

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter the Eligibility of:
Claimant,

and

Inland Regional Center,

Service Agency.

OAH No. 2014070485

DECISION

This matter came on regularly for hearing on July 29, 2014, before Susan J. Boyle, Administrative Law Judge, Office of Administrative Hearings, State of California, in San Bernardino, California.

Leigh Ann Pierce, Consumer Services Representative, Fair Hearings and Legal Affairs, represented the Inland Regional Center (IRC).

J.R., claimant's mother, represented claimant, who was present during the hearing.

The matter was submitted on July 29, 2014.

ISSUES

1. Is claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) based on a diagnosis of autism?
2. Is IRC required to perform an assessment of claimant to determine if he is eligible for regional center services under the Lanterman Act based on a diagnosis of autism?

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FACTUAL FINDINGS

Jurisdictional Matters

1. Claimant is an eleven-year-old boy who lives with his mother, J.R. He has a 15-year-old brother who has been diagnosed with autism and who receives services from IRC. J.R. sought regional center services for claimant because he was exhibiting characteristics that she believed were indicative of a person with autism.

2. By letter dated June 11, 2014, IRC advised J.R. that it reviewed claimant's records and determined that he was not eligible for regional center services because he did not fit the criteria for services as required by the Lanterman Act.

3. On June 17, 2014, J.R. signed a Fair Hearing Request appealing IRC's decision. In her hearing request she stated that she disagreed with IRC because it made its decision that he was not eligible for services without first performing a diagnostic evaluation.

4. On July 1, 2014, the parties met for an informal meeting. The parties reviewed documents including claimant's school records. J.R. stated that she believed that doctors from Lutheran Social Services had recently assessed claimant; she requested that IRC representatives contact them to discuss their diagnosis. After the meeting, Ms. Pierce spoke to Lutheran Social Services representatives who advised her that their records list autism as a possible diagnosis for claimant but that Lutheran Family Services did not perform any assessments to arrive at this conclusion.

5. By letter dated July 8, 2014, IRC advised J.R. that, based upon the school records and because Lutheran Social Services had not performed an assessment of claimant, IRC reaffirmed its determination that claimant was not eligible for regional center services.

6. J.R. disagreed with IRC's determination, and the matter proceeded to hearing.

Educational and Psychological Records Reviewed by IRC

7. Claimant attends school in the Morongo Unified School District. He was initially referred by his classroom teacher for special education services in April 2010, when he was seven years old.

8. On May 5, 2010, a psycho-educational evaluation of claimant was performed by P. Mohler, Specialized Academic Teacher and SD Worthey, School Psychologist. The report of the assessment contains a list of more than 30 "concerns" that were reported by claimant's classroom teacher, including:

Attention and concentration problems.

Avoidance behavior

Cannot formulate sentences to express academic thoughts.

Cannot handle changes in routine.
Cannot or will not anticipate behavioral consequences.
Difficulty in formulating pragmatic responses to peers
Interpersonal relationship problems
Low frustration tolerance
Oppositional behavior
Poor impulse control
Poor self-esteem
Poor social discrimination – inappropriate time and place

It was noted in the report that claimant's developmental milestones were delayed. He did not crawl, and he walked at 17 months. He was toilet trained at age 7. He was retained in kindergarten. The report also stated that claimant's brother, who was then eleven years old, had been diagnosed with autism.

The evaluators found that claimant "tends to be withdrawn in interactions with adults and peers." They stated that claimant was reluctant to go to the testing area but that he became more relaxed and confident when he became more familiar with the environment. They found that claimant was cooperative but that he was not talkative and had difficulty expressing himself.

The results of psycho-educational tests indicated that claimant's cognitive skills were in the average range but that there was a "significant discrepancy between his intellectual ability and achievement," and that he had a processing disorder in the area of visual processing. It was determined that claimant had a Specific Learning Disability and, based upon this finding, was eligible for special education services under Title 5 of the California Code of Regulations.

There was no discussion of, or testing for, autism.

9. On June 1, 2010, an Individualized Education Program (IEP) meeting was held to create and adopt an IEP for claimant. The IEP listed claimant's primary disability as Special Learning Disability. Notes in the IEP include:

Extremely quiet in new situations, can talk and express his wants and needs, but is often "shut down." Mother reports he talks a lot at home.

A loner in the classroom and on the playground, classmates try to help him, but he doesn't really interact with them.

Will get himself ready for school about half the time, the rest of the time he refuses. Also refuses to do his chores. Has temper tantrums at home.

His mother states that he does exhibit behavior problems at home, and is seeking counseling. She also states that he is quite verbal at home, having no problem communicating.

10. Notes from an October 29, 2010, IEP team meeting state that claimant was “happy in this smaller class with more small group interaction.” Concerns raised about claimant’s classroom behavior included that he did not have, or failed to exercise, control over his bodily functions. The notes state that claimant would soil himself but “not be bothered by the soiled pants.” Claimant was observed to provoke other students in a way described as “not overly aggressive, just annoying.”

11. On January 27, 2014, an IEP meeting was held to conduct an annual review of claimant’s progress. The IEP listed claimant’s primary disability as Special Learning Disability and his secondary disability as Speech and Language Impairment. Comments in the IEP include that claimant “likes to make his friends laugh and gets along with a lot of his classmates. His academic strength is math,” and “[claimant] has friends in the class and is well liked.” All of his goals and objectives relate to academic learning; none relate to modification of behavior.

12. On May 14, 2014, claimant was seen by Lutheran Social Services for a clinical assessment. During the screening process, the clinician performing the assessment, Paul True, Psy.D., LMFT, attempted to communicate with claimant, but claimant either failed to respond at all or answered questions with inappropriate or nonsensical responses. All information, other than Dr. True’s direct observations, was provided by J.R. J.R. reported that claimant shuts down in school and home, resists going to school, soils his clothing, destroys property, has temper tantrums, touches J.R. inappropriately, and becomes assaultive when he is frustrated or agitated. Dr. True concluded that claimant “appears significantly developmentally delayed and exhibits behaviors more appropriate for a three- than eleven-year-old.” Dr. True did not administer any standardized tests or assessments. Based on the information reported by J.R. and his observations, Dr. True made an Axis I diagnosis of Pervasive Development Disorder NOS (not otherwise specified), Separation Anxiety Disorder, Encopresis, and Learning Disorder NOS.

13. On June 27, 2014, Brenda S. White, M.D., of Lutheran Social Services, performed a psychiatric evaluation of claimant. Dr. White’s only information about claimant came from J.R. As reported by Dr. White, the chief complaint for which claimant was being evaluated was “aggressive behavior toward mother, brother, animals, impulsive, oppositional, sexually inappropriate toward mother.” Dr. White noted that claimant “did not respond to any questions.” Dr. White was “unable to assess” significant categories of the mental status portion of the assessment, including speech and thought processes; orientation as to person, place or thing; memory; calculation; general fund of information; abstraction; insight; judgment; or play characteristics, because claimant “refused to speak or answer questions.” J.R. reported severely disturbing conduct by claimant including making sexual overtures towards J.R., being incontinent of urine and feces combined with a lack of concern

that he had soiled himself, threatening to kill J.R. and his brother, and killing and mutilating animals.

Despite being unable to assess claimant in many of the categories of the examination, and without administering any standardized tests, including those specifically designed to detect and diagnose autism, Dr. White diagnosed claimant as having Pervasive Development Disorder NOS, an Autism Spectrum Disorder; Oppositional Defiant Disorder; Encopresis; and Learning Disorder NOS.

Testimony of Laura Elena Gutierrez, Psy.D.

14. Laura Elena Gutierrez, Psy.D., obtained a doctorate in psychology in 2011 and has served as a staff psychologist with IRC since October 2013. She is licensed in California as a clinical psychologist.

Dr. Gutierrez stated that only an individual who has a substantial disability as a result of autism, mental retardation, cerebral palsy, or epilepsy, or as a result of having a condition similar to mental retardation or that requires treatment similar to a person with mental retardation, is eligible to receive services from a regional center. Dr. Gutierrez was asked to review claimant's records to determine if he could be eligible for regional center services, including an assessment, as a person with autism.

Dr. Gutierrez, reviewed materials obtained from claimant's school district and from Lutheran Social Services. She concluded that claimant was not eligible for regional center services under the category of autism because he did not meet the criteria for having an autistic disorder under the Diagnostic and Statistical Manual of Mental Disorders (DSM) V.¹ She opined that claimant was properly diagnosed as having substantial mental health disorders. Under the DSM V, a diagnosis of autism must be supported by evidence that a child showed substantial signs of autism by age five.

Dr. Gutierrez found no documentation of autistic behaviors in claimant's early years. No serious concerns were raised about him until he was seven years old, which was when his classroom teacher referred him for special education testing. At that time, claimant was found eligible for special education services for a Specific Learning Disability because his academic performance fell below his average intellectual ability. There were no entries in these records suggesting that claimant was exhibiting characteristics of an autistic child.

Dr. Gutierrez noted that claimant's 2014 IEP provided that he was eligible for special education services because of a Specific Learning Disability and Speech Language Impairment. She stated that a diagnosis of a learning disability may qualify an individual for special education services under California Code of Regulations, Title 5 (the regulations related to special education), but it does not constitute an eligible developmental disability

¹ In June, 2013, the American Psychiatric Association issued a revised Diagnostic and Statistical Manual of Mental Disorders, referred to as the "DSM-V."

for regional center services under the Lanterman Act or the applicable Lanterman Act regulations in California Code of Regulations, Title 17. She also noted that school districts routinely assess for autism when there are behaviors that suggest a child might be autistic, but claimant's school district did not administer an assessment for autism to claimant.

Dr. Gutierrez questioned the conclusion contained in the records from Lutheran Social Services that claimant had a diagnosis of Pervasive Developmental Disorder NOS because neither Dr. True nor Dr. White administered any testing to support the diagnosis. Dr. Gutierrez stated that "you cannot just look at someone to determine if they are autistic."

Dr. Gutierrez noted that claimant's records confirm consistent mental health concerns about him and that he was on medication to address behaviors ascribed to mental health disorders, such as Oppositional Defiance Disorder and Attention Deficit Disorder. She stated that the behaviors claimant was reported to have engaged in are not "autistic-like" behaviors. Claimant's records contain references to him having friends and engaging in social activities. Dr. Gutierrez testified that she would not expect to see that in a child with autism. Also, she stated that she looks for consistency in behavior such that the behavior observed at school would be the same behavior reported to be occurring at home. She did not find that consistency in claimant's records.

Based upon claimant's history and records, Dr. Gutierrez concluded that the evidence did not support a finding that claimant was eligible for regional center services based upon autism or that IRC was required to perform an assessment. She suggested that J.R. communicate with claimant's school district and ask them to perform the assessment. Dr. Gutierrez stated that she and IRC would review claimant's records again if they were provided with the results of such testing.

Evidence Presented on Behalf of Claimant

15. J.R. asked IRC to evaluate claimant because she "want[ed] to know what [she was] dealing with." She believed that J.R. exhibited signs of autism and that Lutheran Social Services doctors had diagnosed him with having a disorder on the autistic spectrum. She did not know if that diagnosis was accurate. She sought an evaluation by IRC to help her identify claimant's disorder so that she could find ways to better help him.

16. J.R. believed the Lutheran Social Services diagnosis could be valid. She disputed the claims in claimant's school records that he had friends and made friends easily. J.R. testified that when she had taken claimant places to play with other children, including his cousins, he did not want to play. She said he became upset, ignored the others and stopped talking. J.R. stated that claimant does not talk to his grandmother, aunts, uncles or cousins; he talks only to his brother and J.R. Similarly, when she takes claimant to Child and Family Team meetings, claimant does not talk.

J.R. also reported that claimant engages in autistic-like behavior including flapping and compelled repeating. J.R. stated that claimant watches only one movie. He requires J.R.

to read to him from one book only when he is in the shower. He flickers the light switch at home. She also stated that claimant hits his head when he is frustrated.

17. J.R. testified that she had spoken to claimant's school district and that they agreed to assess claimant for autism before the start of the next school year. She stated that she understood IRC's position and was just trying to do her best for her son. Her testimony was heartfelt and credible.

LEGAL CONCLUSIONS

The Burden and Standard of Proof

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 that he or she has a qualifying diagnosis. The standard of proof required is preponderance of the evidence. (Evid. Code, § 115.)

2. A preponderance of the evidence means that the evidence on one side outweighs or is more than the evidence on the other side, not necessarily in number of witnesses or quantity, but in its persuasive effect on those to whom it is addressed. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

The Lanterman Act

3. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4500, et seq.) The purpose of the Act is to rectify the problem of inadequate treatment and services for the developmentally disabled, and to enable developmentally disabled individuals to lead independent and productive lives in the least restrictive setting possible. (Welf. & Inst. Code, §§ 4501, 4502; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) The Lanterman Act is a remedial statute; as such it must be interpreted broadly. (*California State Restaurant Association v. Whitlow* (1976) 58 Cal.App.3d 340, 347.)

4. An applicant is eligible for services under the Lanterman Act if he or she can establish that he or she is suffering from a substantial disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or what is referred to as the fifth category – a disabling condition closely related to mental retardation or requiring treatment similar to that required for mentally retarded individuals. (Welf. & Inst. Code, § 4512, subd. (a).) A qualifying condition must also start before the age 18 and be expected to continue indefinitely. (Welf. & Inst. Code, § 4512.)

5. California Code of Regulations, title 17, section 54000, also defines “developmental disability” and the nature of the disability that must be present before an individual is found eligible for regional center services. It states:

(a) Developmental Disability means a disability that is attributable to mental retardation, 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 deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.”

6. When an individual is found to have a developmental disability as defined under the Lanterman Act, the State of California, through the regional center, accepts responsibility for providing services and supports to that person to support his or her integration into the mainstream life of the community. (Welf. & Inst. Code, § 4501.)

7. “Services and supports” for a person with a developmental disability can include

diagnosis and evaluation. (Welf. & Inst. Code, § 4512, subd. (b).)

8. A regional center is required to perform initial intake and assessment services for “any person believed to have a developmental disability.” (Welf. & Inst. Code, § 4642.) “Assessment may include collection and review of available historical diagnostic data, provision or procurement of necessary tests and evaluations, and summarization of developmental levels and service needs” (Welf. & Inst. Code, § 4643, subd. (a).) To determine if an individual has a qualifying developmental disability, “the regional center may consider evaluations and tests . . . that have been performed by, and are available from, other sources.” (Welf. & Inst. Code, § 4643, subd. (b).)

9. California Code of Regulations, title 5, section 3030, provides the eligibility criteria for special education services required under the California Education Code. The criteria for special education eligibility are not the same as the eligibility criteria for regional center services found in the Lanterman Act.

Evaluation

10. J.R. asked for a Fair Hearing to obtain an assessment² of claimant. She believed claimant could be eligible for regional center services because he exhibited autistic-like behaviors and because he was qualified for special education services from his school district. J.R. expressed her genuine desire to have a full assessment performed so that she could understand what claimant suffered from and how she could best help him. Her motives are sincere and commendable.

11. The information contained in claimant’s records does not support a reasonable belief that claimant has a developmental disability as defined by the Lanterman Act which would trigger IRC’s obligation to provide or procure a further assessment of claimant. Instead, the records evidence that claimant suffers from mental health disorders that affect his behavior and academic performance. Although some professionals have recently suggested that claimant may have a disorder on the autistic spectrum, their opinions were not based upon accepted testing instruments. Claimant’s records support a diagnosis of learning disabilities and/or psychiatric disorders, which do not qualify him for regional center services.

12. Eligibility for special education services does not determine eligibility for regional center services. The Lanterman Act and the applicable regulations specify the criteria an individual must meet in order to qualify for regional center services. The regional center is statutorily required to use different criteria for eligibility than a school district.

13. Claimant’s mother was sincere, her testimony heartfelt, and her frustration palpable. She is clearly motivated by her desire to help her child and to obtain the services

² J.R.’s request is understood to be a request that IRC administer to claimant, and interpret the results of, standardized tests for autism.

that she believes are necessary to allow him to function in the world; she undoubtedly has her child's best interest at heart. However, the weight of the evidence demonstrated that claimant was not eligible to receive a further assessment or other services under the Lanterman Act based on autism. The weight of the evidence established that claimant did not have a condition that made him eligible for regional center services.

ORDER

Claimant's appeal from IRC's determination that he is not eligible for regional center services and supports, including a further assessment, is denied.

DATED: August 12, 2014

_____/s/_____
SUSAN J. BOYLE
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 ninety days.