BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of Claimant vs. Inland Regional Center, Service Agency.	OAH No. 2014100718

DECISION

Beth Faber Jacobs, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on May 27, 2015.

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

Claimant's father represented claimant.

The matter was submitted on May 27, 2015.

ISSUES

Is claimant eligible for regional center services on the basis of autism?

Is claimant eligible for regional center services on the basis of having an intellectual disability?

FACTUAL FINDINGS

Jurisdictional Matters

1. Claimant is a 22 year-old unconserved adult.

2. On April 29, 2015, IRC notified claimant that she was not eligible for regional center services. A family friend timely requested a fair hearing. On January 23, 2015, claimant requested that her father represent her in this proceeding.

3. Claimant's father contends that claimant is eligible for regional center services on the bases that she has autism and/or that she has an intellectual disability. [1]

Evidence Presented at the Hearing

4. Claimant had a very difficult start in life. Her biological parents were drug addicts, and it is likely her biological mother abused alcohol and methamphetamines or heroin while she was pregnant with claimant. During claimant's first few years of life, she was neglected and possibly abused. An agency charged with protecting children removed claimant from her biological mother's care on several occasions, and claimant was placed in foster care. Claimant was adopted when she was three years old.[2]

5. Claimant demonstrated mental health and behavioral issues from a young age. After her adoption, she tried to dominate her adoptive brother, who was three years her senior. In pre-school she hit and bit other children. When claimant was in kindergarten, she was diagnosed as having Attention Deficit Hyperactivity Disorder (ADHD). By the first grade, her aggressiveness and mood swings became so extreme that she was placed on Adderall and Depakote. She began receiving psychotherapy.

6. Claimant's parents divorced in 2000, when she was seven years old. After the divorce, claimant lived primarily with her mother but regularly spent time with her father. Around 2013 she began to live primarily with her father and stepmother. Her father and stepmother have divorced, and claimant currently lives with her father.

7. In 2002, when claimant was about nine years old, Robert Gordon, M.D., claimant's psychiatrist, confirmed claimant's diagnosis of ADHD and added a diagnosis of Bipolar Disorder. He recommended that claimant continue psychotherapy and her medications.

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[1] Effective January 1, 2015, the Lanterman Developmental Disabilities Services Act (the Lanterman Act), Welfare and Institutions Code section 4500, et seq., was amended to eliminate the term "mental retardation" and replace it with "intellectual disability." The Diagnostic and Statistical Manual of Mental Disorders, fifth edition (DSM-5), which mental health care professions use to diagnose mental disorders, also uses the terms "intellectual disability" or "intellectual developmental disorder" in place of the formerly used term "mental retardation."

[2] Unless otherwise stated, all references in this decision to claimant's parents, mother, or father refer to claimant's adoptive mother or adoptive father.

8. In November 2002, when claimant was in the fourth grade, claimant's mother requested a more detailed psychological evaluation. Dr. Gordon referred claimant's mother to The Amen Clinic. Claimant's mother asked the clinic to evaluate claimant to aid in improving claimant's behavior, determine her best medication schedule, and help claimant "reach her full potential." Claimant's mother reported her chief complaint was that:

> [Claimant] has problems with concentration, focus, impulsivity, aggression and irritability. These problems have caused difficulty in her interactions with her peers because she has such poor social skills.

Claimant's mother relayed that numerous different medications had been tried, some unsuccessfully. The 2002 medication regimen helped in giving claimant bowel and bladder control, which had become an issue. Claimant's "irritability and abrasive language" continued to be a source of stress in her family.

9. Lucretia Reed, M.D., a child, adolescent, and adult psychiatrist, signed the Amen Clinic report. According to the 2002 report, claimant's fine and gross motor coordination skills were "good and comparable to her peers." Her vocabulary was "excellent," and she had good articulation and comprehension. Dr. Reed reported that claimant had "good" attachment to her mother and father but was unable to play cooperatively with other children; she was "bossy and controlling" with her peers. Dr. Reed noted that claimant did "not seem to have any learning disabilities" but did her school work very slowly in class.

The clinic performed a tomographic brain (SPECT) study of claimant's brain while she was on Depakote and Wellbutrin.

After she reviewed multiple test results, claimant's clinical history, and family checklists, Dr. Reed made the following findings: probable Bipolar Disorder, anxiety issues, oppositional traits, temporal lobe dysfunction, parietal lobe dysfunction, head trauma without open intracranial wound,[3] and cerebellar dysfunction.

Dr. Reed made numerous recommendations. As to medications, she suggested that claimant continue on Depakote, the mood stabilizer, and that the dose be increased if needed. She recommended that, if anxiety and oppositional behaviors persisted, a serotonergic agent (such as Celexa or Zoloft) be added. She recommended other mood stabilizers "such as an anticonvulsant, lithium [sic], or an atypical antipsychotic medication to calm focal areas of increased activity, enhance mood stability, and/or calm irritability." Other drugs listed as possible alternatives included Zyprexa, Risperdal, Trileptal, Tegretol, Neurontin, Prozac, and Paxil. Also, Dr. Reed recommended other interventions, such as psychotherapy, social skills training, educational assessment, sleep strategies, dietary strategies, exercise, and occupational therapy for sensory integration-parietal lobe problems.

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[3] As a young child, claimant suffered two traumatic injuries to her head.

The report did not mention "autism" or "Asperger's," or indicate any suspicion that claimant may have had an autistic condition.

10. By fifth grade, claimant was taking three prescription medications: Wellbutrin, Zoloft, and Depakote.

11. In 2004, when she was 11 years old, claimant was still receiving school counseling and therapy but continued to have difficulties making friends, socializing with her peers, and acting appropriately. She was not in special education classes, and her mother requested an evaluation for special education. The West End Special Education Local Plan Area (SELPA) performed a psycho-educational evaluation. The summary concluded that, with some exceptions, claimant's overall level of intellectual functioning fell within the average range when compared with others of her same age. It found, however, that her processing and visual motor speed was "well below" the average range. The report indicated that she had "average cognitive ability" and "average to above-average scores in academic achievement." Also, the SELPA specialist concluded that claimant did not require speech and language services "at this time."

Noting that claimant "is benefitting from instruction in the regular classroom," the district concluded: "[I]t would not appear to be in her best interest to have her work in any type of remedial program." As a result, claimant was not found eligible for special education. At the school psychologist's recommendation, however, the district agreed that "modifications and some type of accommodations" needed to be continued, and a "504 reasonable accommodation plan" was created.

In June 2004, claimant's case for special education was reconsidered. On re-evaluation, the IEP team concluded that claimant was qualified for special education under the category of "other health impaired."

12. In November 2006, while in the eighth grade, claimant was transferred to the Dorothy Gibson High School, a public special education school that could provide a more restrictive environment than the regular public school she had been attending. Her eligibility for special education was changed to the "emotional disturbance" category. Counseling services were added.

13. In a special education triennial records review conducted in 2009, the district reaffirmed its determination that claimant was eligible for special education based on the category of "emotional disturbance." The IEP team found that claimant's academic testing and classroom performance was average and at grade level, although her lower scores on timed testing would warrant a request for accommodation for college testing.

The review included a summary of claimant's prior intellectual evaluations from 2004 through 2006, including the Wechsler Intelligence Scale for Children-Third Edition (WISC-III); the Wood-Johnson R scales; and the Wechsler Intelligence Scale for Children-Fourth

Edition (WISC-IV). The report concluded that her scores reflected "an average range of cognitive abilities" that appear "stable" and that "[t]his is not an area of suspected disability."

The IEP team wrote that claimant's "ongoing difficulties in broad social interactions" "tend to be unstable and dramatic" and are "directly tied to her Bipolar Disorder."

14. In February 2010, when claimant was 17 years old, claimant's mother completed a risk assessment questionnaire for the county's Department of Behavioral Health. Claimant's mother checked boxes indicating that claimant was a danger to herself or others; that claimant had expressed suicidal ideation, and that she had assaulted others and routinely put herself in dangerous situations. She answered "yes" to whether claimant has "behaviors that are so difficult that his/her current living or educational situation is in jeopardy." As examples, claimant's mother checked the boxes indicating that claimant's "behaviors are chaotic or disruptive;" that claimant "has daily verbal outbursts," "constantly challenges authority of adults or attempts to undermine authority of caregiver with other children," "requires constant direction and supervision," "requires total attention of caregiver, and is overly jealous of caregiver's other relationships." In response to the question as to whether claimant exhibits "unusual, bizarre or psychotic behaviors," claimant's mother answered "yes" and checked the box to reflect that claimant had a "history or pattern of fire setting."[4] She answered "yes" to the question of whether claimant needed psychotropic medication and indicated that claimant was "currently stable on psychotropic medications."

The assessment noted claimant's significant problems with social adjustments. Claimant's mother checked boxes that claimant verbally threatens people, purposely damages things, frequently lies to avoid consequences, and has a consistent pattern of negative, hostile or defiant behavior. Claimant's mother checked the box indicating that claimant has problems making and maintaining healthy relationships. Examples checked included being unable to form positive relationships with peers, provoking others, and engaging in sexual behaviors that put her at risk.

Claimant's mother noted claimant's lack of self-care, and checked the box indicating that claimant had "significant problems managing" her feelings. Examples checked included having "severe temper tantrums," "worries excessively", and "exhibits excessive grandiosity." Claimant's ADHD was also listed.

Under "current Axis I diagnoses," claimant's mother wrote "Bipolar, ADHD, possible Asperger's."

15. Claimant's behaviors were so extreme that she was expelled from every school she attended in California. When she was a junior in high school, her parents placed her in a special school for girls in Kansas that also worked on improving her behavior. When the

[4] Under this question, there were boxes that could be checked if the child "consistently repeats words, sounds or phrases; emits unusual noises or sounds," had "bizarre fixations," or a "markedly flat affect." Claimant's mother did not check any of these boxes.

school closed before claimant completed high school, her father personally paid some of the teachers to house and care for her in Kansas, and to tutor her until her studies were completed. She also continued to have psychotherapy. In 2011, she earned her high school diploma in Kansas.

16. On October 26, 2012, when claimant was almost 20 years old, Dr. Gordon (her psychiatrist who diagnosed her with Bipolar Disorder in 2002) completed a medical "History and Diagnosis of Disability" form regarding claimant for the California Department of Rehabilitation. Under "history and date of onset" Dr. Gordon wrote:

> History since childhood of labile emotional status, poor concentration and task completion and impaired social awareness and impulsivity

Under "diagnosis," he wrote: "1. Bipolar Disorder; 2. ADHD; 3. Asperger's Disorder." Under "treatment," he wrote "many years of treatment."

Dr. Gordon did not testify, and there was no evidence about how he arrived at the new, third diagnosis he listed, Asperger's Disorder.

17. In June 2014, claimant was involuntarily hospitalized under Welfare and Institutions Code section 5150 for homicidal ideation after she threatened to harm her step-mother. At the conclusion of her hospital stay, she was prescribed Wellbutrin XL, Trileptal, and Geodon. She remains on these medications.

Expert Testimony

LISA A. DAVIDSON, PH.D.

18. Lisa Davidson, Ph.D., a clinical neuropsychologist, testified by telephone. She earned a master's degree[5], and in 1997, she received a Ph.D. in clinical psychology from York University in Toronto. Dr. Davidson completed a post-doctoral fellowship at UCLA in neuropsychology and became licensed to practice psychology in California in 2003. She has a private practice in psychology and neuropsychology.

19. Dr. Davidson conducted a neuropsychological evaluation of claimant and prepared a report dated December 25, 2014. According to her report, claimant's mother asked for the evaluation to help claimant achieve her highest level of living and social independence, and to "clarify her diagnosis" and aid in her treatment.

20. Dr. Davidson's report summarized many of the reports listed above and included new or additional information. For example, Dr. Davidson reported that claimant

[5] Claimant did not provide Dr. Davidson's curricula vitae. Dr. Davidson did not testify about when or from where she received her master's degree, or the subject.

had trouble speaking as a child, that her speech was unclear, and that she stuttered. She found that claimant had more significant motor skills issues than was previously reported. She discussed that, in addition to having trouble making friends and often fighting with her peers, claimant preferred to play alone or with younger children, and that when she was with her peers, she would take the "leader role." She often hit, scratched, threatened, and injured other students. She had a problem with impulsivity and overreacted when faced with a problem.

The report stated that claimant's mother "enjoys [claimant's] compassion and sense of humor" and that as a child, claimant "often participated in movies, meals, conversations, visits with relatives, television, and church." It also stated that, according to claimant's mother, claimant's primary difficulties as a child were in the areas of "social skills and hygiene."

Dr. Davidson's report indicated that, in 2013, claimant was convicted in Kansas of a crime. It related to "Contributing to a Child's Misconduct," a misdemeanor, and resulted in claimant being placed on one year's unsupervised probation.

According to Dr. Davidson's report, claimant stated that she "enjoys watching movies and listening to music, and attending church;" that she has a "special interest" in singing and involvement with the Mormon faith church groups. She told Dr. Davidson that she was "currently in a committed relationship with her boyfriend," and that she enjoyed his "personality and has no concerns about their relationship."

21. Dr. Davidson interviewed claimant. Her psychology assistant administered numerous tests, including the WAIS-IV; Wechsler Memory Scale – IV; Trail Making Tests (Trails A & B); MMPI -2; Beery Developmental Test of Visual-Motor Integration, Sixth Edition, the Beck Depression Inventory II; and the Beck Anxiety Inventory.

As to behavioral observations, the report indicated that claimant was "alert and oriented," "cooperative, friendly, and easily engaged," and that she "appeared focused, motivated, and attentive." She maintained "appropriate eye contact." She presented with a "constricted range of affect" but her "speech was coherent and clear."

The personality portion of the testing (MMPI-2) revealed that she was experiencing "severe levels of emotional distress." According to the report, claimant "is very fearful," and "has concentration and attention difficulties, memory deficits, and poor judgment." "She thinks that people say vulgar and insulting things about her, that they have it in for her, and that people are trying to influence her mind." "Her behavior is likely to be unpredictable and inappropriate." She reports symptoms that "may reflect a psychotic process." She is "extremely introverted." She "likely has suicidal ideation." "Her prognosis is generally poor. Her problems are chronic and severe." According to the report, short-term behavioral interventions rather than insight-oriented psychotherapy are warranted.

22. Based on her review of the test results and her meeting with claimant, Dr. Davidson concluded that respondent's primary diagnosis was autism. Using the Diagnostic and Statistical Manual V (DSM V), she found claimant to have an Axis I diagnosis of Autism Spectrum Disorder, "with a level 2 severity." She listed several secondary diagnoses: Bipolar Disorder, ADHD, Developmental Coordination Disorder, Specific Learning Disorders (impairment in written expression and reading), Persistent Motor Tic Disorder and Cognitive Disorder NOS. She also listed Borderline Personality Disorder, but it is unclear from the report's format if Dr. Davidson was listing this as another Axis I diagnosis or as an Axis II diagnosis.

23. Dr. Davidson testified that she was "mystified" as to why claimant had not previously been identified as autistic or diagnosed as being on the autism spectrum. To her, the diagnosis was clear.

Dr. Davidson acknowledged that neither she nor her assistant conducted tests that were specifically geared toward evaluating autism, such as the Gilliam Autism Rating Scale (GARS3); the Childhood Autism Rating Scale (CARS2); the Autism Diagnostic Observation Schedule (ADOS); or the Autism Diagnostic Interview-Revised (ADI-R). According to Dr. Davidson, these tests are not normed for adults and were not necessary or useful for diagnosing claimant. Dr. Davidson opined that she had sufficient information, based on her review of the records, interview with the claimant, lengthy history, and the tests conducted at her request, to conclude that claimant's primary diagnosis was autism. In her opinion, other professionals missed the diagnosis for many years; as she explained it, claimant presented a "complicated scenario." She opined that claimant had a significant "overlay" between autism and her psychiatric conditions, autism should be the primary diagnosis, and claimant's autism began in early childhood.

SANDRA BROOKS, PH.D.

24. Sandra Brooks, Ph.D., received her master's degree and doctorate in clinical psychology from Loma Linda University. She has served as a staff psychologist at the IRC for eight years. Dr. Brooks conducts psychological evaluations of children, adolescents, and adults to determine eligibility for services and supports under the Lanterman Act. She participates in interdisciplinary teams that review eligibility for the regional center. She is experienced in diagnosing autism and intellectual disabilities.

25. Dr. Brooks explained that autism is addressed in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V) as autism spectrum disorder. Under the DSM-V, diagnostic criteria for autism spectrum disorder include persistent deficits in social communication and social interaction across multiple contexts plus at least two of four specific types of restricted, repetitive patterns of behavior, interests, or activities. For a diagnosis of autism under the Lanterman Act, these symptoms must be present in the child's early developmental period and constitute a substantial handicap. Also Dr. Brooks explained that, when the DSM-IV (the prior Diagnostic and Statistical Manual of Mental Disorders) was in use, there was a separate category for autism, and a diagnosis of Asperger's disorder

was insufficient for regional center eligibility. Under the DSM-V, however, a person "with a well-established DSM-IV diagnosis of . . . Asperger's disorder, . . . should be given the diagnosis of autism spectrum disorder." In Dr. Brooks's opinion, claimant did not have a "well-established diagnosis of Asperger's disorder" under the DSM-IV and she did not present with diagnostic criteria necessary for an autistic spectrum disorder under DSM-V.

26. Dr. Brooks reviewed all of the records received regarding claimant to determine if she was eligible for services. In her opinion, claimant is not eligible for services; she does not have autism or an intellectual disability. Dr. Brooks opined that claimant does not have the types of restrictive, repetitive patterns of behavior that are required for a diagnosis of autism, and she did not have autism as a child. Rather, claimant's challenges stem from her psychiatric diagnoses of Bipolar Disorder and ADHD. Neither of these conditions is a developmental disability under the Lanterman Act.

27. Dr. Brooks observed that claimant had been diagnosed with Bipolar Disorder as a child, has continued to maintain that diagnosis, and has been on psychotropic medications for most of her life for bipolar and ADHD impulsiveness. Dr. Brooks noted that claimant was evaluated for special education while in elementary school. The school district determined that claimant was initially qualified for special education under the category of "other health impairment" and, later, under the category of "emotional disturbance." The district's IEP did not mention a suspicion of autism even though it had a category for "autism" or "autistic-like" behaviors that it could have used. In Dr. Brook's opinion, if the district had suspected claimant was autistic, the district would have identified autism as a possible concern early on, but it did not.

28. According to Dr. Brooks, numerous elements of claimant's personality and behavioral issues are inconsistent with a diagnosis of autism. Being oppositional, defiant, or engaging in violent behaviors that result in being asked to leave a school are not commonly associated with an autistic child. Most autistic children are aloof and do not seek social interaction; claimant's risky behaviors are more consistent with impulsivity and ADHD than a lack of interest. Dr. Brooks also found claimant's "dramatic" and "attention-seeking behaviors" inconsistent with autism; a hallmark of autism is restricted, repetitive behaviors, and none of the multiple evaluations made over the years reported that she displayed such behaviors. An autistic child's difficulty with social interaction is often reflected by failing to understand social cues and taking things literally; claimant would lash out or manipulate the situation to obtain an effect. Autistic individuals are disinterested in what other people think of them. Claimant's thought processes were inconsistent with being autistic.

29. Dr. Brooks reviewed Dr. Davidson's report. She disagreed with Dr. Davidson's conclusion that claimant has autism, or that it has been the primary cause of her difficulties. Dr. Brooks noted that Dr. Davidson did not use any of the established diagnostic tools for evaluating autism, such as the GARS, CARS, ADOS, or ADI-R tests. In Dr. Brook's opinion, these assessments, particularly the ADOS, are part of the standard evaluation repertoire for determining if a person has autism. She disagreed with Dr. Davidson's statement that the tests were not geared for adults; the parent's input in reviewing

claimant's behaviors as a child would be relevant under the CARS, and ADOS is designed with four modules for assessing individuals of all ages. Module four is specifically created to evaluate an adult.

30. Dr. Brooks noted that the records showed no information to explain how Dr. Gordon determined, in 2012, that claimant had Asperger's in addition to Bipolar Disorder and ADHD. And, in Dr. Brooks' opinion, without using any of the standard, well-established tests for evaluating whether claimant had autism, Dr. Davidson did not have sufficient information upon which to make a diagnosis of autism, to determine that claimant's behaviors were primarily caused by autism, or to conclude that she had autism before the age of 18.

31. Dr. Brooks agreed that claimant requires some type of services and that claimant has significant mental health challenges. To Dr. Brooks however, those challenges are best explained under her Bipolar diagnosis that claimant has consistently received throughout her life. Dr. Brooks opined that claimant's issues are predominantly psychiatric issues, and she does not have a qualifying diagnosis that supports eligibility for regional center services.

32. Also, Dr. Brooks addressed claimant's father's concern that claimant may be eligible for regional center services on the basis of having an intellectual disability. Claimant's full scale intelligence quotient was 82; which is low average. Consumers having an IQ under 70 fall within the intellectual disability category. Claimant's achievement scores and academic achievement are inconsistent with having an intellectual disability.

Claimant's Father

33. Claimant's father requested this hearing because of his grave concern for his daughter's future. He discussed the difficult path claimant had from birth. He stated that claimant began to live with him and his then-wife when she was 16 months old, before she was adopted.

34. Claimant's father is worried; he is getting older. As he put it, he feels that if he were to die today, in two months claimant would be off her medication, homeless, and a danger to herself or others. She needs help, and in his opinion, she has autism or an intellectual disability, and requires regional center services.

35. Looking back, claimant's father is "puzzled" why none of the professionals who evaluated his daughter ever mentioned autism until Dr. Gordon did so about four years ago. Claimant's mother was a special education teacher, and she did not suggest it. He wondered if claimant's teachers were not truthful about claimant's diagnosis as a way of being "nice" to him. He explained how he tried to cover claimant's problems by hiring teachers to get her through each year. He always tried to make the lives of claimant's teachers easier; as a veterinarian, he made sure to "take care of all their animals."

36. In retrospect, he feels that no one wanted to say the word "autism" to him. He began to realize this by watching his sister and her son, who is "very autistic." He had not realized that autism was on a spectrum. He has seen similarities between his daughter and his nephew: Both need a larger area of personal space. Claimant never liked to be held. If he asks her, she will say "oh, dad, I'll give you a hug," but it does not come naturally to her. She has nervous "coughing" when she is under stress. According to claimant's father, claimant has never been physically coordinated. She needs to keep her routine; she gets up and goes to the bed at the same time each day. If her routine is changed, such as needing to go to the dentist, it upsets her.

37. According to claimant's father, claimant has been "kicked out" of every school she has ever attended, including pre-school and church camp. He relayed a story about one of the times she was asked to leave. Claimant rode the bus to school. Every day, another student sat in front of claimant and bullied her. Tired of being bullied, claimant decided to get back at him. One day, she put superglue on the bully's seat. When the ride was over, he was stuck to the bus seat. Claimant was expelled. Although she transferred to Dorothy Gibson, a special education school, claimant was asked to leave when she carried a knife that she stole and sneaked onto campus. Claimant's father sent her to a private girls' school in Kansas. There were 20 girls, and it was very expensive. She did well with the structured environment. Three months before she was to graduate, the school closed. Claimant's father paid for claimant to live with the school counselor, and he paid teachers to come to the home to tutor her so claimant could graduate on time.

38. Claimant has lived with him for the past three years. She sits at home and watches television. She has tried, but cannot get a job. She was twice in county training programs, but was "kicked out" of the programs for "having sex with boys" from the program.

39. Claimant's living skills are poor. She can heat up a meal and take the dog for a walk, but she has poor personal hygiene and needs to be reminded to shower or brush her teeth. After taking the driver's test four times, she passed and was given a driver's license. However, her father does not consider her to be a safe driver; she has already had one accident.

40. When asked if claimant had any "interests or hobbies," claimant's father said "no." He stated that she sits at home all day and watches television.

41. Claimant's father candidly commented on some of the information in Dr. Davidson's report that had been provided by claimant to Dr. Davidson. According to claimant's father, "everything she said to Dr. Davidson is made up." Although claimant told Dr. Davidson that she likes to sing and draw, she does neither. She told Dr. Davidson she is involved in her church, but according to claimant's father, the reference to church is "imaginary." Claimant does not have a "boyfriend" and is not in a committed relationship; she will sometimes have a boy come over. They "have sex, and he leaves." She does not do illicit drugs; according to her father, her drug is sex.

42. Claimant's father would like the regional center to find claimant eligible or perform the evaluative tests Dr. Brooks mentioned.

LEGAL CONCLUSIONS

The Burden and Standard of Proof

1. In a proceeding to determine whether an individual is eligible for 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 Lanterman 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 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 an intellectual disability, cerebral palsy, epilepsy, autism, or what is referred to as the fifth category – a disabling condition closely related to an intellectual disability or requiring treatment similar to that required for individuals with an intellectual disability. (Welf. & Inst. Code, § 4512, subd. (a).) A qualifying condition must also start before the eligible person's 18th birthday 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,[6] 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. . . .

6. Welfare and Institutions Code section 4512, subdivision (l), defines "substantial disability" as the existence of significant functional limitations in three or more of the following areas of major life activity:

(1) Self-care;

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[6] 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.

(2) Receptive and expressive language;
(3) Learning;
(4) Mobility;
(5) Self-direction;
(6) Capacity for independent living;
(7) Economic self-sufficiency.

7. California Code of Regulations, title 17, section 54001, subdivision (a) defines "substantial disability" as a condition that 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." It must constitute a significant functional limitation in three or more of the areas of major life activity, identical to the seven listed above in Welfare and Institutions Code section 4512, subdivision (l).

8. When an individual is found to have a substantial disability based on one of the five categories for eligibility under the Lanterman Act, the State of California, through a regional center, accepts responsibility for providing supports and services to that person. (Welf. & Inst. Code, § 4501.)

Evaluation

9. From early childhood, claimant has had substantial disabilities that have caused significant challenges in her daily life. But, unless her disabilities are the result of a developmental disability specifically identified in the Lanterman Act, claimant is not eligible to receive regional center services. The evidence in this case did not establish that claimant has an intellectual disability or autism; instead, it was established that claimant's difficulties are caused by her Bipolar Disorder and ADHD, conditions that are psychiatric in nature and do not constitute a developmental disability under the Lanterman Act.

10. Claimant was first found eligible for special education in her school under the primary category of "other health impairment." Later the district changed claimant's eligibility category to "emotional disturbance." Autism was never listed, not even as a secondary qualifying condition. Although the basis for a claimant's special education eligibility would not determine whether claimant is eligible for regional center services, in this case, it does tend to show that claimant did not display behaviors at school that caused school professionals to suspect autism. [7]

11. The first time the word "Asperger's" was used in any document received in evidence was in February 2010, when claimant's mother requested services from the county Department of Behavioral Health. Claimant's mother listed claimant's Axis I diagnoses as

[7] "Autism" and "other health impaired" are administrative categories used by local school districts under the California Code of Regulations, title 5. Regional center eligibility, however, is addressed in the Lanterman Act and in California Code of Regulations, title 17.

"Bipolar, ADHD, possible Asperger's." The boxes she checked on the form were consistent with claimant's psychiatric diagnosis, and she did not check boxes that would be indicative of autism, such as those that would indicate having restricted, repetitive patterns of behaviors or interests that are required for a diagnosis of autism under the DSM-V.

12. The first written evidence of a diagnosis of autism or Asperger's was referenced in Dr. Gordon's 2012 report that he completed for the Department of Rehabilitation, when claimant was over 19 years old. In that form report, Dr. Gordon stated that claimant's diagnoses included "Bipolar Disorder, ADHD, and Asperger's Disorder," in that order. Under "treatment," he wrote "many years of treatment," although claimant had never been referred for treatment related to autism or Asperger's. There was no evidence to indicate when Dr. Gordon first added the Asperger's diagnosis, and there was no evidence that established the basis for this diagnosis. There was no new information that would support the changed (or additional) diagnosis. Dr. Gordon's writing of the words "Asperger's Disorder" is insufficient to establish that claimant is eligible for services on the basis of autism.

13. Dr. Davidson's opinion is similarly problematic. Dr. Davidson appeared to leap from a picture of an established psychiatric illness (including suicidal ideation and a belief people are saying insulting things about her) to a primary diagnosis of autism spectrum disorder without identifying the hallmark diagnostic criteria for autism and without an appropriate assessment to corroborate the diagnosis. Even the behavioral observations described in the report (that claimant "appeared focused, motivated, attentive," that she "maintained appropriate eye contact" and had "coherent and clear" speech) were inconsistent with a diagnosis of autism. In addition, Dr. Davidson's report did not support a conclusion that claimant has an intellectual disability within the meaning of the Lanterman Act.

14. Although claimant may have some characteristics of an individual on the autistic spectrum, they are better explained and more reasonably attributed to claimant's psychiatric conditions. Claimant had the burden of establishing that she is eligible for regional center services based on autism or intellectual disability. Claimant did not meet this burden. A preponderance of the evidence did not establish that claimant has autism or that she has an intellectual disability.

15. During the hearing, claimant's father requested that IRC formally conduct an autism assessment using one or more of the tools Dr. Brooks discussed. The request was new and was not part of the fair hearing process. Nonetheless, there was insufficient evidence that additional testing would achieve a different result.

16. Claimant's father wondered if professionals failed to tell him that claimant had autism because they were trying to protect him and claimant from a difficult diagnosis that had no "cure" or medical fix. This is unlikely. Mental health professionals, including psychiatrists, psychologists, and school personnel have been evaluating claimant since she was three years old. Had any suspected she showed the characteristics of a child with autism, those suspicions would likely have been conveyed. A diagnosis of autism was no

"worse" a diagnosis than Bipolar Disorder. The diagnosis of autism (as a mental health disorder) was included in the DSM-IV well before claimant was born. If autism was suspected, there would have been no downside to a mental health professional sharing this information when the professional first suspected it.

17. Claimant's father testified that he was concerned that he may have done a "disservice" to his daughter by trying to "cover up her disabilities all these years," and pay for services to help her whenever he could. On the contrary, claimant's adoptive parents are to be commended for their unwavering support for claimant and for having provided her with every opportunity they could find to evaluate and address her mental health challenges, further her academic growth, and to give her tools to improve her social interaction problems. Claimant's father's love for his daughter and his desire to obtain the help she needs was apparent and heartfelt. Claimant has challenges and disabilities, and she may need assistance to function as an independent adult. There are other agencies and programs for which claimant may be eligible. But the evidence did not establish that claimant is entitled to regional center services under the Lanterman Act.

ORDER

Claimant is not eligible for regional center services and supports under the Lanterman Developmental Disabilities Services Act.

Claimant's appeal from Inland Regional Center's determination that she is not eligible for regional center services and supports is denied.

DATED: June 10, 2015

_____/s/_____
BETH FABER JACOBS
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.