BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: OMAR P. Claimant, vs. SOUTH CENTRAL LOS ANGELES REGIONAL CENTER, Service Agency.	OAH Case No. L 2006030011

DECISION

This matter was heard by Chris Ruiz, Administrative Law Judge, Office of Administrative Hearings, State of California, on August 14 and 15, 2006, in Los Angeles.

Claimant Omar P.[1] (Claimant) was represented by Anna R. Levine, Staff Attorney, Protection & Advocacy, Inc. Spanish interpreter Susan Sardas translated for Claimant's mother at the hearing.

South Central Los Angeles Regional Center (SCLARC or Regional Center) was represented by Peter T. Haven, Esq., Musick, Peeler & Garrett. Johanna Arias, Regional Center Fair Hearings Coordinator, was also present.

The record was left open until August 25, 2006, in order for the parties to submit closing briefs. Regional Center's brief was received and marked as Exhibit RC-17. Claimant's brief was received and marked as Exhibit C-20. Thereafter, the matter was submitted for decision on August 28, 2006.

[1] Only Claimant's first initial of his last name is used to protect his privacy and that of his family. For that same reason, only the first initial of their last name will be used for his family members.

ISSUE PRESENTED

Is Claimant eligible for Regional Center services?[2]

EVIDENCE RELIED ON

Documents: Claimant's Exhibits C-1 to C-18 and Regional Center Exhibits RC-1 – to RC-15.

Testimony: Claimant's Witnesses – Robin Bernstein-Lev, Esq., Deputy Public Defender, Los Angeles County Public Defender; Yolanda P., Claimant's mother; Kyle Brauer Boone, Ph.D. Regional Center's Witnesses – Timothy D. Collister, Ph.D.; Lisa M. Doi, Ph.D.

FACTUAL FINDINGS

Procedural History

1. Claimant contends that he is eligible for services from Regional Center because he has the qualifying condition of mental retardation and/or a disabling condition closely related to mental retardation or a disabling condition which requires treatment similar to that required for individuals with mental retardation.[3] Regional Center contends that Claimant is not eligible under either of these two categories and that Claimant has a learning disability.

2. On January 26, 2006, the Regional Center advised Claimant that its interdisciplinary team had determined that Claimant did not have an eligible developmental disability as defined by the Lanterman Act. (Exhibit RC-3.) The Regional Center team determined that Claimant was diagnosed with a learning disability and that Claimant did not have mental retardation or any other qualifying condition.

3. On February 27, 2006, Claimant filed a Fair Hearing Request. (Exhibit RC-6.)

Claimant's Criminal Proceeding and Incarceration

4. Claimant is 22 years old. For approximately the past two to three years, Claimant has been incarcerated at Twin Towers Correctional Facility in Los Angeles. Claimant's Public Defender, Ms. Bernstein-Lev, testified regarding Claimant's crime. The underlying events leading to Claimant's incarceration were as follows: Claimant and an accomplice attempted to rob a liquor store. Claimant and his accomplice each had a gun. During the

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[2] The evidence presented clarified the issue as: "Does Claimant have the developmental disability of mental retardation or a disabling condition found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation (otherwise known as the "Fifth Category") entitling him to eligibility for Regional Center services under the Lanterman Act?"

[3] This condition closely related to mental retardation will hereinafter be referred to as the Fifth Category.

course of the robbery, the gun that the storekeeper had hidden under his shirt became visible. A gun battle then occurred which involved all three individuals firing their guns. Claimant and his accomplice fled into the street. Claimant fired his gun toward the storekeeper, but apparently Claimant did not hit or did not seriously wound the storekeeper. Claimant was shot three times and his accomplice was killed. Claimant was charged with armed robbery and murder. The murder charge was brought due to his accomplice's death. Claimant's accomplice was a neighbor of Claimant's family, whom Claimant had known a short time.

Testimony of Robin Bernstein-Lev

5. Ms. Bernstein-Lev became aware of Claimant's limitations almost immediately after she began representing him. She found Claimant to be naïve, childlike, and lower functioning than some of her other clients who are regional center consumers. Claimant has memory problems and often forgets conversations that he has with Ms. Bernstein-Lev. Claimant also often gives inappropriate responses to Ms. Bernstein-Lev's questions. His conversations with Ms. Bernstein-Lev address only Claimant's simple day-to-day activities. When Ms. Bernstein-Lev gives him a set of choices, Claimant gives inappropriate responses, such as, "I don't know," or "I trust you're trying to help me." In Ms. Bernstein-Lev's opinion, Claimant lacks "street smarts" and is taken advantage of in jail by other inmates who threaten him for his food, bedding, and eyeglasses.

6. The court presiding over Claimant's criminal proceeding concluded that Claimant was not competent to stand trial. This finding was based, in part, on a neuro-psychological evaluation and report by Dr. Kyle Boone, who was asked by Ms. Bernstein-Lev to evaluate Claimant. Dr. Boone concluded that, "his markedly impaired cognitive skills preclude him from participation in the defense of his case and render him incompetent to stand trial." (Exhibit C-2, page 6.)

7. California Penal Code section 1370, subdivision (a)(1)(B), states, "If the defendant is found mentally incompetent, the trial or judgment shall be suspended until the person becomes mentally competent." Therefore, it is expected that, if Claimant is ever found to be competent, his criminal proceeding will continue.

8. The Regional Center provides support for eligible consumers at Twin Towers jail. Claimant is currently in a section of Twin Towers that is reserved for inmates who are regional center clients. Claimant was asked by Twin Towers personnel to be a "trustee", which is an inmate who provides other inmates with food and clothing. Claimant accepted this position.

9. Claimant desires a transfer out of the Twin Towers facility, primarily because of the difficulties he has had with other inmates. Claimant would like to be transferred to Porterville Developmental Center, but he may only be transferred there if he is found eligible for Regional Center services. (Exhibit C-17). Claimant was previously denied a transfer to

Patton State Hospital, the facility which provides competency training to individuals without developmental disabilities. Claimant's application for transfer to Patton State Hospital was denied based on the evidence of his developmental disability, contained in the reports of Dr. Ronald Fairbanks and Dr. Kyle Boone. (Exhibit C- 17.) On the other hand, Porterville Developmental Center will not accept Claimant because Regional Center, which has the responsibility to determine his eligibility and recommend a placement for him, has denied Claimant's request to be deemed eligible for services.

Social Assessment by Mr. Phil Shorts at Twin Towers Jail

10. On August 26, 2004, Ms. Bernstein-Lev contacted Regional Center and requested an evaluation to determine Claimant's eligibility for regional center services. (Exhibit C-16, ID Note of August 26, 2004.)

11. On September 7 and 14, 2004, Mr. Phil Shorts, a Regional Center Law Enforcement Liaison, conducted a social assessment of Claimant. Mr. Shorts interviewed Claimant and his mother. He found Claimant had difficulty understanding basic words, such as "income" and "knees" and that Claimant could not recite the months of the year. (Exhibit C-1, page 4.) Based on his interviews, Mr. Shorts concluded that Claimant "presents with features suggestive of mental retardation." Mr. Shorts then referred Claimant for a psychological evaluation. (Exhibit C-1, page 5).

Claimant's Childhood Development

12. Claimant was born in Mexico on March 18, 1984. He was the product of a normal, full-term, uncomplicated pregnancy. Claimant's mother reported no history of mental retardation or developmental disability on either side of the family. (Exhibit C-1.)

13. Claimant is the third of four children. Two of his siblings received special education services under the category of "learning disability." Claimant lived with his mother, father, two older brothers, and a younger sister in his family's home until he was incarcerated. The family was close, and engaged in most activities together. (Testimony of Yolanda P.).

14. Claimant's mother reported that, overall, Claimant's development was somewhat delayed in comparison to her other children, particularly in the areas of learning. Claimant also does not act his age, but rather, like a child. When Claimant lived with his family, his mother took care of most of his home living needs. Claimant is only able to prepare a simple meal, such as a sandwich. Claimant has difficulties remembering to do his daily chores, such as making his bed and putting clothes in his hamper. (Testimony of Yolanda P.)

15. As a youth, Claimant was always a "follower," in that he followed the suggestions of others. (Testimony of Yolanda P.) He did not make decisions for himself regarding where to go or what to do for fun. When playing games as a child, Claimant would listen to and follow the lead of others, even of his younger sister, instead of making his own

decisions. At home, Claimant did not make decisions independently, but relied on family members.

16. Claimant did not develop a circle of friends as a child. He was only close with his family members. (Exhibit C-1, page 4; Testimony of Yolanda P.) Claimant cannot drive. His use of public transportation is limited to one simple and direct route. As a teenager, if Claimant needed to pay for the bus, his mother had to give him the exact fare since Claimant did not know how much money he should get in change. Claimant must use a menu with pictures or ask someone to assist him to order meals in a restaurant. (Testimony of Yolanda P.) Claimant's mother believes that Claimant would need help to live on his own because of his lack of knowledge and memory problems.

17. Claimant attended elementary, middle, and high schools. Those schools were: 28th Street Elementary, Granada Hills Middle, Dorsey and Jefferson High Schools. (Exhibits C-6, page 1; C-8, page 1; C-9, page 1; C-10, page 1; C-11, page. 1; C-12, page 1; and C-1, page 3.)

School Records and Testing History

18. Claimant's education history reveals a mixed picture of Claimant's abilities. For the most part, Claimant did very poorly in school and when he was tested. At times, however, Claimant achieved scores higher than what would be expected from a mentally retarded person. As such, a discussion of those facts supporting each party's position is necessary.

Facts supporting the Regional Center's Position

19. Dr. Timothy Collister testified that early in Claimant's school years, Claimant tested in the "upper borderline" range of mental functioning, i.e., above the 3rd percentile or above the "mild mental retardation range." In particular, Dr. Collister noted May 1993 test results (when Claimant was approximately nine years of age) which stated that Claimant was in the 7th percentile for total reading and 8th percentile for total language. (Exhibit C-6, page 1.)

20. A May 1996 Individualized Education Plan (IEP) (when Claimant was 12 years old and attending elementary school) indicated that he was placed in a special "Educationally Retarded" (ER) program normally reserved for mentally retarded students. However, the records also state that he was placed in that program due to a "learning disability" as follows:

> Committee Discussion: Committee consensus is that [Claimant's] educational needs would best be served in an E.R. program based on his severely delayed academic functioning, although he exhibits a specific learning disability as evidence by a discrepancy between his cognitive ability and academic achievement. (Exhibit C-9, page 5.)

21. The May 1996 IEP also contained entries that indicate that the elementary school teachers and evaluators set relatively high annual and short-term goals for Claimant. These goals appeared inconsistent with a belief that Claimant was mentally retarded

22. The May 1996 IEP further stated, "At times, [Claimant] can add/subtract basic facts (single/double digits); he's working on basic multiplication facts (single digits); he's working on basic word problems using basic operations. [He] is able to copy from the board."

23. In Claimant's January 1998 IEP, a "learning disability" diagnosis was also noted when Claimant was nearly 14 years old and was attending Carver Middle School as follows: "Consensus Statement: [Claimant] continues to meet the eligibility criteria for a student with a specific learning disability due to a processing deficit in the areas of auditory processing." (Exhibit C-11, page 8.)

24. The January 1998 IEP also contains evidence of higher mental functioning and motor skills, both of which contradict a diagnosis of mental retardation and support the diagnosis of auditory processing deficits consistent with a learning disability:

> [Claimant's] cognitive abilities were assessed to be in the average to low average range. Utilizing the Matrix Analogies Test (MAT) and Test of Visual Perceptual Skills-UL(TVPS-UL), average abilities can be documented in the areas of visual processing and in non-verbal reasoning. Particularly on the MAT, [Claimant] clearly demonstrated the ability to see basic similarities and differences and the ability to draw conclusions.
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> [Claimant] Participates in regular Physical Education classes, his gross motor skills appear to be within normal limits, however [Claimant's] PE Teacher stated that Claimant rarely comes to class. Even though [Claimant's] score on the VMI is four years below the expectancy for a student his age, his performance is commensurate with his estimated level.
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> Scores on the Test of Visual-Perceptual Skills (non-motor) Upper Level-R (TVPS) indicated age appropriate skills. [Cliamant's] ability to recognize and interpret visual stimuli, is an area of strength. On the test of Auditory Perceptual skills Upper Leverl-R (TAPS), general test scores demonstrate performance significantly below the expectancy level for a student [Claimant's] age. He exhibited difficulty in processing and remembering information presented aurally. However, his ability to interpret directions was comparable to his estimated ability level. Thus in the classroom [Claimant] may have difficulty reasoning and remembering information that is only presented via auditory channels. (Exhibit C-11, pp. 6-7.

25. Claimant's January 2000 IEP (Jefferson High) stated that Claimant had a math computation score of 82, which was also in the "low average" range at or about the 13th

percentile. (Exhibit C-12, page 4.) According to Dr. Collister and Dr. Doi, these scores preclude a finding of mental retardation. According to Dr. Boone, a person with mental retardation could achieve Claimant's score.

26. Regional Center contends that these higher test scores were likely the result of Claimant looking at another student's similar test. However, it was not established that these school records were inaccurate. Neither party called any of Claimant's former teachers to testify regarding his performance at school. There was also no evidence presented regarding the conditions under which the tests were given. Absent evidence to the contrary, these scores can, and are, considered accurate.

Facts supporting Claimant's position

27. Claimant's school records reveal a pattern of deficits and delays. On his first IEP, the IEP team reported that "Claimant is slow responding and appears to have difficulty organizing his thoughts and expressing information" and that he is only able to communicate to a "limited degree." (Exhibit C-8, page 4.) A third grade teacher reported that Claimant's "social and academic skills [were] far below grade level, (Exhibit C-6, page 1), while his fourth grade teacher reported that while "he shows interest in learning how to read . . . his retention skills are low. He works hard and has taken extra work, yet he still needs to learn the sounds and letters of the alphabet." (Exhibit C-6, page 2.) In fourth grade, at the age of ten, Claimant's rote memory was four and a half years below his chronological age level and he had "difficulty integrating new material with what he has learned before." (Exhibit C-8, page 1). Claimant was also "not sure of what grade he was in." (Exhibit C-8, page 4). A fifth grade teacher noted that Claimant had "poor retention" and social impairments, writing that Claimant "desperately wants to 'fit in' and make friends but doesn't seem embarrassed by inappropriate behavior." In fifth grade, at the age of 12 years old, Claimant was reading at the kindergarten level and only identifying half of the letters of the alphabet. (Exhibit C-9, page 2.) Claimant's "response time to stimulus very slow [and] deliberate," while his performance in language arts and math was "significantly below age/grade level." (Exhibit C-11, at page 9.)

28. Though he attended ER special day classes for years, Claimant never learned basic reading, writing, and arithmetic. A person, like Claimant, who never progresses in his academic goals in an ER placement, is similar to a person with mental retardation according to the medical experts that evaluated Claimant.

29. The academic goals in his IEP at age 15, in Math as well as Written Language, remained the same as the academic goals in his IEP at age 10. (Exhibit C-8, page 2; Exhibit C-12, page 2.) Claimant's most recent school records reveal that he is unable to write a simple sentence, multiply, or subtract with regrouping. (Exhibit C-12, page 2). The majority of Claimant's test scores in reading, spelling, and arithmetic skills, are at a level consistent with mental retardation.

30. Los Angeles Unified School District, per its policy, never administered standardized intelligence tests to Claimant in school, and no standardized intellectual test results appear in Claimant's records from prior to the age of 18. Instead, "alternative assessment procedures" were used by the schools. (Exhibit C-11, page 6.)

31. Claimant contends that Regional Center's conclusions rely heavily on three isolated tests within the six year span of Claimant's IEP's: a single subtest of a single administration of the Kaufman Test of Educational Achievement (KTEA); one administration of the Matrix Analogies Test (MAT); and one administration of the Test of Visual Perceptual Skills (TVPS-UL). (Exhibit RC-1 at page 5.) The school records do not provide the actual evaluations; and do not provide numeric scores for the MAT or the TVPS-UL. (Exhibit C-11 at page 7.) The school records do not state the qualifications of those administering the tests; whether evaluators made any modifications, performed the test appropriately, or provided cues or assistance. None of these tests are an independent method to test for mental retardation. However, for the reasons stated in Factual Finding 26, these school records are considered as follows:

32. Claimant's January 30, 1998 IEP, when Claimant was in seventh grade, and almost 14 years old, contains the first recorded KTEA scores in his school records (Exhibit C-11, page 5):

	Standard Score	Age Equivalent	Grade Equivalent
Math Applications	58	7 years, 3 months	1.9
Reading Decoding	55	Below 6 years, 0 months	1.0
Spelling	51	Below 6 years, 0 months	Below 1.0
Reading Comprehension	52	Below 6 years, 0 months	Below 1.0
Math Computation	57	8 years, 0 months	2.6

33. Claimant's 2000 KTEA scores in 10th grade, when he was 16 years old, remained similarly low (Exhibit C-12, page 4):

	Standard Score	Age Equivalent	Grade Equivalent
Math Applications	Pre-Primer	Pre-Primer	Pre-Primer
Reading Decoding	49	5 years, 1 month	Primer
Spelling	51	5 years, 2 months	1.5
Reading Comprehension	Primer	Primer	Primer
Math Computation	82	8 years, 0 months	3.1
Writing Sample	57	5 years, 6 months	1.1

34. The majority of Claimant's KTEA scores in both 1998 and 2000 were at an extremely low level consistent with a diagnosis of mental retardation. However, a comparison of the two KTEA results reveals an inconsistency. A age 14, Claimant obtained a standard score in the mild deficit range (57). At 15 years and 10 months of age, Claimant achieved a standard score in the low average range (82). (Exhibit C-12, page 4; Exhibit C-11, page 6.)

35. Regional Center contends the 2000 KTEA subtest score is consistent with the school diagnosis of a learning disability, and inconsistent with a diagnosis of mental retardation. On the other hand, Dr. Boone assumed that the KTEA score was erroneous and she concluded that the KTEA test results are insufficient either to diagnose a learning disability or to rule out mental retardation. Claimant's academic achievement tests in Claimant's school records are consistently low, but are also inconsistent and varied.

Expert Opinion of Claimant's Diagnosis

Psychological Evaluation of Dr. Ronald Fairbanks

36. Dr. Fairbanks interviewed Claimant in jail, from behind a glass partition, in order to evaluate his competency to stand trial for his alleged criminal behavior. (Exhibit C-4, page 1). Unlike the other evaluators, Dr. Fairbanks opined that he believed Claimant to have experienced auditory hallucinations, and he reported that Claimant admitted to having used marijuana and alcohol. Dr. Fairbanks's concluded that Claimant may be mentally retarded. Dr. Fairbanks wrote that, as a former Chief of Psychological Services at North Los Angeles County Regional Center, his "extensive experience with mentally retarded individuals caused the examiner to conclude almost immediately that the likelihood of [Claimant's] being retarded was quite high just by his presentation alone." This impression was reinforced for Dr. Fairbanks by Claimant's "childlike", "defenseless", and "immature" presentation, and by the fact that Claimant "admits to significant special education experience and also admits to being called mentally retarded." (Exhibit C-4, page 4). Dr. Fairbanks found that Claimant "clearly is limited" and has "significant problems with memory and [is] not very bright." (Exhibit C-4, page 4). Dr. Fairbanks found Claimant could not make change, that he could not tell time using an orbital clock, and that he would rather have a pile of sixteen one dollar bills instead of one twenty dollar bill because "there's more dollars." (Exhibit C-4, page 4-5.) Dr. Fairbanks concluded that Claimant was incompetent to stand trial. Dr. Fairbanks recommended further evaluation for mental retardation using a full IQ test and adaptive assessment. (Exhibit C-4, page 6.)

Testimony of Dr. Timothy Collister

37. Dr. Collister, has never met Claimant. His testimony was generally similar to that of Dr. Lisa Doi. Dr. Doi's testimony is more meaningful as she examined and tested Claimant.

Psychological Evaluation of Dr. Lisa Doi

38. Regional Center contracted with psychologist Dr. Lisa M. Doi to conduct an evaluation of Claimant in September 2004. Dr. Doi administered the Wechsler Adult Intelligence Scale-3rd Edition (WAIS-III), the Wide Range Achievement Test—Revision 3, and the Vineland Adaptive Behavior Scales. Dr. Doi found Claimant to have a Full Scale IQ of 63, with a Verbal IQ of 61 and a Performance IQ of 74. (Exhibit RC-1, page 7). On Dr.

Doi's administration of the Vineland Adaptive Behavior Scales (VABS), Claimant's overall adaptive functioning fell in the moderate deficit range, with a composite score of 44; his communication functioning fell in the severe deficit range, with a score of 29; his daily living skills fell in the mild deficit range, with a score of 62, and his socialization skills fell in the moderate deficit range, with a score of 51. (Exhibit RC-1, page 7). Dr. Doi wrote that her IQ test scores merit caution because a review of school records convinced her that neither a diagnosis of Borderline Intellectual Functioning or Mental Retardation was appropriate. (Exhibit RC-1, page 5.) Dr. Doi also testified that Claimant's poor performance in school could be explained, at least in part, by Claimant's noncompliance with teachers' directives and his excessive absence from school. Dr. Doi's report did not discuss the possibility of Claimant's qualification for services based on the Fifth Category. Dr. Doi testified that she does not consider this issue, but instead leaves it to the Regional Center eligibility committee to decide.

Neuropsychological Evaluation of Dr. Boone

39. On May 3, 2005, Dr. Kyle Boone conducted a neuropsychological evaluation of Claimant. Dr. Boone administered WAIS-III testing to Claimant, and determined that Claimant has a Full Scale IQ of 51, with a Verbal IQ of 56 and a Performance IQ of 55. (Exhibit C-2, page 3.) In her report, Dr. Boone noted that Claimant has childlike demeanor, concrete thinking, and a poor memory. Dr. Boone is of the opinion that Claimant has a diagnosis of mental retardation.

Recent Functioning of Claimant

40. Claimant was employed as a warehouse worker (loading and unloading trailers) and as a general laborer for a construction company and a toy store factory. He reportedly earned approximately $220 per week. (Exhibit C-1, page 3.) Claimant did not manage his own earnings. All of the money he earned was turned over to his mother. (Testimony of Yolanda P.).

Evidence of Deception and/or Malingering

41. Regional Center contends that Claimant was not always candid during interviews with doctors and that he tried not do as well as he could on certain tests. The tendency of a subject to intentionally under-perform on tests was referred to by the doctors who testified as "malingering." Dr. Boone testified that she tried to give Claimant a test for malingering, but that she could not complete the test because Claimant said he could not answer her questions. It was not established whether Dr. Doi gave a test for malingering, but she testified that Claimant appeared to be giving good effort.

42. Claimant told Dr. Boone that "he has held no employment with the exception of being a trustee in Twin Towers." (Exhibit C-2, page 2.) This statement was not true as described in Finding 40.

43. Dr. Boone's report states: "When queried as to possible alcohol or drug abuse, the patient indicated that he had used alcohol 'maybe once.'" (Exhibit C-1, page 1). Claimant did not indicate any other drug use to Dr. Boone. However, Claimant reported to Dr. Fairbanks that:

> When the examiner asked him about use of drugs or alcohol, he indicated he uses marijuana. Through further questioning the examiner determined that he smokes approximately 10 blunts per day and also drinks alcohol. At the time of the incident he said he was using a lot. He thought that maybe he was using more blunts than he usually does, maybe 6 or 7 just before the incident. He said he was very high but could not remember very much about the details of the crime. (Exhibit C-4, page 1).

Thus, Claimant was not being truthful with Dr. Boone as to his prior drug and alcohol use.

44. In addition, Claimant's performance on Dr. Doi's testing and Dr. Boone's testing varied. Dr. Doi's report noted:

> [Claimant] was administered the Wide Range Achievement Test-Revision (WRAT3) to obtain data on his academic functioning in the areas of reading, spelling and arithmetic. Reading and spelling achievement were assessed to be in the moderate deficit range, with arithmetic achievement assessed to be in the mild deficit range. On the reading subtest, [he] demonstrated the ability to identify three kindergarten level words. He correctly spelled first grade level words. In the area of arithmetic, he demonstrated the ability to add and subtract triple-digit numbers with regrouping. (Exhibit RC-1, page 3.)

In this context, triple-digit subtraction with "regrouping" meant "borrowing" from numbers in order to complete the subtraction. During her testimony, Dr. Doi also stated that she administered an alphabet identification test, and Claimant was able to identify all of the letters he was shown. However, when Dr. Boone later tested Claimant, Claimant could not complete any math questions, even simple addition or subtraction, and Claimant could not read or identify printed letters. (Exhibit C-2, pages 3-5.)

Based on the above, it was established that Claimant was not completely candid with Dr. Boone and that he did not give his best effort on her testing.

<u>Evidence of Other Reasons for Poor Performance and Low Scores</u>

45. There was evidence that indicated other reasons for Claimant's low scores in the classroom and during more recent testing. Dr. Boone reported that Claimant took Prozac "for sadness." (Exhibit C-2, page 1.) Claimant's incarceration could only exacerbate his "sadness." Dr. Doi also noted that Claimant "reported feelings of sadness related to his incarceration." (Exhibit RC-1, page 4.) Thus, Claimant suffered from some form of

depression at the time he was examined by these doctors and his depression could have affected his testing scores.

LEGAL CONCLUSIONS

Jurisdiction & Burden of Proof

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welfare and Institutions Code section 4500 et seq.[4]) An administrative "fair hearing" to determine the rights and obligations of the parties is available under the Lanterman Act to appeal a regional center decision. (§§ 4700-4716.) Claimant properly and timely requested a fair hearing and therefore jurisdiction for this appeal was established. Factual Findings 1-3.

2. Where an applicant seeks to establish eligibility for government benefits or services, the burden of proof is on him. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits); *Greatorex v. Board of Admin.* (1979) 91 Cal.App.3d 54, 57 (retirement benefits).) The standard of proof in this case requires proof to a preponderance of the evidence, pursuant to Evidence Code section 115, because no other law or statute (including the Lanterman Act) requires otherwise.

3. The Legislature intended to defer to the California Department of Developmental Services (DDS) and the various regional centers for implementing the Lanterman Act. (*Mason vs. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1127.) With regard to eligibility, "the Lanterman Act and implementing regulations clearly defer to the expertise of the DDS and RC (regional center) professionals determination as to whether an individual is developmentally disabled." (*Id.*, at p. 1129.) In the *Mason* case, the court focused on whether the claimant's expert witnesses' opinions on eligibility "sufficiently refuted" those expressed by the regional center's experts. (*Id.*, at p. 1137.)

4. Based on the above, in eligibility cases such as this one, a claimant requesting regional center services has the burden of proving by a preponderance of the evidence that his or her evidence regarding eligibility is more persuasive than that adduced by the involved regional center.

Claimant Did Not Establish He Has the Qualifying Condition of Mental Retardation

5. Eligibility under the Lanterman Act triggers when an individual establishes that he suffers from a substantial disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism or what is commonly known as the "Fifth Category." (§ 4512, subd. (a).) A qualifying condition must onset before one's 18th birthday and continue indefinitely thereafter. (§ 4512, and Cal. Code Regs., tit. 17, § 54000.)

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[4] All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

6. Excluded from eligibility are handicapping conditions that are solely psychiatric disorders, solely learning disabilities, or disorders solely physical in nature. (Cal. Code of Regs., tit. 17, § 54000.) "Psychiatric disorders" are defined as intellectual or social functioning which originated as a result of a psychiatric disorder, or treatment given for such a disorder (Cal. Code Regs., tit. 17, § 54000, subd. (c)(1)). "Learning disorders" are defined as a significant discrepancy between estimated cognitive potential and actual level of educational performance which is not "the result of generalized mental retardation, educational or psycho-social deprivation, [or] psychiatric disorder . . . " (Cal. Code Regs., tit. 17, § 54000, subd. (c)(2)). Those conditions exclude eligibility only when they are *solely* the cause of a handicap. Therefore, a person with a "dual diagnosis," that is, a developmental disability and a psychiatric disorder or learning disability, may still be eligible for services. However, someone whose conditions are *solely* from the excluded categories, alone or in some combination, is not eligible.

7. In this case, Claimant failed to meet his burden of establishing by a preponderance of the evidence that he is mentally retarded. This condition is typically diagnosed in early childhood. Claimant's school records did reveal a child with developmental issues. However, no evidence was presented that any qualified medical practitioner ever diagnosed Claimant as being mentally retarded before he was recently incarcerated. Factual Findings 12-45.

8. Claimant's strongest argument for a mental retardation diagnosis was the IQ testing results of both Dr. Boone and Dr. Doi. However, the Service Agency's in-take assessment team and expert psychologist Dr. Doi relied on the inconsistencies in Claimant's educational record and came to the credible conclusion that Claimant was not eligible as mentally retarded. Dr. Boone's opinion was not more persuasive than that expressed by Dr. Doi, because, in part, Dr. Boone was unable to give Claimant the "malingering test." In this case, such a test was crucial. Claimant is in jail and depressed. If he is ever found competent, the criminal charges that he will face are extremely serious. He also had a very good motive to underachieve when he was tested . . . to attempt to convince others that he should be transferred to a more tolerable jail. Claimant was also able to perform certain acts in school and during testing with Dr. Doi. Some of these acts included basic math computations and recognizing letters. When tested by Dr. Boone, Claimant could not, or did not, perform similarly. In sum, it cannot be concluded that Claimant's evidence sufficiently refuted the evidence presented from the Service Agency's in-house assessment team and Dr. Doi that Claimant does not have a diagnosis of mental retardation. (Factual Findings 4-45.)

<u>Claimant Did Establish He Has a Qualifying Fifth Category Condition</u>

9. The Fifth Category is described as "disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals." (§ 4512, subdivision (a).) Section 4512 does not more specifically define what constitutes a fifth category condition. Whereas the first four categories of eligibility are very specific (e.g., autism or cerebral palsy), the disabling conditions under this residual category are intentionally broad to encompass unspecified conditions and

disorders. While the Legislature did not more specifically define the Fifth Category, it did require that the condition be "closely related" (§ 4512) or "similar" (Cal. Code Regs., tit. 17, § 54000) to mental retardation. "The fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded." (*Mason vs. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1129.)

10. Claimant established that he is eligible for services based on the Fifth Category. Sufficient evidence was presented to establish that Claimant presents like a person with mental retardation and has a condition similar to mental retardation. Claimant's mother, his public defender, Dr. Fairbanks, Phil Shorts (a regional center employee), and Dr. Boone all believe that Claimant presents as a mentally retarded person. Dr. Doi's report did not discuss the possibility of Claimant's qualification for services as a person with a condition like mental retardation or who requires treatment like that required by people with mental retardation. Dr. Doi testified that she does not consider this issue, but instead leaves it to the Regional Center eligibility committee to decide.

Throughout his life, Claimant has presented as a person with a disability closely related to mental retardation. In school, Claimant was placed in an "Educationally Retarded" special day class for children with mental retardation. A person, like Claimant, who never progresses in his academic goals in an ER placement, is functionally the same as a person with mental retardation. Claimant also generally obtained test scores similar to what would be expected from a mentally retarded person. Further, Claimant's recent IQ testing, performed by Dr. Doi, placed Claimant in the mentally retarded range. Claimant has been found incompetent to stand trial by a criminal court. Claimant always lived with his family, can only take a simple bus route, can not make change, turned his earnings over to his mother, and can not read or write. Factual Findings 4-45.

<u>Claimant Did Establish that He is Substantially Disabled</u>

11. As referenced above, a qualifying condition must also cause a substantial disability. (§ 4512, subd. (a); Cal. Code Regs., tit. 17, § 54000, subd. (b)(3).) A "substantial disability" is defined by California Code of Regulations, title 17, section 54001, subdivision (a), as follows:

> (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.[5]

12. In this case, applying a review of Claimant's history, and the testing of Dr. Doi, reveals that Claimant is substantially disabled, as follows:

Cognitive Functioning. It was established that there is a major impairment of Claimant's cognitive functioning. Claimant was placed in an "Educationally Retarded" class for the majority of his school career. Claimant never made significant progress in his education. Claimant tested in the mild deficit range in this area with Dr. Doi.

Social Functioning. It was not established that there is a major impairment of Claimant's social functioning.

Receptive and Expressive Language. Claimant has a significant functional limitation in this area. Claimant has a severe deficit in this area per Dr. Doi's testing. It was also established that Claimant has extreme difficulty receiving information and expressing himself.

Learning. Claimant has a significant functional limitation in this area. He never progressing in school and Dr. Doi's testing revealed a moderate deficit with regard to reading and spelling and a mild deficit with respect to arithmetic.

Self-care. Claimant has some level of functional limitation in this area, but not significant. Claimant can dress himself and can complete household tasks. He can cook a simple meal and can take the bus.

Mobility. Claimant did not establish a substantial limitation in this area.

Self-direction. Claimant has a significant functional limitation in this area. Throughout his life, other people have always made decisions for Claimant, and he has shown no interest or ability in making decisions for himself.

Capacity for Independent Living. Claimant has a significant functional limitation in this area. Claimant always lived with, and relied on, his family. While he can cook a simple

[5] Welfare and Institutions Code section 4512, subdivision (l), defines "substantial disability" similar to that of California Code of Regulations, title 17, section 54001, subdivision (a)(2).

meal or take a direct bus route, he cannot count or manage money. He also has difficulty doing the tasks he can perform without assistance from his family members.

Economic self-sufficiency. It was not established that Claimant has a significant functional limitation in this area. Claimant was able to perform a manual labor jobs.

Claimant established a major impairment of cognitive functioning. He also established the existence of significant functional limitations in four of the above areas of major life activity. As such, Claimant is eligible for services under the Fifth Category, in that such condition causes him a substantial disability. (Factual Findings 4-45.)

ORDER

Claimant Omar P. established eligibility for services from the Service Agency, South Central Los Angeles Regional Center. Claimant's appeal of the Service Agency's determination that he is not eligible for services is therefore GRANTED.

DATED: September ___, 2006,

_____
CHRIS RUIZ
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision pursuant to Welfare and Institutions Code section 4712.5, subdivision (b)(2). Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.