

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

In the Matter of:

CLAIMANT

v.

INLAND REGIONAL CENTER,

Service Agency

DDS Case No. CS0005588

OAH No. 2023050513

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on June 20, 2023. 31, 2023.

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

Claimant's mother appeared on behalf of claimant, who was not present.

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on June 20, 2023.

ISSUE

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

FACTUAL FINDINGS

Jurisdictional Matters

1. Claimant is a 13-year-old boy. On May 2, 2023, an IRC multidisciplinary team comprised of a psychologist, medical doctor, and a Senior Intake Counselor at IRC reviewed claimant for eligibility and determined he did not have a substantial disability as a result of autism, intellectual disability, cerebral palsy, epilepsy, or a condition that is closely related to an intellectual disability or requires treatment similar to a person with an intellectual disability. On that same date, IRC issued a Notice of Proposed Action denying claimant's request for services.

2. On May 8, 2023, IRC received an appeal filed by claimant's mother on claimant's behalf, seeking review of IRC's decision. This hearing followed.

Diagnostic Criteria for Autism

3. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Text Revision (DSM-5 TR) 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 TR diagnosis of autism spectrum disorder to qualify for regional center services based on autism.

Testimony of Ruth Stacy, Psy.D., and Summary of Pertinent Records

4. Ruth Stacy, Psy.D., testified on behalf of IRC. Dr. Stacy has worked at IRC since 1991. She has served as a staff psychologist since 2015, where her primary responsibilities involve assessing individuals for regional center services and reviewing intake records to determine whether an individual is eligible for regional center services. Dr. Stacy also served as a Senior Intake Counselor and Senior Consumer Services Coordinator prior to becoming a staff psychologist. 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. Dr. Stacy qualifies as an expert in the diagnosis of autism and in the assessment of individuals for IRC services. The following is a summary of Dr. Stacy's testimony and relevant records.

5. Nothing in any of the records showed claimant has ever received special education services under the category of autism, or any other developmental disability.

6. Krystle Frazier-Philo, Ed.D. (Dr. Frazier), conducted a psychological assessment of claimant on March 23, 2022, when claimant was 12 years old. Dr. Frazier conducted a clinical interview with claimant and claimant's mother and made behavioral observations during the assessment. She administered a series of tests, including but not limited to, the Autism Diagnostic Observation Schedule, Second Edition (ADOS-2); Autism Spectrum Rating Scales (ASRS); Behavior Assessment System for Children, Parent Rating Scale (BASC); the Childhood Autism Rating Scale, Second Edition (CARS-2); Multidimensional Anxiety Scale for Children, Second Edition, (MASC-2); A Developmental Neuropsychological Assessment System, Second Edition (NEPSY-2); Vineland Adaptive Behavior Scale, Third Edition (Vineland-3); and the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-5). Pertinent results are noted below.

The assessment report noted claimant's mother told her claimant is very particular about things and has difficulty with reciprocal communication and social cues. Claimant's mother reported claimant met all developmental milestones according to accepted timelines and had never been diagnosed with autism. Claimant reported he had good relationships with his family. Claimant never received early intervention services, special education, or a 504 plan (a plan for individuals who need extra assistance in school but who may not meet the criteria for special education). While claimant was in school, he would sometimes have "freezing" episodes and get "stuck" in certain situations, but he would generally recover on his own. His grades at the time of the assessment were "all A's." Various behaviors reported by claimant's mother included: covering his ears and rocking; complex finger movements; screaming at siblings; biting fingernails; inability to regulate emotions; missing social cues; lacking social awareness; inappropriate laughter; inability to communicate when upset; uses overly formal language at times; and sometimes communicates using a British accent.

Claimant's mother also reported to Dr. Frazier that claimant is picky with his food, sensitive to touch, sensitive to lights, sensitive to loud noises, cannot have tags on his clothing, and dislikes certain materials. She reported claimant is fun to be around, is kind, has a big heart, is good at building things with Legos, loves reading, and overall is a great child.

Dr. Frazier's psychological assessment took place during the height of the COVID-19 pandemic and both she and claimant wore masks. Dr. Frazier observed:

Claimant was appropriately dressed and groomed for the weather and the situation in a grey sweater, black t-shirt, jeans, and tennis shoes. He wore his mask and glasses throughout the entire evaluation. [Claimant] was observed to engage in many complex hand and finger movements. He was generally fidgety, he rocked in his seat, tapped his fingers on the table, engaging in a repetitive snapping action, and moving his hands back and forth when listening to and repeating numbers on digit span. He tended to be very literal and had a difficult time explaining similarities and vocabulary and he tended at times to use overly formal language. For example, he stated. "You can't give me antonyms" when presented with two words for a task on similarities. [Claimant] evidenced tonal abnormalities and some idiosyncratic phrasing. An example would be "I do not get sick; I just get infected." He perseverated throughout the evaluation on whether or not he was "passing" or "failing" despite repeated assurances that there was no pass or fail. He also mentioned the word "evil" repeatedly in atypical contexts.

On the WISC-5, claimant achieved a full scale IQ score of 113, placing him in the high average range of intelligence. Claimant's nonverbal achievement was ranked in the very high range, indicating well-developed functioning when presented with visual information. Claimant was found to have strength in the area of visual-spatial

integration, which measured claimant's ability to evaluate visual details and understand visual spatial relationships in order to construct geometric designs from a model. The Fluid Reasoning Index (FRI) measured claimant's ability to detect the underlying conceptual relationship among visual objects and use reasoning to identify and apply rules. Claimant's scores in this portion of the assessment were diverse across the various subtests but overall in the above average range. The Working Memory Index (WMI) measured claimant's ability to register, maintain, and manipulate visual and auditory information in conscious awareness, which requires attention and concentration, as well as visual and auditory discrimination. Claimant's scores reflected a well-developed ability to identify visual and auditory information, maintain it in temporary storage, and resequence it for use in problem solving. Claimant's overall performance on the WMI portion of the WISC-5 was advanced for his age.

On the Conners 3a Edition, parent rating form, claimant's mother's ratings placed claimant in the significantly impaired range of hyperactivity and impulsivity, indicating a likelihood of Attention Deficit Hyperactivity Disorder (ADHD).

On the Vineland-3, a standardized measure of adaptive behavior, claimant's mother rated him as adequate in some areas and low in others, rendering a composite range of moderately low. Claimant's mother's report indicated claimant functions below his age level regarding socialization, while daily living skills were age-appropriate.

On the ASRS, which utilized ratings by claimant's mother to quantify observations pertaining to autism. Claimant's scores placed him in the "very elevated" range, indicating he had many behavioral characteristics associated with autism.

On the NEPSY-2, which measures a person's neurocognitive processes, claimant scored in the low average range.

On the BASC, claimant had a diverse range of scores across the different domains that measure emotional and social behaviors. Those scores, for example, indicating claimant was at risk for depression, withdrawal, adaptability, and aggression. However, no concerns were noted regarding attention, anxiety, conduct, leadership, activities of daily living, or functional communication. Dr. Frazier wrote that claimant's scores on the BASC were indicative of a variety of possible disorders other than autism, including ADHD, Conduct Disorder, Persistent Depressive Disorder, Major Depressive Disorder, Oppositional Defiant Disorder and Disruptive Mood Dysregulation Disorder.

CARS-2 is a fifteen-item behavioral scale developed to identify children with autism and is designed to distinguish them from developmentally delayed children without autism. The scores were obtained from claimant's mothers' ratings and Dr. Frazier's in-office observations. Claimant scored in the "severe" range for autism.

The ADOS-2 was not administered in the traditional format because claimant and Dr. Frazier were wearing masks and the test is not standardized for the use of masks. Dr. Frazier did record claimant's behaviors during the administration of the test, which showed some behaviors that might be exhibited by a person with autism.

Dr. Frazier concluded claimant met the diagnostic criteria for autism, level one, and ADHD.

7. Theodore Swigert, Ph.D., conducted a psychological assessment of claimant a year after the assessment completed by Dr. Frazier, on March 21, 2023. According to Dr. Swigert's evaluation, claimant was referred to him by IRC to conduct

an evaluation for autism and intellectual developmental disorder. Claimant was 13 years old at the time of the evaluation. He reviewed prior records, which included Dr. Frazier's assessment report. Dr. Swigert conducted a clinical interview of claimant and claimant's mother, and also administered the Adaptive Behavior Assessment System, Third Edition (ABAS), ADOS, the Childhood Autism Rating Scale, Second Edition (CARS2-HF), and the WISC-5.

On the ADOS, Dr. Swigert found claimant tested outside the autism range. Dr. Swigert observed claimant to use complex speech during the ADOS and spontaneously offered his own thoughts and feelings. Claimant attempted to keep the conversation going and used communicative gestures. Claimant used modulated eye contact and displayed socially appropriate changes in gesture, gaze, and facial expression at the right times. Dr. Swigert did not notice claimant using any overly restrictive or repetitive topics and claimant did not engage in repetitive behavior.

Dr. Frazier's observations of claimant were similar on the CARS2-HF to what he observed during the administration of the ADOS. Overall, claimant fell in the "minimal to no symptoms" of autism range.

In the WISC-5, claimant's scores varied widely between "average" to "high average," but also included many strengths in the "very high" range. Claimant's full scale IQ was tested at 122, or the "very high" range of cognitive functioning.

Finally, claimant's adaptive functioning, as tested by the ABAS, showed he functioned in the low average to average range in most areas, but was rated in the low and extremely low range in health and safety, leisure, self-care, self-direction, and social skills. The ratings were completed by claimant's mother.

Overall, Dr. Swigert concluded claimant should be evaluated for anxiety disorder and ADHD, but he did not meet the DSM-5 TR criteria for autism or intellectual developmental disorder. Dr. Swigert wrote:

[Claimant] is a 13-year-old male who was referred to the Regional Center to assess for Lanterman eligibility under Autism Spectrum Disorder (ASD) and Intellectual Developmental Disorder (IDD). Reported concerns are repetitive movements, overly formal language, freezing, outbursts, obsessive behaviors, difficulties with routine changes, sensitivity to light and noise, and anxiety.

[Claimant] was administered a battery of tests to observe behaviors and traits associated with Autism Spectrum Disorder (ASD) as well as to assess his cognitive functioning and adaptive behaviors. His profile indicates a low probability of ASD with some minor deficits in social affective functioning and no significant deficits in stereotyped and repetitive behaviors. As such, an ASD diagnosis is considered not appropriate. Regarding an Intellectual Developmental Disorder (IDD) diagnosis, findings from this evaluation indicate that he has no significant deficits in cognitive or adaptive functioning. As such, an IDD diagnosis is not appropriate.

8. Dr. Stacy explained that the assessments showed claimant is very intelligent and has average communication skills, which is not indicative of autism. Also, one assessment contained a mild diagnosis of autism (Dr. Frazier) while the other

assessment (Dr. Swigert) did not conclude claimant met the diagnostic criteria for autism. While claimant does have some features and characteristics of autism, the assessments administered to evaluate claimant's adaptive skills do not show claimant suffers from significant functional limitations, which would be required in addition to a qualifying diagnosis to be found eligible for regional center services. She further noted that looking at the two different assessments was "like two different children." Dr. Stacy concluded claimant does not meet regional center eligibility.

Claimant's Mother's Testimony

9. Claimant's mother's testimony is summarized as follows: Claimant's mother disliked Dr. Swigert's assessment for several reasons. She said that Dr. Swigert was wearing a mask during the assessment just as Dr. Frazier had done, even though it was not noted in the report. The report completed by Dr. Frazier is "much more indicative" of the child she knows and more consistent with claimant's daily behavior. Claimant has tendencies to fidget, snap his fingers, flap his hands back and forth, and has problems expressing himself. Yet, in Dr. Swigert's report this is written in a more "muted" manner; he says claimant is "fidgety" but does not describe it. Dr. Swigert noted that claimant declined some interactive play but then on another page he indicated claimant used imaginative play. Overall, claimant's mother felt Dr. Swigert's report was very contradictory.

Claimant's mother described claimant as "very intelligent." She has worked hard to help claimant develop his skills. She feels his expressive and receptive communication is low for his age. Claimant has been home-schooled since the fourth grade. Claimant has no problems in the areas of math and science. When he was in school, he struggled with noise and functioning with other children. Claimant has obsessive behavior regarding how things are set up in a classroom. Claimant is

particular about his personal possessions. Claimant would, while in school, “literally meltdown” if anyone touched his personal possessions. Sometimes he would have behaviors that were similar to a temper tantrum.

Claimant’s parents have sought out services to help him. She feels he has benefitted from those services. Claimant is a remarkable child and academically, he has the ability to “change the world.” However, the way he responds to the world and the way the world responds to him is a limitation on his ability to thrive. Claimant’s mother would “move the world” for her son and feels like the decision to deny him services minimizes his challenges and it is very frustrating. Saying claimant is “not autistic” is a “flat out lie.”

LEGAL CONCLUSIONS

Applicable Law

1. The Legislature enacted the Lanterman Act (Welf. & Inst. Code, § 4500 et seq.) to provide an array 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 Lanterman Act 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.)

2. 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 (department) 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. 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 retardation¹, cerebral palsy, epilepsy,

¹ 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. Further, the DSM-5-TR no longer uses the term "intellectual disability" and instead refers to the

autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

condition as "intellectual developmental disorder," however, the California Code of Regulations has not been updated to reflect this change.

(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 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 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.)

Conclusion

8. No evidence was presented, nor was it claimed, that claimant was eligible under the categories of epilepsy; cerebral palsy; intellectual development disorder; or the fifth category. Claimant is not eligible for regional center services under any of those categories.

9. Regarding autism, claimant's mother gave heartfelt testimony concerning her son and clearly wants the best for him. Seeking out regional center services is but one example of how she is pursuing all avenues to help claimant thrive.

10. Based on the reports of Dr. Swigert and Dr. Frazier, as well as his mother's testimony, claimant does exhibit many behaviors associated with autism. However, as Dr. Stacy indicated, reading the two assessments is like looking at two different people. Dr. Frazier concluded based on her assessment that claimant meets the criteria for autism but is on the mild end of the spectrum. Dr. Swigert's testing, however, showed claimant did not meet the diagnostic criteria for autism. It is difficult to reconcile such two different assessments. Putting the reports aside, what is more helpful here is what is not present in this case: there is no history of a need for special education, no history of a 504 plan, no historical diagnosis of autism during the

developmental years, nothing noted up to fourth grade when claimant was pulled out of school to indicate that school psychologists ever had a concern regarding autism, and virtually no pattern of behaviors indicating autism throughout claimant's developmental years. This lack of evidence strongly suggests claimant does not have autism, or if he does, is – consistent with Dr. Frazier's report – at the very mild end of the spectrum.

11. Complicating things further are the fact that both assessments indicate claimant is highly intelligent. He is able to communicate in complex language. He sometimes speaks in a British accent. He is currently receiving all A's in school. These are not the features of someone who experiences significant functional limitations in adaptive skills. This is not to say claimant does not experience challenges; but those challenges are not significantly limiting in three or more areas of a major life activity as required by the California Code of Regulations. Put another way, even assuming claimant has autism and Dr. Frazier's diagnosis is correct, claimant does not have significant functional limitations attributable to that diagnosis. Thus, as Dr. Stacy concluded, claimant does not meet the criteria for regional center services under the Lanterman Act.

12. Accordingly, claimant's appeal must be denied.

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ORDER

Claimant's appeal is denied. Claimant is not eligible for regional center services due to a substantial disability that resulted from autism, intellectual disability, cerebral palsy, epilepsy, a condition that is closely related to an intellectual disability, or a condition that requires treatment similar to a person with an intellectual disability.

DATE: June 29, 2023

KIMBERLY J. BELVEDERE

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision. Each party is bound by this decision. Either party may request a reconsideration pursuant to Welfare and Institutions Code section 4713, subdivision (b), within 15 days of receiving the decision, or appeal the decision to a court of competent jurisdiction within 180 days of receiving the final decision.