

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Continuing Eligibility of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2015030953

DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California (OAH), heard this matter in San Bernardino, California, on September 23, 2015.

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

Claimant's mother represented claimant, who was not present at the fair hearing.

The matter was submitted on September 23, 2015.

ISSUE

Was IRC's previous determination that claimant was eligible for regional center services based on a diagnosis of autism, a substantially disabling condition, "clearly erroneous?"

FACTUAL FINDINGS

Jurisdictional Matters

1. In 2011, after IRC conducted an assessment, it determined that claimant was eligible for services based on a diagnosis of autism. IRC re-assessed claimant in 2015 and

on February 23, 2015, IRC notified claimant that he was no longer eligible for regional center services.

2. On March 18, 2015, claimant's mother filed a fair hearing request appealing that decision. This hearing ensued after being continued because the parties required additional time to complete the current Individual Program Plan (IPP).

Diagnostic Criteria for Autism Spectrum Disorder

3. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, (DSM-5), identifies diagnostic criteria necessary to reach the diagnosis of Autism Spectrum Disorder. The diagnostic criteria include: 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 that are not better explained by intellectual disability or global developmental delay. An individual must have a DSM-5 diagnosis of autism spectrum disorder to qualify for regional center services under the eligibility category of autism.

Documents Introduced at Hearing

4. Claimant is an eight-year-old male who was previously determined to be eligible for services based on a diagnosis of autism that was a substantial handicap. He presently receives services through his school district and his private insurer, but no services are being funded by IRC.

5. IRC's 2011 assessment documented claimant's pertinent history. In 2010 his school district performed testing, including administering the ADOS-1, and determined claimant was eligible for special education services under the category of autism. In 2011 when IRC performed its psychological assessment, IRC administered the Vineland Adaptive Behavior Scales - Second Edition, the Childhood Autism Rating Scale, and the Autism Diagnostic Observation Schedule - Module 1 (ADOS-1). Also, the staff interviewed claimant's mother. At that time, claimant was in preschool receiving special education services under the category of autism. His mother was concerned with his poor communication skills and his repetitive behaviors. In 2011 claimant's medical provider assessed claimant in the mildly, moderately autistic range and diagnosed autistic disorder. The IRC report documented the results of its testing, noting that a score of 12 or above was suggestive of a diagnosis of autism and that claimant obtained a score of 12. Claimant made fleeting eye contact, did not want to engage in play, and was reported to fail to develop appropriate peer relationships or interact with other children. IRC concluded that prior testing demonstrated claimant was in the average to borderline range in cognitive ability. His adaptive functioning scores fell within the low to moderately low adaptive range. Claimant exhibited a significant delay in the development of self-help, communication, and learning skills. He did not demonstrate much social awareness or desire for interaction

which was consistent with a diagnosis of autistic disorder. IRC determined that claimant was eligible for services under a diagnosis of autistic disorder.

6. Claimant's medical provider performed a developmental evaluation in 2011, noting the assessment tools utilized, including the ADOS and the Wechsler Preschool and Primary Scale of Intelligence - Third Edition. Claimant's mother also brought a video that showed the behaviors she was concerned about. The evaluator also performed behavioral observations of claimant. Claimant attained a score of 13 on the ADOS, with 12 being the cut off for autism. It was noted to be difficult to administer many portions of the Wechsler exam. On the Childhood Autism Rating Scale, the clinician's scores placed claimant in the mildly-moderately autistic range, whereas his mother's score placed him in the non-autistic range. Claimant scored in the developmentally delayed range on the Child Development Inventory, a parent report that measured claimant's present development. During the evaluation, claimant made poor eye contact, made few attempts to interact, did not engage in pretend play, slapped his hands, lined up the blocks, and was fascinated by ceiling fans and mechanical objects. He spoke mostly gibberish and was unable to perform some of the testing administered. Based on the testing performed, the evaluator's diagnostic impression was autism disorder.

7. Records from claimant's treaters in 2011, 2012 and 2013 documented the therapy and treatment given.

8. IRC's 2015 IPP documented the activities of daily living that claimant could perform by himself, and those for which he needed assistance. Claimant used three or four word sentences to communicate. He could ask questions and could tell his mother about his school day, although he was not able to give great details. He played with other children and had two or three friends at school. He is very friendly but has problems with personal space according to his mother. Claimant's mother also reported that he continues to display inappropriate social behaviors, for example tantrumming, if he does not get his way. His mother also reported that he "does not take change well" and is unaware of his personal safety. Claimant likes attention and will tattle on his peers. Claimant receives medical treatment with a specialist because of his autism diagnosis but takes no medication. Claimant receives monthly SSI benefits.

9. Claimant's 2015 Individualized Education Program (IEP) prepared by his school district identified his primary disability as autism and his secondary disability as speech or language impairment. However, IRC questioned those determinations since claimant's strengths were identified as his being "very interactive with his classmates while he plays . . . and playing with peers during recess." The IEP noted that claimant "is distracted and his inattention and impulsively [sic] do impede his progress however he does not always answer the specific WH? but is almost always on-topic if not distracted by peers." He was noted to be "impulsive at times," but he "follows classroom routines and procedures well and he raises a quiet hand before speaking most of the time. He continues to be extremely distracted by others and their activities and he often reports or 'tattles' on others that have nothing to do with him." During the IEP meeting, the school psychologist discussed claimant's assessments, noting that he exhibited some behaviors at home that he

did not exhibit at school, specifically hand flapping. Other members of the IEP team shared their observations. Claimant's mother had no questions and was pleased with claimant's progress. The IEP noted that claimant spends 201 minutes in specialized academic instruction, one hour per day mainstreamed in a general education math class, and 120 minutes per week receiving language and speech services in a separate classroom.

10. Claimant's January 5, 2015, psychoeducational evaluation, conducted by his school district, noted that claimant has been receiving special education academic services and speech/language services since preschool. At that time, he was attending a portion of his day in the general education classroom for math instruction. The report noted the assessments administered, but the ADOS-2 was not one of them. On cognitive testing, claimant received scores in the borderline and average ranges. His achievement test scores were in the average to low average ranges. Claimant's scores on auditory processing tests fell within the average to deficit range. Claimant was observed in his classroom. He worked independently, completed assignments, with prompting he went on to the next task, but appeared easily distracted by visual and verbal stimuli in the classroom environment. Brief hand flapping was observed when the class lined up for recess. Claimant was observed on the playground to initiate play with peers, to use a distal point that was well coordinated with gaze to distract a peer's attention and "to really enjoy playing with others." During the interview portion of the assessment, claimant appeared to show much more difficulty understanding questions that moved beyond his age, birthday, grade and teacher. His answers or comments frequently followed his own areas of interest.

Claimant's scores on the Autism Spectrum Rating Scales revealed that his teacher scored him in the average, elevated, slightly elevated and variable ranges; for a total score of elevated. His parents gave him scores in the average, elevated and very elevated ranges; for a total score of slightly elevated. The input from claimant's teacher and mother indicated elevated levels of concern related to behavioral characteristics similar to a child with a diagnosis of an autism spectrum disorder. Claimant's reported difficulty with behaviors related to socialization and social/emotional reciprocity, with his parent indicating concerns with stereotypy, behavioral rigidity, and sensory sensitivity. Both individuals indicated elevated concern regarding claimant's atypical language. The report concluded that claimant continued to meet eligibility for special education services due to autism and speech language impairment. Claimant continued "to display a set of behaviors, including delays in communication and socialization, and stereotypical behaviors, which are like those of children who have a diagnosis of autism."

11. IRC's February 5, 2015, psychological assessment, performed by Paul Greenwald, Ph.D., contained a summary of the previous assessments performed and documented the results of the current assessments. Dr. Greenwald administered the Kaufman Brief Intelligence Test, 2nd Edition, that noted verbal scores in the average range, nonverbal scores in the low average range, and an IQ composite score in the low average range. The Wechsler Preschool and Primary Scale of Intelligence - 4th Edition Block Design Subtest had scores in the average range. The Wechsler Intelligence Scale for Children 4th Edition Digit Span Subtest had scores in the borderline range. The Autism Diagnostic Observation Schedule - 2nd Edition (ADOS-2) had a total score of 5, with 9 being the autism

cut off score and 8 being the autism spectrum cutoff score. Claimant also had a low level of autism spectrum disorder related symptoms. Claimant's score on the Childhood Autism Rating Scale - 2nd Edition was 26, with 30 being the minimal to mild moderate autism spectrum symptoms cutoff score. Claimant's scores on the Vineland II Adaptive Behavior Scale were in the moderately low, low, adequate and moderately high ranges.

Dr. Greenwald also observed claimant, noting that he readily transitioned; demonstrated mild visual sensory distractibility; was amenable to redirection; did not demonstrate repetitive or stereotyped motor actions; and had no apparent restrictions in visual, auditory acuity, gross/fine motor functions, attention and concentration, comprehension of test instructions, or motivation necessary for valid testing. Claimant's cognitive scores suggested attenuated powers of attention and concentration. His scores on the ADOS-2, "the 'gold standard' for observational assessment of autism spectrum disorder," noted mild deficits in areas of communication and reciprocal social interaction but did not result in scores in the autism spectrum disorder range. Moreover, claimant shared enjoyment; had no restrictions in the amount of reciprocal social communication produced; and engaged in activities with a well-modulated, flexible gaze, demonstrating a robust, friendly, cooperative demeanor. Claimant had mild iteration of tactile sensory seeking behavior, repetitively rubbing his finger across the ripped cover of a book. Claimant responded to the examiner's initiatives in ways that added and built on what was being said, remaining relevant and facilitating the dialogue. Claimant also used his words in imaginative/social imitative play. Dr. Greenwald concluded that claimant's cognitive tests suggested attenuated powers of attention and concentration, but his autism test results did not approach or meet the critical cutoff criteria for an autism spectrum disorder diagnosis. Dr. Greenwald concluded that claimant was not eligible for regional center services under autism diagnostic criteria as defined by the Lanterman Act, that attention deficit hyperactivity disorder should be ruled out, and that claimant should have an occupational therapy evaluation addressing questions of mild tactile sensory seeking. Dr. Greenwald also recommended literature for claimant's parents to read.

12. The May 12, 2015, Initial Assessment and Recommendation Report from Easter Seals Autism Services, noted that claimant was referred for an evaluation to determine his eligibility and recommendations for an intensive adaptive behavior analysis program. Claimant's mother reported tantrum behavior when claimant does not get his way, and a 20 minute tantrum was observed during the evaluation. His mother also reported hand flapping but that was not observed. Claimant's scores on the Vineland were in the moderately low to adequate ranges. Based on the assessment, Easter Seals recommended parent training and consultation "at this time." Seventy two hours of training would be given over a six month period.

Witness Testimony

13. Dr. Greenwald's testimony was consistent with his report. He explained that the goal of intensive intervention and therapy is to address the behaviors caused by autism and, in some cases, the intervention successfully reduces or eliminates those behaviors to the point that the individual no longer has a diagnosis of autism. Dr. Greenwald explained that

such is what happened here. Moreover, Dr. Greenwald noted discrepancies in claimant's IEP in that there are many references to claimant's social abilities and interactions with peers, which are contrary to a finding of autism. Dr. Greenwald testified that "autistic like behaviors" do not necessarily indicate that an individual has autism. He acknowledged that claimant does have a few autistic like behaviors, but overall, claimant's test results indicate that he does not have autism. Dr. Greenwald explained that eligibility for school services under a category of autism are not the same as eligibility for regional center services under a diagnosis of autism spectrum disorder. He also noted that the diagnosis of autism by claimant's medical provider in 2011 was consistent with IRC's diagnosis in 2011. However, based upon IRC's reevaluation in 2015, claimant no longer has that diagnosis, as defined by the Lanterman Act, making him ineligible for regional center services.

14. Claimant's mother testified about her concerns of regression should claimant no longer be eligible for regional center services. Claimant's mother testified that she believed IRC has made a mistake since her son is still eligible for services with his provider, Easter Seals, and his school district. She testified that she believes he will continue to improve with these services. But as Dr. Greenwald explained, IRC's determination is separate and apart from claimant's medical provider's determination, the school's determination, or the ABA determination made by Easter Seals.

LEGAL CONCLUSIONS

Burden of Proof

1. In a proceeding to determine whether or not the previous determination that an individual has a developmental disability was 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.)

Statutory Authority

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

3. Welfare and Institutions Code section 4501 states:

The State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. Affecting hundreds of thousands of children and adults directly, and having an important impact on the lives of their families, neighbors and whole communities, developmental disabilities present social, medical, economic, and legal problems of extreme importance . . .

An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community. To the maximum extent feasible, services and supports should be available throughout the state to prevent the dislocation of persons with developmental disabilities from their home communities.

4. Welfare and Institutions Code section 4512, subdivision (a) defines “developmental disability” as follows:

“Developmental disability” means a disability which originates before an individual attains age 18, continues, or can be expected to continue indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

5. Welfare and Institutions Code section 4643.5, subdivision (b) states:

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.

6. California Code of Regulations, title 17, section 54000 provides:

(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.”

7. 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

8. The Lanterman Act and the applicable regulations set forth criteria that a claimant must meet in order to qualify for regional center services. Although IRC initially diagnosed claimant with autism in 2011, his score was on the low end of the autism cutoff. Four years later, after claimant had been receiving services in school and through his medical provider, IRC re-assessed him and determined he was no longer eligible. As Dr. Greenwald credibly explained, the intensive therapies given to claimant the past four years have ameliorated his autistic like behaviors such that his test scores now fall below the autism cutoff scores. No evidence was introduced demonstrating that IRC’s 2015 evaluation was incorrect or that the test results were invalid. In fact, the IEP supported that determination.

Moreover, the fact that a school is providing services to a student under the category of autism is insufficient to establish eligibility for regional center services. Schools are governed by California Code of Regulations, title 5, and regional centers are governed by

California Code of Regulations, title 17. Title 17 eligibility requirements for services are much more stringent than those of title 5.

None of the documents introduced in this hearing demonstrated that claimant presently has a diagnosis of autism that causes a substantial handicap. IRC met its burden of proving that the prior determination that claimant was eligible for services is clearly erroneous. As such, claimant's appeal of IRC's determination that he is no longer eligible to receive services, must be denied.

ORDER

Claimant's appeal from Inland Regional Center's determination that he is no longer eligible for regional center services and supports is denied. Claimant is ineligible for regional center services and supports under the Lanterman Developmental Disabilities Services Act.

DATED: October 7, 2015

_____/s/_____
MARY AGNES MATYSZEWSKI
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.