

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAH No. 2013020762

Claimant,

vs.

SOUTH CENTRAL LOS ANGELES REGIONAL
CENTER,

Service Agency.

DECISION

Administrative Law Judge Glynda B. Gomez, Office of Administrative Hearings, heard this matter on April 9, 2013, in Los Angeles, California. Claimant was represented by his mother (Mother). Claimant attended a portion of 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 April 9, 2013.

ISSUE

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

FACTUAL FINDINGS

1. Claimant is a 12 year old boy. He lives with his mother and 15 year- old sister. His mother is concerned that Claimant does not seem to understand what she is

saying to him, is very slow to process information and has difficulty with school work. Claimant has a history of tantrums, oppositional behavior, and head injury from falls and tantrums as a young child. Claimant 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 he 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.

2008 EVALUATION

3. On July 9, 2008, when Claimant was 8 years old, licensed clinical psychologist Ann L. Walker (Walker) evaluated Claimant for Regional Center Services eligibility. Walker administered the Leiter- International Performance Scale-Revised (Leiter-R), Wide Range Achievement Test-4 (WRAT-4), Autism Diagnostic Interview Scale-Revised (ADI-R), Vineland Adaptive Behavioral Scales-II (VABS-II), and conducted a records review and clinical interview. Claimant performed in the average range achieving a full scale intelligence quotient (FSIQ) of 99 on the Leiter-R. Claimant, a third grader at the time, scored in the kindergarten range with standard scores of 79 in word reading, 77 in spelling and 75 in math computation on the WRAT-4. Walker opined that the WRAT-4 scores were in the borderline range; significantly below what would be expected based upon his FSIQ. Claimant's scores on the VABS-II were scattered with a 69, within the borderline range, in Daily living skills, a 79, within the borderline range, in communication

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.

skills and 85, within the normal range, in socialization skills. Claimant scored a 0 on the ADI-R with no indicators of autism.

4. Walker's report notes mother's concerns that Claimant did not seem to understand her, refused to follow her directions, and was argumentative at all times. Walker did not see any distraction or inattention in her observation. Walker diagnosed Respondent with Opposition Defiant Disorder with the possibility of a learning disorder to be ruled out. SCLARC found Claimant ineligible for regional center services in 2008.

2012 EVALUATION

5. On October 24, 2012 and November 7, 2012, licensed clinical psychologist Beartix Wagner (Wagner) evaluated Claimant for eligibility for Regional Center Services. She administered the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), WRAT-4, ADI-R, VABS-II, and conducted a behavioral observation. Wagner's administration of the WISC-IV yielded a FSIQ of 69 within the borderline range. Claimant performed in the low range on the WRAT-4 with standard scores of 83 in Word Reading, 88 in Spelling and 79 in Math Computation. On the VABS-II, Claimant performed in the mild deficit range with standard scores of 61 in communication, 61 in daily living skills, 62 in socialization and 60 in adaptive behavior composite. Claimant received a standard score of 0 on the ADI-R showing no indications of autism. Wagner noted that during observation and testing, Claimant had difficulty focusing and concentrating, repeatedly forgot directions and fidgeted excessively. She also noted that Claimant had difficulty understanding directions, needed them repeated frequently, and had poor pronunciation skills including omissions and substitutions of sounds.

6. Wagner diagnosed Claimant with Attention-Deficit/ Hyperactivity Disorder, Predominately Inattentive Type and Mixed Receptive-Expressive Language Disorder and Borderline Intellectual Functioning.

SCHOOL EVALUATIONS

7. Claimant is placed in a public school special day class with a modified slower paced curriculum. He was initially placed in special education with an eligibility of speech and language impairment. His eligibility was later changed to specific learning disability based upon auditory and visual processing disorders.² At the time of his initial determination of eligibility in May of 2008, the school district assessed his cognitive level as within the average range.

8. Claimant's triennial psycho-educational evaluation was completed on May 2, 2011 by school psychologist Luz Pena-Rivera (Pena-Rivera) for the purpose of determining his continued eligibility for special education services. The evaluation consisted of a cumulative records review, a teacher report and interview, a parent interview and the administration of the Comprehensive Test of Phonological Processing (CTOPP), Cognitive Assessment System (CAS) and the Test of Visual Perceptual Skills-5th Edition (TVPS). The special education teacher administered the Woodcock Johnson Test of Achievement III (WJA III) and the results were included and analyzed in the psychoeducational report prepared by Pena-Rivera.

9. Although the school district does not compute a FSIQ, the testing provides a range of cognitive and processing ability. The school psychologist reported that Claimant's performance on the CTOPP, CAS and TVPS, placed him in the below average to well below average range for cognitive and processing ability. She also opined that Claimant demonstrated weaknesses in auditory processing and visual processing. Claimant scored in the below average range on the Broad Reading Composite. He performed well below average in reading decoding and reading fluency subtests and well below average in the passage comprehension subtest. Claimant scored in the low average range on the Broad Math Composite. He scored below average in the math

².Inattention was not observed in the school setting.

fluency subtest and within the low average range in the calculation and applied problems subtest.³

10. The IEP team determined that Claimant remained eligible for special education services under the eligibility category of specific learning disability. He is also eligible for speech and language services.

11. At hearing, Mother testified that Claimant's play was immature and that he was often the target of bullying by other children. He needs assistance with some self-care tasks and must be prompted and reminded to wash, wipe after using the bathroom, and to dress appropriately.

12. Claimant testified that he does not always understand what people are saying to him and needs the information broken down, repeated or rephrased in order to understand. Claimant testified that it takes extra time for him to think about things. He also testified that it was difficult for him to find words for his thoughts. While Claimant appeared eager to answer questions posed to him, he had notable difficulty responding to simple questions and required that questions be rephrased, often multiple times, in short, simple sentences during examination and even then struggled to respond. His answers were often off subject and partially responsive.

13. Claimant suffers from severe headaches. His physician prescribed Topiramate, a medication used for treatment of Epilepsy, presumably for the headaches. Mother was not able to explain why the Topiramate was prescribed and has never been told that Claimant has Epilepsy.⁴ Although the Topiramate made it easier for Claimant to

³ Pena-Rivera's report notes that Claimant did not have his glasses on during the assessment and the results should be viewed with caution on that basis.

⁴ Medical records were not introduced into evidence or available at the administrative hearing and were not considered by the Service Agency in its determination.

concentrate, it was discontinued by Mother because Claimant was experiencing unspecified "side effects". The administration of Epilepsy medication, the severe headaches, history of head injury and significant drop in FSIQ from 99 to 69 are cause for concern and warrant further examination. However, there was not sufficient evidence presented at the administrative hearing to establish that Claimant suffers from Epilepsy or seizure disorder.

LEGAL CONCLUSIONS

1. Claimant established by a preponderance of the evidence that he suffers from a developmental disability entitling him 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 his 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 the 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 Findings 3-6, and 9-13, Claimant established that he has functional limitations in the areas of expressive and receptive language, learning and self-direction. Claimant has significant impairments in his ability to communicate and learn. In the area of learning, Claimant's academic performance was in the low range as measured by Wagner's administration of the WRAT-4. Claimant has demonstrated difficulties in expressive and receptive language and requires that information be delivered in smaller portions at a slower pace. Claimant also demonstrated deficits in adaptive skills on Wagner's administration of the VABS-III scoring in the overall low range. In the area of self-direction, claimant is unable to follow directions and frequently responds off-topic. He also has a history of difficulty regulating his emotions, engaging in tantrums and oppositional behavior. Accordingly, Claimant established that his 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 Wagner's testing, Claimant received a FSIQ of 69, which is within the mild mental retardation to borderline range for intellectual disability. His adaptive skills

fall within the low range with most pronounced deficits are in communication and learning, but he demonstrated weaknesses across most adaptive skills. Although Wagner concluded that Claimant has ADHD, she acknowledged that he has at most, borderline intellectual ability, as evidenced by his FSIQ of 69. Therefore, the diagnosis of co-morbid ADHD, does not exclude Claimant from eligibility for regional center services.

15. The preponderance of the evidence establishes that Claimant has mild mental retardation or a condition similar to mental retardation or requiring treatment similar to that of someone with 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 his FSIQ. Claimant meets Criterion B-significant limitations in adaptive functioning in at least two designated areas by reason of the deficits in his communication, and functional academic skills, as shown by his performance on the VABS-III and WRAT-IV. With regard to Criterion C, Claimant is under the age of 18 years and therefore meets the final criterion that the condition manifests itself by that age.

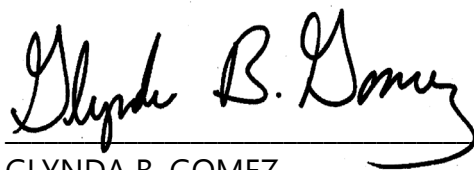
16. The weight of the evidence supports a finding that Claimant is eligible to receive regional center services.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

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

Dated: May 6, 2013

A handwritten signature in black ink, reading "Glynda B. Gomez". The signature is written in a cursive style with a horizontal line underneath the name.

GLYNDA B. GOMEZ

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 90 days.