did obtain a diagnosis of autism from Dr. Hsieh, that diagnosis was based on an evaluation that did not properly administer the ADOS because at that time, masking was required. Even the CARS-2 HF that she administered to claimant was in the non-spectrum range. Throughout his history, claimant has not exhibited the hallmark features of autism (i.e. repetitive or restricted interests; problems with expressive and receptive language), and the documentation does not support an autism diagnosis. The fact that Kaiser reported a diagnosis of autism without doing any autism-specific testing shows that diagnosis was simply a carry-over diagnosis from the other record, which itself did not support a diagnosis of autism. The most comprehensive evaluation was the one conducted by Dr. Swigart, and both the ADOS-2 and CARS-2 HF show claimant does not exhibit symptoms consistent with autism.

Claimant's Mother's Testimony

14. Claimant is receiving Applied Behavioral Analysis (ABA) therapy Monday through Friday through Kaiser. Claimant's mother has to pay a copayment and it is expensive. Claimant's mother disagrees with IRC's position that claimant does not have autism because claimant obtained a diagnosis of autism from Dr. Hsieh at Gunn Psychological services. The evaluation performed by Dr. Swigart that concluded claimant did not have autism was shorter than Dr. Hsieh's evaluation. Claimant's

mother also felt IRC did not evaluate claimant because the ABA therapist who treats claimant told her that the evaluation by Dr. Swigart was not an IRC evaluation. Claimant's mother feels that the entire process has been very traumatizing for claimant and thinks the reason he performs better with time is because he is memorizing the tests and knows how to manipulate the tests. Claimant's aggressive behavior is improving with ABA therapy but his overall reading comprehension is not good. Claimant's mother took issue with Dr. Brooks's testimony that autism is usually recognized by age six, and because claimant's mother did not see any unusual behaviors until that time, it is likely claimant does not have autism. Claimant's mother said she is a single mother and claimant was in "24 hour daycare." At present, claimant is eight years old but is "still at the kindergarten level." He is far behind other students his age. Ultimately, claimant's mother "just really wants help for [her] son" because he needs better social skills and IRC provides that type of support to help him thrive.

LEGAL CONCLUSIONS

Applicable Law

1. 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.)

2. 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.

3. 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.)

4. 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.

5. 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.*)

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

(a) "Developmental Disability" means a disability that is attributable to intellectual disability², cerebral palsy, epilepsy, autism, or disabling conditions found to be closely

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.

related to intellectual disability or to require treatment similar to that required for individuals with intellectual disability.

(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 between estimated cognitive potential and actual level of educational performance and which is not a result of

generalized intellectual disability, educational or psychosocial 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 intellectual disability.

7. 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

8. A person must have both a qualifying condition and a substantial disability (significant functional limitations in three or more areas of a major life activity) attributable to a qualifying condition to be found eligible for regional center services under the Lanterman Act. Although the psychological assessment completed by Dr. Hsieh concluded claimant had autism, the data in the report does not support that conclusion. As the uncontested expert opinion from Dr. Brooks established, claimant does not exhibit the typical features of autism (challenges in expressive and receptive communication, language, etc.). Claimant's intelligence level is in the low average range. On the autism-specific measures administered in several of the reports, claimant did not score within the range for autism. On the ASRS, which is not a measure that is evaluated by a psychological professional, claimant scored in the elevated range. However, because that measure is based on parent or teacher reporting, regional centers do not use it to diagnose autism as scores can be affected by other mental challenges a person might be experiencing. Although the Kaiser report documented autism, no autism specific testing was completed to reach that conclusion so it appeared to be a diagnosis by history only, which is not sufficient to qualify as a DSM-5 diagnosis. Further, although claimant receives special education services under autism through his school district, the criteria to receive special education under the criteria of autism for a school district require only "autistic-like" features, which is much less stringent than the criteria for service under the Lanterman Act, which require a full DSM-5 diagnosis plus a substantial disability.

9. Even if one were to assume claimant did have autism, the evidence did not establish that claimant has a substantial disability (significant functional limitations in three or more areas of a major life activity as appropriate for an eight-year-old,

which, for claimant, would be receptive and expressive language, learning, self-care, or mobility). The OWLS-2 was administered by two different evaluators, and claimant's oral and written expression skills were found to be in the average range. Throughout all the assessments, there were no consistent reports of stereotypical behavior, echolalia, restricted or repetitive interests, or any of the characteristics that are primary features of autism. Although claimant may have some behavioral challenges that interfere with his ability to excel in school, the evidence as a whole does not support a finding of a substantial disability attributable to autism, which is required to find claimant eligible for services.

10. Claimant's mother's testimony was sincere and heartfelt. She clearly wants the best for her son and desires to pursue services to see him thrive. However, a preponderance of the evidence did not demonstrate that claimant is eligible for regional center services.

ORDER

Claimant's appeal from Inland Regional Center's determination that he is not eligible for services based on being substantially disabled as a result of autism spectrum disorder is denied. Claimant is not eligible for regional center services.

DATE: December 19, 2022

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.