

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

**In the Matter of:**

**CLAIMANT**

**v.**

**INLAND REGIONAL CENTER,**

**Service Agency**

**DDS Case No. CS0016870**

**OAH No. 2024050579**

**DECISION**

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 6, 2024, in San Bernardino, California.

Dana Hardy, Fair Hearings Representative, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

Claimant's mother appeared on behalf of claimant, who was present.

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on August 6, 2024.

## **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 an 11-year-old boy who lives at home with his family. He has been raised speaking Spanish, English, and Mayan.

2. On April 16, 2024, an IRC multidisciplinary team comprised of a psychologist, a medical doctor, and a Senior Intake Counselor reviewed claimant for eligibility and determined he did not have a substantial disability as a result of autism, intellectual developmental disorder (IDD),<sup>1</sup> cerebral palsy, epilepsy, or a condition that

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<sup>1</sup> The Lanterman Act was previously amended to eliminate the term "mental retardation" and replace it with "intellectual disability," as reflected in the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5). The more current DSM-5, text revision (DSM-5-TR) no longer uses the term "intellectual disability" and instead refers to the condition as IDD. Many of the regional center forms have not

is closely related to IDD or requires treatment similar to a person with IDD. On that same date, IRC issued a Notice of Action stating claimant was ineligible for services under any category.

3. On May 14, 2024, claimant's mother filed a fair hearing request asserting claimant needed services because he shows "characteristics" of autism, especially in the areas of self-care, independent living skills, speech, and social skills.

### **Diagnostic Criteria for Autism**

4. 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.

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been updated to reflect this change. Accordingly, for purposes of this decision, "mental retardation," "intellectual disability," and "IDD" mean the same thing.

## **Testimony of Sandra Brooks, Ph.D., and Summary of Pertinent Records**

5. Sandra Brooks, Ph.D., is a licensed clinical psychologist. She 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, where she specializes in the assessment and diagnosis of persons for the purpose of determining eligibility for regional center services. Prior to that, she served as a psychological assistant at IRC from 2007 to 2009. Prior to that, she served in multiple positions across the country. She has been involved with many professional presentations in the field of psychology, and attended countless trainings and workshops in her field. Dr. Brooks is an expert in the diagnosis of autism, and in the assessment of individuals for regional center services. The following is a summary of Dr. Brooks's testimony and relevant records.

6. Claimant has a history of struggling with social skills, mainly in his interactions with others, and he has received applied behavioral analysis therapy for those challenges. Claimant often gets frustrated because other children do not understand him.

7. Claimant has a history of receiving special education services, first qualifying in 2016 under the category of speech and language impairment. At a triennial evaluation on January 23, 2019, claimant was still found to qualify for special education services under speech and language impairment, but he was excluded from special education services on January 15, 2020, after it was deemed he no longer qualified. Claimant was placed in general education classes.

8. On January 13, 2021, Victor Cordova, Psy.D., conducted a psychological assessment on claimant when claimant was eight years and four months old. During that assessment, both Dr. Cordova and claimant wore face masks, as it was the middle of the COVID-19 pandemic. Dr. Cordova conducted the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-5); the Autism Diagnostic Observation Scale, Second Edition, Module 3 (ADOS-2); and several adaptive assessments. On the WISC-5, claimant's scores in each module generally varied between average and low average, but overall, he scored in the low average range. On the ADOS-2, claimant's scores placed him in the "clinically significant" range for autism symptoms. However, Dr. Brooks noted that the ADOS-2 is a standardized test, and it is not rated to be administered wearing face masks. As such, the results are not valid. On the adaptive skills assessments, the reports were completed by claimant's mother, who rated claimant in the "at risk" range on one assessment, and the "delayed" range on another. Dr. Brooks noted that the caregiver checklists used in the adaptive skills assessments are subject to overreporting by the caregiver, so she relies more on the behavioral observations made during the assessment and noted in the records.

9. Regarding various observations of claimant's behavior throughout the records, which included the above psychological assessment, an individualized education program (IEP) document, and the below evaluation by Theodore Swigart, Ph.D., who conducted an evaluation on behalf of IRC, Dr. Brooks noted that claimant's behaviors are not consistent with autism. Claimant enjoys school, likes recess, enjoys playing with his brother at home, and is interested in nature. He gets distracted, but is able to talk about his interests and feelings to others. Claimant was able to make inferences, can compare and contrast, sequences events, recognizes cause and effect relationships, demonstrates key ideas and details, raises his hand to ask questions, and has been observed to laugh with his peers. Outside of the classroom during lunch, he

will play on the playground by himself, but also take part in group interaction. These behaviors are not what would normally be expected in a child with autism. What is also missing from the records throughout the developmental history are deficits in social communication and social interaction across multiple contexts, and restricted repetitive and stereotyped patterns of behavior, interests, or activities, which are the hallmarks of autism.

10. Nonetheless, based on Dr. Cordova's ultimate conclusion that claimant met the criteria for autism, claimant's school district placed claimant, once again, in special education under the category of autism. Claimant's mother provided claimant's IEPs from 2023 and 2024, confirming as much. However, Dr. Brooks explained that the documentation in the IEP, and other documents provided from claimant's school district since being placed back in special education, are not consistent with autism. Claimant self-reported that he likes to play video games, likes to play with animal toys, enjoys reading at school, and said he has friends. Claimant's teacher in his general education class reported he works well in small groups but does need some additional support. Claimant's fluency, voice, and articulation were all found to be within normal limits. This is not typical of someone who has autism, since often times there will be unusual features in the person's voice, fluency, or speaking mannerisms. Claimant's language scores were also in the average range. Most important, there was an assessment done of his pragmatic skills, and in individuals with autism, even high functioning, this is where individuals have issues. The results showed claimant's pragmatic skills were in the average range – these are skills like using communication in a functional way (i.e., eye contact, pace of speech, engaging in conversation, etc.) Claimant was not found to have any of the difficulties a person with autism would have in pragmatic language. He engages in unprompted conversation with his peers. Claimant is reserved and communicates very little during the day, but his teacher

reports claimant is happy and gives a “thumbs up” when teacher checks in with him. This is important because people with autism have trouble with using gestures appropriately. Dr. Brooks explained that while the school district may have placed claimant in special education under the category of autism based on Dr. Cordova’s psychological evaluation, the criteria used by the school districts to determine eligibility for special education services is different than that used by regional centers. School districts and regional centers are governed by different regulations, and school district criteria is less stringent than regional center criteria. Dr. Brooks believes Dr. Swigart’s evaluation of claimant, which found claimant does not have autism, is more persuasive and consistent with the above-referenced behaviors.

11. The most recent psychological evaluation of claimant was conducted by Dr. Swigart on January 19 and 20, 2023, when claimant was 11 years old. Dr. Swigart conducted the ADOS-2, the Childhood Autism Rating Scale, Second Edition (CARS2-HF) High-Functioning Version, the Adaptive Behavior Assessment System Third Edition (ABAS-3), Parent Form, and reviewed prior records. Dr. Swigart reported detailed observations, which were completely inconsistent with a diagnosis of autism, as follows:

Claimant used gestures that were appropriately integrated with speech during the “Cartoons” activity. He evidenced good eye contact while doing so. He laughed and/or smiled at this examiner while telling the story (i.e., shared enjoyment). He accurately mentioned some of the emotions of the depicted characters (scary, happy).

During the “Conversational” activity, claimant showed interest in statements made by the examiner. He elaborated

and provided sufficient background information when talking about his morning routine and said trip to Florida. He effectively integrated eye gaze with vocalization and directed facial expressions when doing so. He evidenced shared enjoyment (e.g., smiling/laughing integrated with eye gaze and facial expression) with the examiner during the conversation activity. Claimant also showed adequate conversational skills, as he participated appropriately in a discussion with this examiner. He showed an ability to track the conversation across topics without problems. He provided leads to sustain the conversation. He took on a full role in the pragmatics of the discussion. He proficiently reported routine and non-routine events. For example, he was able to give a reasonable account of his morning routine before school. He was also able to give a reasonable account about a family trip to Florida. He spontaneously inquired about this examiner's experiences during the conversation. When the examiner said that cats made him sneeze, claimant looked at the examiner, made a facial expression of curiosity, and vocalized, "Wait, you are allergic to cats?" Claimant then stated that he was also allergic to cats.

Claimant was able to identify events that elicited different emotions (he said he is happy when he sees his dog). He also stated that he was "claustrophobic", and when queried, he stated that he was afraid of being stuck in a cave. He



exhibited facial expressions while doing so. He showed age-appropriate insight into typical social relationships that caused these emotions. He showed good ability in perceiving social difficulties and age appropriate insight into the nature of these problems. He mentioned that he adjusted behavior to alleviate the problems that he described. Claimant was able to tell when other kids at school were being picked on/being teased versus being bullied. He was able to describe how he knows he is annoying his brother. Claimant showed age-appropriate understanding of relationships and marriage. He showed adequate and age-appropriate insight into friendships with two similar aged boys at school, including being able to identify how he knows they are a friend and the various activities they do together, such as talking about "drama and secrets." Claimant demonstrated an understanding of the concept of loneliness.

Claimant used sentences in a largely correct fashion with some complex speech during the ADOS-2 evaluation. His speech evidenced appropriately varying intonation, reasonable volume, and normal rate of speech, with regular rhythm coordinated with breathing. Claimant did not repeat others' speech. He spontaneously offered information about his own thoughts, feelings, or experiences on several occasions. He occasionally (allergies) asked this examiner about his thoughts, feelings, or experiences. Claimant

reported a specific non-routine event (e.g., a vacation) that was not part of any preoccupations or intense interests. He gave a reasonable account without specific probes but needed to be asked a general question to get started. Conversation between Claimant and this examiner and/or his mother flowed, building on this examiner's dialogue. He evidenced frequent use of conventional or instrumental gestures but only rare use of descriptive gestures.

Claimant demonstrated appropriate gaze with subtle changes meshed with other communication during the ADOS-2 evaluation. He directed a range of appropriate facial expressions to this examiner in order to communicate affective or cognitive states. His vocalizations were usually accompanied by subtle and socially appropriate changes in gesture, gaze, and facial expression. Claimant showed definite pleasure, which was appropriate to the context during interactive participation or conversation with the examiner in more than one task or conversational topic. He spontaneously communicated a clear understanding, labeling of, and/or appropriate response to several different emotions in other people/characters. He showed examples of insight into several typical social relationships but not into his own role in it. He effectively used nonverbal and verbal means to make clear social overtures to the examiner. He showed responsiveness to most social contexts, but said responses were somewhat limited and

socially awkward. He made extensive use of verbal or nonverbal behaviors for social interchange. Interactions between the participant and this examiner were comfortable and appropriate to the context of the ADOS-2 assessment.

Claimant did not use stereotyped or idiosyncratic words or phrases during the ADOS-2 evaluation. He did not engage in any unusual sensory interests or sensory-seeking behaviors. He did not engage in any hand and finger mannerisms or complex mannerisms. He made no attempts to harm himself. He did not show excessive interest in or references to unusual, highly specific, or restricted topics, objects, or repetitive behaviors. There were no obvious activities or verbal routines that had to be completed in full or according to a sequence that is not part of the task. He was fidgety during the session. He did not become upset, disruptive, negative, destructive, or aggressive during the ADOS-2 assessment. . . .

Similar to his observations during the ADOS-2, during the administration of other measures, including an IQ test, Dr. Swigart observed the following: claimant clearly understands facial expressions, gestures, tone of voice, and body language of others; claimant is able to understand that others may have a different perspective and what that perspective may be; claimant shows the appropriate type and degree of emotional response, both by word and behavior; claimant was proficient and fluid in interacting with others, displaying a reciprocal, back-and-forth pattern; claimant

showed a wide variety of interests, with no single interest or theme predominating; claimant's eye contact was good and integrated with verbal and nonverbal communication skills; claimant's listening behavior appeared appropriate for his age; claimant responded appropriately to pain or touch from others; claimant was able to understand meaning of information presented either pictorially, in writing, or verbally; and claimant's IQ score (cognitive abilities) was found to be in the low average range.

As such, Dr. Swigart reported that an ASD diagnosis is not considered appropriate, and claimant is not eligible for regional center services. Dr. Swigart diagnosed claimant with an unspecified communication disorder. Dr. Brooks agreed with Dr. Swigart's assessment that claimant is not eligible for regional center services, and unspecified communication disorder is not a qualifying condition for regional center services under the Lanterman Act.

12. Overall, according to Dr. Brooks, the records as a whole show claimant is not eligible for regional center services under autism. Claimant does not have autism, and claimant does not have the deficits necessary to meet the substantial disability criteria. Although claimant has challenges in speech and language, which may affect his social skills, he overcame those speech and language challenges and was exited from special education. Claimant is now in a general education class. The most recent psychological evaluation completed by Dr. Swigart does not show claimant meets the diagnostic criteria for autism, and overall, claimant's intelligence has been shown to be in the low average range. Further, claimant's scores on Dr. Swigart's administration of the ASRS, which showed claimant had symptoms of autism, were not compatible with his findings on the ADOS, which was properly administered and found that claimant had minimal to no symptoms of autism. While it is true that Dr. Cordova's administration of the ADOS-2 showed claimant had "clinically significant"

characteristics of autism, it was administered with face masks rendering the results invalid.

### **Claimant's Mother's Testimony**

13. Claimant's mother testified that she believes claimant qualifies for services because he is not like other children. Claimant needs a lot of help at home, especially in the areas of self-care. He does not brush his teeth correctly. He does not socialize with family. He isolates himself. He sleeps very little at night. He cannot write, and his academic achievement is not good. Claimant has unusual movements, and hits himself. When he sleeps, he moves parts of his body and laughs.

### **Observations**

14. Claimant was present during the hearing, with his siblings. He played most of the time on an iPad. Claimant was observed to be speaking with his siblings, responded to instructions to turn the volume down on the iPad during the hearing, and did not exhibit any repetitive or restricted patterns or interests. He sat quietly, and was not observed to be fidgeting, spinning, or otherwise making any unusual movements.

## **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 retardation<sup>2</sup>, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

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

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

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social

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<sup>2</sup> 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 condition as "intellectual developmental disorder," however, the California Code of Regulations has not been updated to reflect this change, either.

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 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. Claimant did not establish by a preponderance of evidence that he meets the DSM-5-TR criteria for autism, based primarily on the psychological assessment conducted by Dr. Swigart, and the various observations and reports of claimant's behaviors throughout the records. Although Dr. Cordova diagnosed claimant with autism in 2021, that diagnosis was primarily based on the ADOS-2, which was not properly administered, as the doctor and claimant were wearing facial coverings. Dr. Swigart's report was very detailed and did not contain any observations that would suggest claimant has autism. Although claimant's most recent IEP shows the school rendered him eligible under the category of autism following Dr. Cordova's psychological assessment, the behaviors noted in the IEP and other recent documents are, like the observations of Dr. Swigart, inconsistent with someone who has autism. Finally, Dr. Brooks is an expert on rendering opinions regarding an individual's eligibility for regional center services, and she reviewed all documents in this case and concluded the evidence did not show claimant meets the DSM-5-TR criteria for autism,

and that the IRC multidisciplinary team's determination that claimant is not eligible for regional center services was correct.

9. As claimant did not establish by a preponderance of the evidence that he is eligible for regional center services under any qualifying category, his appeal must be denied.

## **ORDER**

Claimant's appeal is denied. Claimant is not eligible for regional center services due to a substantial disability that resulted from autism, intellectual developmental disorder, 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: August 19, 2024

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.