

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2015071328

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on October 21, 2015.

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

Claimant's mother appeared on behalf of claimant.

The matter was submitted on October 21, 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 is a three-year old female that had been receiving services from IRC under the Early Start Program. As part of the transition into regular IRC services for children over three years of age, IRC Staff Psychologist Edward Frey, Ph. D., conducted a

psychological evaluation of claimant. Dr. Frey concluded that claimant did not meet the diagnostic criteria for Autism Spectrum Disorder (autism) as specified in the Diagnostic and Statistical Manual for Psychological Disorders, Fifth Edition (DSM-5).

2. On July 16, 2015, IRC notified claimant that she was not eligible for regional center services under the Lanterman Act because the records that claimant's mother provided to IRC, and Dr. Frey's psychological evaluation, did not establish that claimant had a substantial disability as a result of autism.

3. On July 27, 2015, claimant's mother filed a Fair Hearing Request appealing IRC's determination. IRC gave claimant's mother time to submit additional records regarding claimant. IRC met with claimant's mother on August 18, 2015, to discuss the records and claimant's fair hearing request.

4. The informal meeting did not change IRC's position that claimant was not eligible for services under the Lanterman Act, and this hearing ensued.

Diagnostic Criteria for Autism

5. 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. Thus, to make a comorbid diagnosis, an individual's social communication should be below that expected for their general developmental level. According to the DSM-5, manifestations of autism vary greatly depending on the severity of the condition; the developmental level of the individual; and the chronological age of the individual.

IRC's Psychological Evaluation of Claimant

6. Dr. Frey performed a psychological evaluation of claimant on June 17, 2015. Dr. Frey used the following tests to evaluate claimant: the Childhood Autism Rating Scale – 2nd Edition (CARS2-ST) and the Vineland Adaptive Behavior Scales, Second Edition (Vineland II). Dr. Frey also reviewed claimant's clinical records on file with IRC, including psychological assessments provided by claimant's mother that determined she met the criteria for autism.

7. Dr. Frey made the following observations:

[Claimant] presents as a very verbal child with strong expressive language skills. There is some mild level of echolalia noted at

times. On the other hand, [claimant] has a high level of spontaneous speech as well.

Receptively, [claimant] appeared to understand most all commands and directions.

[Claimant] appears to be a happy child who relates well with others. During the assessment, her eye contact was quite strong. She points and uses gestures.

[Claimant] seemed to show a high level of enjoyment in the overall process. She appeared to establish rapport. No repetitive or restrictive behaviors were noticed other than some of the language repetition. There are no hand or finger mannerisms. Words did not appear stereotyped. There were no unusual sensory interests noted in play materials.

8. Dr. Frey noted that claimant's results on the Vineland-II indicated that claimant was well within the average range in the areas of communication, daily living, socialization, and motor skills. Her overall adaptive behavior composite score was 88, which is also well above the average range for children of her age. Dr. Frey concluded that, overall, claimant's adaptive strengths, especially in the areas of communication and socialization, "strongly argue against the presence of any sort of substantially handicapping developmental disability such as [autism]."

9. The CARS2-ST is a rating scale specifically developed to identify children with autism, as distinguished from other developmental disorders. The ratings are based on clinical observation and reports by the caregiver. Dr. Frey determined that claimant exhibited no problems in the areas of relating to people, imitation, object use, visual responses, listening responses, fear or nervousness, and intellectual responses. He noted that, based on the reporting of claimant's mother, claimant may have excessively emotional responses once per day; moderate difficulty in adapting to change; and mild to moderate issues in verbal communication. Claimant's overall score indicated that she had "minimal to no features" of autism.

10. Dr. Frey noted in his diagnostic considerations that a diagnosis of autism requires persistent deficits in two main areas. The first area is social communication and interaction. The second area is the presence of at least two restricted or repetitive patterns of behavior, interest, or activities. Claimant did not exhibit persistent deficits in either of the two categories.¹

¹ Dr. Grey also concluded that, despite her strong communication skills, claimant may meet the diagnostic criteria for Language Disorder as specified in the DSM-5 because of some issues regarding the pragmatics of her speech.

11. After reviewing claimant's records, her scores on the Vineland-II and CARS2-ST, and in consideration of his overall comprehensive assessment of claimant, Dr. Frey's diagnostic impression was that claimant fell below the clinical cutoff for autism. In addition, he concluded that claimant's "social adaptive functioning indicates all domains within the average range. [Claimant] is particularly strong in the areas of communication and socialization, which certainly would be atypical in a case of autism." Ultimately, Dr. Frey determined that claimant did not meet the diagnostic criteria for Autism Spectrum Disorder under the DSM-5, and thus, was ineligible for regional center services.

Testimony of Michelle Lindholm, Ph. D

12. Michelle Lindholm, Ph. D, testified on behalf of IRC. Dr. Lindholm is a clinical psychologist for IRC. In addition to holding her doctorate in psychology, she is a board-certified Behavioral Analyst at the doctorate level.

13. Dr. Lindholm reviewed Dr. Frey's psychological evaluation of claimant. Based on her review of Dr. Frey's report, she concurred that claimant did not appear to meet the diagnostic criteria for autism under the DSM-5. Moreover, even if claimant did have autism, there is no evidence that claimant exhibited a substantial disability in three or more areas of major life activities as appropriate for her age.²

14. Dr. Lindholm reviewed documents provided by claimant's mother. These document's included an Individualized Education Plan (IEP) and Multidisciplinary Team Assessment Report prepared by claimant's school in July 2015 for the purposes of obtaining special education services; two letters from Mario Gaspar de Alba, M.D. (Dr. Gaspar), one dated July 8, 2015, and the other undated; and a letter from Ricki Robinson, M.D., M.P.H., dated October 7, 2015. Dr. Lindholm stated that neither Dr. Gaspar's letters nor Dr. Robinson's letter changed her conclusion regarding claimant's diagnosis.

Dr. Lindholm explained that the school's evaluation of claimant was conducted using a more lenient criteria because that evaluation is conducted under the regulations contained in the California Code of Regulations, Title 5, and not Title 17, which are the regulations relevant to the Lanterman Act. Specifically, the Title 5 regulations do not require a finding of "substantial disability," but such a finding is required for IRC services. Dr. Lindholm explained that even though a person may meet the criteria for autism in order to obtain special education services, that same person may not meet the criteria for autism under the DSM-5 for that reason.

The Multidisciplinary Team Assessment Report concluded that claimant had autism. This conclusion was based on the following "eligibility considerations": engagement in repetitive activities and stereotyped movements; resistance to environmental change; and unusual responses to sensory experiences. Dr. Lindholm pointed out, however, that the team

² Dr. Lindholm identified the areas of major life activities appropriate for claimant's age as receptive and expressive language; learning; self-care; mobility; and self-direction.

members observed that claimant was actively engaged during testing; utilized her communication skills very well; warmed up to the team during testing; and had no difficulties interacting with anyone throughout the process. Moreover, there were no concerns noted regarding adaptive behavior; claimant fell within the average range for children of her age. Although claimant did experience some deficits in fine motor skills, Dr. Lindholm pointed out that claimant did not display any deficits in speech or motor production, voice, or oral motor skills. Dr. Lindholm explained that these observations are “highly inconsistent” with a diagnosis of autism and “strongly undercut” any claim of an autism diagnosis.

15. Regarding the letters from Dr. Gaspar, Dr. Lindholm explained that neither letter established eligibility for Lanterman Act services. Dr. Linholm cited the following excerpt from Dr. Gaspar’s undated letter:

[Claimant] screened positive for autism using the MCHAT-Revised. I interacted with [claimant] for just over an hour and determined she meets the DSM-5 criteria for Autism Spectrum Disorder. The diagnosis of Autism Spectrum Disorder is a clinical diagnosis for which there is no diagnostic tool. There are assessment tools that may be used to aid in the diagnosis but these were not necessary.

Dr. Lindholm explained that this statement is not accurate because, although it is true that there is no specific test that will diagnose autism, there are a host of assessment tools that need to be used to make a correct diagnosis of autism. Moreover, in the letter from Dr. Gaspar dated July 8, 2015, claimant’s score on the MCHAT-revised test showed that she was in the “low-risk” range for autism. The MCHAT score that Dr. Gaspar reflected on his report is therefore inconsistent with a DSM-5 diagnosis of autism.

16. Finally, the letter from Dr. Robinson was not helpful to Dr. Lindholm regarding an eligibility determination because, although Dr. Robinson concluded that claimant had autism, she did not specify what she used as the basis for her determination. Dr. Robinson stated that claimant “was seen,” on August 5, 2015, but did not state whether she directly observed claimant or relied upon other doctor’s observations in order to reach her conclusions; if Dr. Robinson reviewed previous assessments of claimant; or if Dr. Robinson reviewed claimant’s medical records. Dr. Lindholm explained that a comprehensive review of all past evaluations is a necessary tool in making as accurate of a diagnosis as possible when it comes to autism.

Testimony of Claimant’s Mother

17. Claimant’s mother testified on behalf of claimant. She disagreed with Dr. Frey’s assessment. She said that the assessment completed by Dr. Frey only took an hour, and that he did not test any “fine motor skills” that would show the difficulties claimant had with simple activities. She also said that claimant did not show a high level of enjoyment in

the testing process as Dr. Frey described. To the contrary, claimant was “very fearful.” She also said that it is difficult to reconcile the fact that Dr. Frey recommended speech therapy for claimant, but concluded that she had excellent communication skills.

18. Claimant’s mother testified that she has been present for each assessment completed by any doctor who has ever assessed claimant. Regarding the evaluation of claimant by Dr. Gaspar, claimant’s mother testified that Dr. Gaspar immediately saw evidence of autism and probably felt he did not need to do any additional testing because it was “obvious.” Regarding Dr. Robinson’s evaluation of claimant, claimant’s mother testified that Dr. Robinson’s evaluation of claimant took place over “four days.” However, when asked if there were any additional documents regarding the testing completed by either Dr. Gaspar or Dr. Robinson to support claimant’s diagnosis of autism, claimant’s mother said that there was no additional documentation to provide.

19. Claimant’s mother testified that claimant has a two year old sister and a one-year old brother, and that she is “awesome” in every possible way. But, since the beginning of her life, there has “always been something off” about claimant. That was the reason that she and claimant’s father started “this whole process” in the first place.

20. Claimant’s mother said that claimant cannot do the things that her two-year old sister can do. For example, claimant cannot open and close zippers; she cannot put on her socks or shoes; she cannot put a string through a bead; she cannot write; she cannot brush her teeth; and she cannot properly close buttons or snaps. Claimant also “gets into people’s personal space” and hides “all the time.” Although claimant may exhibit good social skills, claimant’s mother said that most of her social interaction is either “faked” emotions or echolalia, and not claimant actually interacting appropriately. Claimant’s mother said that she may not be a licensed psychologist, but that she observes claimant on a daily basis and knows that claimant has limitations in fine motor skills and socialization.

21. Claimant attends the Autism Discovery Center at Rady’s Children Hospital. She gets applied behavioral analysis (ABA) therapy five days a week at the request of her parents. Claimant also receives speech and occupational therapy. Claimant’s mother wants IRC services for claimant because she believes that claimant has autism and is benefitting from the intensive ABA therapy, speech, and occupational services that claimant has been receiving. Claimant’s mother hopes that the interventions will benefit claimant to the point where, someday, claimant will no longer need services.

LEGAL CONCLUSIONS

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

2. 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.)

3. 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 that 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.*)

4. 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 [that] 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.

5. 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.

6. The eligibility criteria for receiving special education under the Education Code are not the same as the eligibility criteria for regional center services under the Lanterman Act. (Cal. Code of Regs, tit. 5, section 3030.)

Evaluation

7. 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. Frey completed a comprehensive assessment of claimant that showed she did not exhibit persistent deficits in social communication and interaction and did not have restricted or repetitive patterns of behavior, interest, or activities. These are the two main features of autism. Dr. Frey's testing results, overall, are inconsistent with the features of autism under the diagnostic criteria listed in the DSM-5, as confirmed by Dr. Lindholm.

Furthermore, although there is some evidence of conclusions reached by Dr. Gaspar and Dr. Robinson that claimant has autism, insufficient evidence was presented to support their conclusions. As Dr. Lindholm explained, there are many assessment tools used to diagnose autism. Dr. Gaspar's undated letter concluding that "diagnostic tools were not necessary" in order to reach his conclusion that claimant had autism calls into question the validity of his conclusion. Although Dr. Gaspar stated in his letter that claimant met the diagnostic criteria for autism under the DSM-5, he referred only to claimant's score on the MCHAT revised, and did not address the specific DSM-5 criteria. Similarly, the letter from Dr. Robinson did not explain either her testing protocol or what information she used to reach her conclusion that claimant had autism. Consequently, Dr. Gaspar's letters and Dr. Robinson's letters are of limited value. Dr. Frey and Dr. Lindholm's opinions are determined to be more credible.

Claimant does not meet the diagnostic criteria under the DSM-5 for autism. Even if she did, the evidence did not establish that claimant has a substantial disability in three or more major life activities. As a result, claimant is ineligible for regional center services, at this time, under the Lanterman Act.

ORDER

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

DATED: October 30, 2015

_____/s/_____
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.