

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

DARYLN M.,

Claimant,

vs.

SOUTH CENTRAL LOS ANGELES REGIONAL

CENTER,

Service Agency.

OAH No. 2012040589

DECISION

Administrative Law Judge Glynda B. Gomez, Office of Administrative Hearings, heard this matter on June 5, 2012, in Los Angeles, California. Claimant Daralyn M. (Claimant) was represented by her parents. Claimant did not attend the hearing. South Central Los Angeles Regional Center (SCLARC or Service Agency) was represented by Fair Hearings Coordinator Johanna Bhatia-Arias.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on June 5, 2012.

ISSUE

Whether Claimant has a developmental disability entitling her to receive regional center services.

FACTUAL FINDINGS

1. Claimant is a 16-year old young woman (born August 6, 1995). Claimant was referred to the SCLARC by her public defender. She is incarcerated at Eastlake juvenile facility. She has a history of drug abuse, truancy and running away from home. Claimant's recent incarceration is for assaulting her pregnant sister. Her parents are concerned about her behavior and her mood swings. She seeks eligibility for regional center services under the categories of Mental Retardation or under the "fifth category" of eligibility.¹

2. The Service Agency determined that Claimant is not eligible for regional center services because she does not meet the criteria set forth in Welfare and Institutions Code section 4512 and California Code of Regulations, title 17, sections 54000 and 54001. Based on this determination, the Service Agency denied services to Claimant. For the reasons set forth below, Claimant's appeal is granted.

COURT ORDERED ASSESSMENT

3. An initial psychological assessment of Claimant was conducted by court appointed psychologist Douglas B. Allen (Allen) on November 7, 2011.² Subsequently, Claimant's public defender requested that cognitive testing be performed to determine

¹ The fifth category refers to a condition that is closely related or similar to mental retardation or requires treatment similar to that required for mentally retarded individuals.

² The initial assessment report was not offered in evidence at the hearing.

whether or not Claimant had Mental Retardation. Allen prepared an addendum to the November 7, 2011 report which was admitted in evidence as Exhibit 6.

4. On November 30, 2011, Allen administered the Wechsler Adult Intelligence Test-Fourth Edition (WAIS-IV) and the Vineland Adaptive Behavior Scales, Second Edition (VABS-II) to Claimant. He also conducted a psychological interview of Claimant. The WAIS-IV is a cognitive measure from which a full scale intelligence quotient (FSIQ) can be calculated. Claimant's scores on subtests ranged from the mildly mentally deficient to the borderline range. She received a standard score of 63 on the verbal comprehension index, 62 on the perceptual reasoning index, 80 on the working memory index and 84 on the processing speed index. Her FSIQ was calculated as 66, which is within the mildly mentally retarded range.

5. The VABS-II was administered to Claimant, but not to her parents or any caregiver. Claimant was incarcerated at the time, and her home telephone number had been disconnected. Allen was unable to locate her parents for participation in the testing. On the VABS-II, Claimant received a standard score of 67 in the communication domain, which is within the low range, a standard score of 85 in daily living skills and a standard score of 73 in socialization, both of which are in within the moderately low range. Claimant's composite adaptive skills score was 75, which is within the moderately low range. Allen noted that the score might be an overestimate of Claimant's skills because she was given partial credit for some answers when she answered "I don't know."

6. Allen noted that Claimant's lowest score was in the communication domain. He found that her communication scores were depressed in part due to her very low academic capabilities. He noted that she has problems understanding the non-literal meaning of phrases and has difficulty following or giving complex directions. Allen also

noted that Claimant's strongest area is in daily living skills. She is able to do some household chores, use some kitchen appliances, prepare snacks and take the bus for ten miles. However, he also noted that she had never prepared a meal, held a part-time job or earned money. In the area of socialization, Claimant is able to engage in small talk, keep a distance between herself and others, play board games and go out in the evening with adult supervision. Claimant acknowledged difficulties with regulating her emotions, getting along with others and expressing remorse.

SCLARC ASSESSMENT

7. On February 9, 2012, SCLARC vendor psychologist Thomas L. Carrillo (Carrillo) conducted a psychological assessment of Claimant. Carrillo was not aware of the assessment performed by Allen. As part of his assessment, Carrillo conducted an interview with Claimant and her parents, clinical observation and again administered the WAIS-IV and VABS-II, as well as the Wide Range Achievement Test-Revision Three (WRAT-3).

8. On Carrillo's administration, Claimant scored consistently within the borderline range on the WAIS-IV. She received a standard score of 74 in verbal comprehension, a 71 in perceptual reasoning, a 77 in working memory, and an 84 in processing speed. Carrillo calculated a FSIQ of 71 from Claimant's performance on the WAIS-IV.

9. Carrillo administered the WRAT-3 to further assess Claimant's cognitive ability based upon her academic achievement. In the area of reading, Claimant received a standard score of 60 which is at the second grade level, in spelling she received a standard score of 71, which is at the third grade level and in math, Claimant received a standard score of 55, which is at the third grade level.

10. Carrillo administered the VABS-II to assess Claimant's adaptive skills. Claimant and her parents completed the scales. On the VABS-II, Claimant received a standard score of 68 in communication. The score represented an age equivalent of 7.6 years in receptive language and 5.7 years in expressive language. Carrillo opined that Claimant had a mild delay in communication skills. Carrillo noted that Claimant has adequate pronunciation skills, but her conversation content is "impoverished and representative of an individual younger than her chronological age." He opined that Claimant's communication skills deficit is consistent with her impaired cognitive ability.

11. Claimant received a standard score of 79 in daily living skills and a standard score of 70 in socialization. Both scores are within the borderline range of delay. Carrillo noted that Claimant's parents stated that she required constant supervision and that she had mood swings.

12. Carrillo diagnosed Claimant with Borderline Intellectual Functioning. This means that while Claimant's FSIQ and adaptive skills are below average, she is too high functioning to be considered mentally retarded.

13. Carrillo was not aware that Allen had assessed Claimant within the previous six months using the WAIS-4 and the VABS-II. Carrillo acknowledged that there might be a "practice effect"³ from the previous administration of the WAIS-IV. He also acknowledged that on the WAIS-IV, there is a five point margin of error on the FSIQ calculation. He opined that the FSIQ of 66 calculated by Allen and the FSIQ of 71 that he calculated were within the margin of error and both were valid.

³ An increase in test score as a result of having seen the test questions in a recent prior administration.

14. Claimant has significant functional limitations in receptive and expressive language, learning, and social and interpersonal relations based upon the assessment results obtained by both Allen and Carrillo.

LEGAL CONCLUSIONS

1. Claimant established that she suffers from a developmental disability entitling her to regional center services.

2. Throughout the applicable statutes and regulations (Welf. & Inst. Code, §§ 4700 - 4716, and Cal. Code Regs., tit. 17, §§ 50900 - 50964), the state level fair hearing is referred to as an appeal of the Service Agency's decision. Where a claimant seeks to establish his eligibility for services, the burden is on the appealing claimant to demonstrate that the Service Agency's decision is incorrect. Claimant has met her burden of proof in this case.

3. To be eligible for regional center services, a claimant must have a qualifying developmental disability. As applicable to this case, Welfare and Institutions Code section 4512, subdivision (a), defines "developmental disability" as:

a disability which originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. . . .

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 individuals

with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.

4. To prove the existence of a developmental disability within the meaning of Welfare and Institutions Code section 4512, a claimant must show that she has a "substantial disability." Pursuant to Welfare and Institutions Code section 4512, subdivision (l):

"Substantial disability" means the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

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

5. California Code of Regulations, title 17, section 54001 states, in pertinent part:

- (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.

6. In addition to proving a "substantial disability," a claimant must show that her disability fits into one of the five categories of eligibility set forth in Welfare and Institutions Code section 4512. The first four categories are specified as: mental retardation, epilepsy, autism and cerebral palsy. The fifth and last category of eligibility is listed as "disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation." (Welf. & Inst. Code, § 4512, subd. (a).)

7. While the Legislature did not define the fifth category, it did require that the qualifying condition be "closely related" (Welf. & Inst. Code, § 4512, subd. (a).) or "similar" (Cal. Code. Regs., tit. 17, § 54000) to mental retardation or "require treatment similar to that required for mentally retarded individuals." (Welf. & Inst. Code, § 4512, subd. (a).) The definitive characteristics of mental retardation include a significant degree of cognitive and

adaptive deficits. Thus, to be “closely related” or “similar” to mental retardation, there must be a manifestation of cognitive and/or adaptive deficits which render that individual’s disability like that of a person with mental retardation. However, this does not require strict replication of all of the cognitive and adaptive criteria typically utilized when establishing eligibility due to mental retardation (e.g., reliance on I.Q. scores). If this were so, the fifth category would be redundant. Eligibility under this category requires an analysis of the quality of a claimant’s cognitive and adaptive functioning and a determination of whether the effect on his performance renders him like a person with mental retardation.

Furthermore, determining whether a claimant’s condition “requires treatment similar to that required for mentally retarded individuals” is not a simple exercise of enumerating the services provided and finding that a claimant would benefit from them. Many people could benefit from the types of services offered by regional centers (e.g., counseling, vocational training or living skills training). The criterion is not whether someone would benefit. Rather, it is whether someone’s condition requires such treatment.

8. In order to establish eligibility, a claimant’s substantial disability must not be solely caused by an excluded condition. The statutory and regulatory definitions of “developmental disability” (Welf. & Inst. Code, § 4512 and Cal. Code. Regs., tit. 17, § 54000) exclude conditions that are solely physical in nature. California Code of Regulations, title 17, section 54000, also excludes conditions that are solely psychiatric disorders or solely learning disabilities. Therefore, a person with a “dual diagnosis,” that is, a developmental disability coupled with a psychiatric disorder, a physical disorder, or a learning disability, could still be eligible for services. However, someone whose conditions originate from just the excluded categories (psychiatric disorder, physical disorder, or learning disability, alone

or in some combination), and who does not have a developmental disability would not be eligible.

9. As more fully discussed below, a diagnosis of Mental Retardation requires administration of an IQ test eliciting a FSIQ score of 70 or below. However, it is important to look at the configuration of subtest scores; Mental Retardation profiles are flat, without areas of weakness and strength. Cognitive functioning will be significantly below others of similar age, and there will also be significant deficits in adaptive functioning. Deficits in adaptive functioning can result from many factors other than cognitive deficits, such as lack of motivation and mental illness. Students with learning disabilities may have problems with social interaction due to difficulty reading social cues.

10. The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revised (DSM-IV-TR) describes Mental Retardation as follows:

The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.

General intellectual functioning is defined by the intelligence quotient (IQ or IQ-equivalent) obtained by assessment with one or more of the standardized, individually administered intelligence tests (e.g., Wechsler Intelligence Scales for Children—Revised, Stanford-Binet, Kaufman Assessment Battery for Children). Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean). It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior. Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning. . . . When there is significant scatter in the subtest scores, the profile of strengths and weaknesses, rather than the mathematically derived full-scale IQ, will more accurately reflect the person's learning abilities. When there is a marked discrepancy across verbal and performance scores, averaging to obtain a full-scale IQ score can be misleading.

Impairments in adaptive functioning, rather than a low IQ are usually the presenting symptoms in individuals with Mental Retardation. Adaptive functioning refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting. Adaptive functioning may be influenced by various factors, including education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with Mental Retardation. Problems in adaptation are more likely to improve with remedial efforts than is the cognitive IQ, which tends to remain a more stable attribute.

(DSM-IV-TR at pp. 39 - 42.)

11. Regarding Mild Mental Retardation (I.Q. level of 50-55 to approximately 70), the DSM-IV-TR states:

[Persons with Mild Mental Retardation] typically develop social and communication skills during the preschool years (ages 0-5 years), have minimal impairment in sensorimotor areas, and often are not distinguishable from children without Mental Retardation until a later age. By their late teens, they can acquire academic skills up to approximately the sixth-grade

level. By their adult years, they usually achieve social and vocational skills adequate for minimum self-support, but may need supervision, guidance, and assistance, especially when under unusual social or economic stress. With appropriate supports, individuals with Mild Mental Retardation can usually live successfully in the community, either independently or in supervised settings.

(Id. at pp. 42 - 43.)

12. Regarding the differential diagnosis of Borderline Intellectual Functioning (IQ level generally 71 to 84), the DSM-IV-TR states:

Borderline Intellectual Functioning describes an IQ range that is higher than that for Mental Retardation (generally 71-84). As discussed earlier, an IQ score may involve a measurement error of approximately 5 points, depending on the testing instrument. Thus, it is possible to diagnose Mental Retardation in individuals with IQ scores between 71 and 75 if they have significant deficits in adaptive behavior that meet the criteria for Mental Retardation. Differentiating Mild Mental Retardation from Borderline Intellectual Functioning requires careful consideration of all available information.

(Id. at p. 48.)

13. As set forth in Factual Finding 5, 6, 9-11, and 14, Claimant established that she has functional limitations in the areas of expressive and receptive language, learning

and self-direction. Claimant has significant impairments in her ability to communicate. She is sixteen years old and has the expressive language skills equivalent to that expected of a child 5.7 years old. Similarly, her receptive language skills are equivalent to those expected of a child 7.6 years child. These skills were described by Carrillo as "impoverished" and "representative of an individual must younger than her chronological age." In the area of learning, Claimant's academic abilities were at the second/third grade level as measured by Carrillo on the WRAT-3. In the area of self-direction, claimant requires constant supervision, is unable to follow or give complex directions and has difficulties regulating her emotions and getting along with others. Accordingly, Claimant established that her condition results in a substantial disability for her as defined by Welfare and Institutions Code section 4512, and California Code of Regulations, title 17, section 54001.

14. On Carrillo's testing, Claimant received a FSIQ of 71, which is within the borderline range for intellectual disability. In Allen's earlier testing, without the potential for "practice effect," Claimant received a FSIQ score of 66, which is within the range of Mild Mental Retardation. Her adaptive skills also fall within the low to borderline range when measured by the psychologists using both ratings provided by her parents and her self ratings. Her most pronounced deficits are in communication and learning, but she demonstrated weaknesses across all adaptive skill areas.

15. The preponderance of the evidence establishes that Claimant has Mild Mental Retardation. The DSM-IV has three criterion for the diagnosis of Mental Retardation. Claimant meets Criterion A which requires significant subaverage general

intellectual functioning, by reason of her FSIQ.⁴ Claimant meets Criterion B-significant limitations in adaptive functioning in at least two designated areas by reason of the deficits in her communication and functional academic skills as shown by her performance on the VABS-II. With regard to Criterion C, Claimant is under the age of 18 years and therefore meets the final criterion that the condition manifest itself by that age.

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16. The weight of the evidence supports a finding that Claimant is eligible to receive regional center services.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Claimant's appeal is granted. Service Agency shall accept Claimant as a client.

DATED: July 9, 2012

_____/s/_____

GLYNDA B. GOMEZ

Administrative Law Judge

Office of Administrative Hearings

⁴ Here, considering the five point margin of error on the WAIS-IV and the two administrations of the WAIS-IV, Claimant's true IQ is in the range of 61 to 76 when looking at the FSIQ scores alone. When considering the impact of the "practice effect" from the second administration of the WAIS-IV, it is reasonable to conclude that Claimant's true IQ is on the lower end of that range.

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 90 days.