

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2015030935

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on October 8, 2015.

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

There was no appearance on behalf of claimant.

The matter was submitted on October 8, 2015.

ISSUE

Is claimant eligible for regional center services under the Lanterman Act under a diagnosis of Autism Spectrum Disorder?

FACTUAL FINDINGS

Jurisdictional Matters

1. Claimant was first diagnosed with autism in 2009 when she was approximately 18 months old, and she began receiving services from the North Los Angeles Regional Center. Claimant is now eight years old.

2. Claimant moved to the jurisdiction of IRC in 2014. IRC held a planning meeting to develop claimant's new Individual Program Plan (IPP). At the time of her transfer, claimant was receiving respite services and applied behavioral analysis services. IRC continued these services pending a comprehensive re-assessment.

3. On June 24, 2014, IRC Staff Psychologist Paul Greenwald, Ph. D., conducted a psychological reassessment of claimant in a clinical setting. On January 15, 2015, Dr. Greenwald conducted an assessment of claimant in a school setting. Based on the overall comprehensive reassessment, Dr. Greenwald concluded that claimant no longer met the diagnostic criteria for Autism Spectrum Disorder (ASD) as specified in the DSM-5.

4. On March 2, 2015, IRC notified claimant that she was no longer eligible for regional center services.

5. On March 15, 2015, claimant filed a Fair Hearing Request appealing IRC's determination, and this hearing ensued.

Diagnostic Criteria for Autism Spectrum Disorder.

6. The DSM-5 identifies the following five criteria for the diagnosis of autism: persistent deficits in social communication and social interaction across multiple contexts; restricted, repetitive 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 are not better explained by intellectual disability or global developmental delay. The DSM-5 notes that intellectual disability and autism frequently co-occur and that to make a comorbid diagnosis, an individual's social communication should be below that expected for their general developmental level.

7. An individual must have a DSM-5 diagnosis of autism spectrum disorder to qualify for regional center services under the category of autism.

Claimant's Original 2009 Psychological Assessment

8. Kathy Khoie, Ph.D., conducted a psychological assessment of claimant on December 7, 2009, to determine eligibility for regional center services on the basis of a diagnosis of autism. At the time of Dr. Khoie's assessment, claimant was almost three years old.

9. Dr. Khoie used the following tests to evaluate claimant: Wechsler Preschool & Primary Scale of Intelligence, Third Edition (WISC-III); Autism Diagnostic Observation Schedule, Module 1 (ADOS-I); Autism Diagnostic Interview-Revised (diagnostic interview); and the Adaptive Behavior Assessment System, Second Edition (ABAS-II). Dr. Khoie also reviewed three prior reports regarding claimant's development. Dr. Khoie noted in her written report that, a 2009 Outpatient Child Development Report authored by Alice Lim, M.D., reflected an impression of "mild autism."

10. Dr. Khoie found that, on the WISC-III, claimant scored an intelligence rating in the high end of the average range but had a 20-point discrepancy between verbal and performance IQ scores. On the subtests, claimant's scores ranged from average to the "superior range on receptive vocabulary." On the ABAS-II, designed to assess communication and adaptive functioning, claimant's receptive and expressive language development fell "within normal limits." However, her academic score was in the low range; her leisure score was in the deficit range; and her health and safety and self-care scores were in the borderline range. Overall, claimant's scores on the ABAS-II placed her "in the deficit range of functioning."

Dr. Khoie interviewed claimant's mother to obtain the necessary information to complete the ADOS-I and diagnostic interview. Claimant scored "at or above the cutoff scores for autism in the areas of communication and reciprocal social interaction" on the ADOS-I. The responses on the diagnostic interview yielded scores below the cutoff for autism in the areas of reciprocal social interaction, communication, and restricted repetitive and stereotypic patterns of behavior. Dr. Khoie personally observed claimant to have poor social eye contact and lack of interest in socialization. Claimant was inconsistent in her emotional reciprocity when interacting with others. Claimant also engaged in repetitive and restricted speech on occasion.

Thus, while claimant's overall cognitive functioning was in the average range, her adaptive functioning placed her in the deficit range and "warranted" a diagnosis of autism.¹

Dr. Greenwald's Comprehensive Psychological Assessment

11. Dr. Greenwald performed psychological assessments of claimant on June 24, 2014, and January 15, 2015, when claimant was seven years old. Dr. Greenwald used the following tests to evaluate claimant: the Wechsler Intelligence Scale for Children, 4th Edition (WISC-IV); Autism Diagnostic Interview (ADI-R); Childhood Autism Rating Scale – 2nd Edition (CARS2-ST); and the Vineland-II Adaptive Behavior Scales. Dr. Greenwald also reviewed claimant's clinical records on file with IRC, including psychological assessments that determined she met the criteria for autism. Dr. Greenwald testified in this proceeding consistent with his report.

¹ Claimant's original diagnosis was under the criteria set forth in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-4).

12. According to Dr. Greenwald, claimant scored a 90 on the WISC-IV, which is not consistent with a diagnosis of autism. On the CARS2-ST administered first on June 24, 2014, and again on January 15, 2015, claimant's scores of 25.5 and 18, respectively, placed her well below the cutoff for "minimal to moderate" autism spectrum symptoms.

Dr. Greenwald noted that the results on the Vineland-II scales, based on reporting by claimant's mother, indicated that claimant had moderate deficits in communication, daily living and in social domains, consistent with a diagnosis of autism spectrum disorder. Similarly, Dr. Greenwald noted that the reporting by claimant's mother on the ADI-R inquiry generated a result that placed claimant within a diagnostic range of autism spectrum disorder in all four categories for that assessment. Dr. Greenwald explained that the results of the Vineland-II scales and ADI-R were "unusual" given claimant's high score on the WISC-IV. Dr. Greenwald attributed the discrepancy to inaccurate reporting on the Vineland-II scale and ADI-R by claimant's mother.

13. Dr. Greenwald observed claimant on June 24, 2014. Dr. Greenwald noted that claimant was very guarded in communicating with him, yet she did not restrict her verbal communications with her mother. Further, Dr. Greenwald observed claimant disagree with her mother multiple times during her mother's verbal reporting to Dr. Greenwald on the ADI-R. Dr. Greenwald said that claimant's verbal disagreements suggested that claimant had sufficient verbal comprehension. Claimant did not display any motor stereotypes or sensory anomalies, and no vulnerability to visual, auditory, kinesthetic-vestibular, or tactile distractions.

14. When Dr. Greenwald assessed claimant at her school on January 15, 2015, he did not find claimant to have persistent impairment in reciprocal social communication and interaction or restricted and repetitive patterns of behavior, all of which are essential features of autism spectrum disorder according to the DSM-5. Claimant demonstrated sustained attention to her assignments and appeared alert and attentive to the teacher's instructions. Claimant was very aware of Dr. Greenwald's presence and constantly looked in his direction. Claimant's teacher told Dr. Greenwald that they had visitors in the classroom before, but claimant had never reacted in that manner. Dr. Greenwald concluded that claimant was "very aware" that he was there to observe her, and she changed her behaviors consistent with that perception.

During the lunch period, claimant calmly lined up with the other children; inserted herself on an already crowded bench in between other children after getting her lunch tray; and had a striking change in her demeanor. Claimant's face "lit up" and she "cheerfully initiated greeting her tablemates." Claimant directed words, gestures, and smiles at the other children. Claimant compared, swapped, and ate items from her lunch box with the other children. Claimant rose from the table and engaged a boy in dialogue and "horseplay."

15. Dr. Greenwald concluded that claimant's "uninhibited and mildly boisterous social communications and interaction with schoolmates in the lunch setting are not consistent with an [sic] non-selective autistic process."

16. Dr. Greenwald noted that autism spectrum disorder is not a "static" disorder. He explained that, in his experience, almost 40 percent of individuals diagnosed with autism at an early age will no longer demonstrate symptoms consistent with autism spectrum disorder as they age. He has found this to be true based on his review of research in the field, as well as in his own personal observations and assessments of patients. The change in symptomology very likely is a result, at least in part, of early interventions, regional center services, and other school-based or social interactions.

17. After reviewing claimant's records, her scores on the various assessments, and in consideration of his overall comprehensive assessment of claimant, Dr. Greenwald's diagnostic impression was that claimant did not meet the diagnostic criteria for Autism Spectrum Disorder under the DSM-5. As a result, claimant was no longer eligible for regional center services.²

LEGAL CONCLUSIONS

1. The Lanterman Act is set forth at Welfare and Institutions Code section 4500 et seq.

2. Welfare and Institutions Code section 4643.5, subdivision (b), provides:

An individual who is determined by any regional center to have a developmental disability shall remain eligible for services from regional centers unless a regional center, following a comprehensive reassessment, concludes that the original determination that the individual has a developmental disability is clearly erroneous.

3. In a proceeding to determine whether a previous determination that an individual has a developmental disability "is clearly erroneous," the burden of proof is on the regional center to establish that the individual is no longer eligible for services. The standard is a preponderance of the evidence. (Evid. Code, § 115.) Thus, IRC has the burden to establish by a preponderance of the evidence that its previous eligibility determination "is clearly erroneous."

² Dr. Greenwald also concluded that claimant had Attention Deficit Hyperactivity Disorder and should be assessed for Selective Mutism and Social Anxiety Disorder.

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 also 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 retardation³, 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.

³ 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) 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. California Code of Regulations, title 17, section 54001 provides:

(a) 'Substantial disability' means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

(A) Receptive and expressive language;

(B) Learning;

(C) Self-care;

(D) Mobility;

(E) Self-direction;

(F) Capacity for independent living;

(G) Economic self-sufficiency.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

(c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

(d) Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.

Evaluation

The Lanterman Act and the applicable regulations set forth criteria that a claimant must meet in order to be eligible for regional center services. Dr. Greenwald completed a comprehensive assessment of claimant that began in 2014 and ended in 2015. He observed her in a clinical setting as well as a school setting. He noted that she did not display the typical behaviors of someone with autism. Many of her scores on the various assessments placed her well-below the minimal cutoff for autism. Although the Vineland-II scales and ADI-R test yielded scores that placed claimant within the cutoff for autism, it appeared that those scores were achieved due to the inaccurate reporting of claimant's mother, given that the scores on those subjective tests were inconsistent with the scores achieved by claimant on the objective WISC-IV test.

Dr. Greenwald did not dispute Dr. Khoie's 2009 diagnosis of autism. However, Dr. Greenwald's comprehensive assessment established that, after almost seven years of ongoing regional center services and school-based interventions, claimant no longer meets the DSM-5 diagnostic criteria for autism spectrum disorder. Nobody appeared on behalf of claimant to produce evidence to contradict Dr. Greenwald's conclusions.

The prior determination that claimant was eligible for regional center services under a diagnosis of autism "is clearly erroneous," in light of Dr. Greenwald's comprehensive re-assessment. As a result, claimant is ineligible for regional center services under the Lanterman Act.

ORDER

Claimant's appeal from the Inland Regional Center's determination that she is no longer eligible for regional center services is denied.

DATED: October 19, 2015

KIMBERLY J. BELVEDERE
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety days.