BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: AMBER H. Claimant, vs. FAR NORTHERN REGIONAL CENTER, Service Agency.	OAH No. N 2006060477

DECISION

Administrative Law Judge Catherine B. Frink, State of California, Office of Administrative Hearings, heard this matter in Redding, California, on July 25, 2006.

Amber H. (claimant) was present and represented herself.

Phyllis J. Raudman, Attorney at Law, 1716 Court Street, Suite 101, Redding, California 96001, represented the service agency, Far Northern Regional Center (FNRC).

Evidence was received, the hearing was closed, and the matter was submitted for decision on July 25, 2006.

PARTIES AND JURISDICTION

Claimant makes a claim for services pursuant to Welfare and Institutions Code section 4512.[1] She appeals FNRC's denial of her claim for services as set forth in its Notice of Proposed Action (NOA), effective date June 1, 2006.

[1] All statutory references are to the California Welfare and Institutions Code unless specified otherwise.

All prehearing jurisdictional requirements have been met. Jurisdiction for this proceeding exists.

ISSUE

1. Within the meaning of section 4512, subdivision (a), is claimant disabled due to mental retardation, or does claimant have a disabling condition found either to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation?

2. Within the meaning of section 4512, subdivision (a), does claimant have a qualifying disabling condition that originated before the age of 18?

FACTUAL FINDINGS

Background

1. Claimant was born on October 9, 1984, and was age 21 years, 9 months as of the date of hearing. She has never been diagnosed with cerebral palsy, epilepsy, or autism.

2. Claimant was in an automobile accident at age four. She sustained head trauma, and reportedly had difficulty with balance and coordination thereafter. Between the ages of six and seven, claimant experienced two seizures. On October 28, 1991, at age seven, claimant underwent a brain CT scan, which was normal.

3. Claimant's mother was a drug addict. Claimant was abused by her mother, and her mother's boyfriends. At the age of 10, claimant was removed from her mother's custody, and was placed in foster care in Klamath Falls, Oregon. She moved frequently from foster home to foster home, with periods of time living on the streets; with her grandmother, Nancy H.; or in juvenile hall as a runaway. Claimant did not attend school regularly after the eighth grade. On April 5, 1999, at age 14, claimant was admitted to the emergency room at Merle West Medical Center in Klamath Falls for bilateral leg contusions, after she was struck with a belt several times by her then-foster mother.

4. Claimant began using alcohol and illegal drugs at about age 12. Claimant "overdosed a few times, really bad," and felt as if she was having a heart attack. In her late teenage years, claimant lived with her grandmother "on and off," and lived with a boyfriend "for a couple of years, until he went to jail." Claimant continued to abuse illegal drugs until she was 19 years old. Claimant was convicted of burglary, and served five months in jail. She was pregnant at the time of her incarceration. According to claimant, jail "kept me away from drugs." Claimant gave birth to her daughter two months after her release from jail. Claimant stopped drinking at about age 20 or 21. She is currently on criminal probation, and

is subject to random drug testing. She knows that, if she began using drugs, she would go to prison, and would lose custody of her daughter.

5. Claimant was in an automobile accident in 2003, in which she injured her cervical and lumbar spine. Claimant continues to experience chronic low back pain, for which she is prescribed a muscle relaxant and pain medication, including a low dose of Vicodin, and over-the-counter ibuprofen. She also takes an antidepressant, and "stomach" medication, for a condition which she believes is related to stress.

6. Claimant and her daughter currently reside with claimant's grandmother. Claimant receives welfare assistance and is participating in CalWORKs, a welfare-to-work program. She is not receiving job training at this time. Claimant provides care for her daughter, now age two, with direction from her grandmother.

Test Data

7. Claimant was placed in special education in the first grade. She continued to receive special education services throughout elementary and junior high school.

8. On June 27, 1994, claimant was evaluated by Chuck Mitchell, Assessment Specialist, Klamath County School District, Special Services Department. Claimant was age 9 years, 7 months, and in the third grade, at the time of the assessment. Mr. Mitchell administered the Wechsler Intelligence Scale for Children, Third Edition (WISC-III). Claimant performed in the low average range of mental ability. She earned a verbal Intelligence Quotient (IQ) score of 84, a performance IQ score of 83, and a full scale IQ score of 83, with subtest scores as follows:

Verbal Tests		**Performance Tests**	
Information	5	Picture Completion	8
Similarities	9	Coding	9
Arithmetic	7	Picture Arrangement	5
Vocabulary	7	Block Design	5
Comprehension	8	Object Assembly	10
Digit Span	7	Symbol Search	9

Verbal Comprehension Index	85
Perceptual Organization	83
Freedom from Distractibility	84
Processing Speed	96

Mr. Mitchell noted that claimant "has definite limitations in both Verbal and Performance ability." He noted relative strength in Similarities and Comprehension (verbal), and Object Assembly, Picture Completion, and Coding (performance).

9. The Kaufman Test of Educational Achievement (K-TEA) was administered to claimant on October 10, 1996, when claimant was 12 years old and in the sixth grade. Claimant achieved standard scores of 77 in mathematics (grade equivalent 4.4), and 97 in reading (grade equivalent 6.2).

10. On March 19, 1999, the Woodcock-McGrew-Werder Mini-Battery of Achievement was administered to claimant. This test measures academic achievement. Claimant received the following scores:

MEASURE	GRADE EQUIVALENT	STANDARD SCORE
BASIC SKILLS[2]	4.0	71
Reading	6.0	89
Writing	4.3	78
Mathematics	3.0	54
Factual Knowledge	3.0	70

Claimant's scores in writing and in factual knowledge, as well as her overall basic skills score, were in the low range. Her mathematics score was considered to be in the "very low range of scores obtained by others at her grade level." On the other hand, claimant's reading score was "within the low average range."

11. Claimant did not attend school after the spring of 1999, until she enrolled in the Churchill County School District (CCSD) in Fallon, Nevada, in January of 2001. CCSD prepared a 30 Day Interim IEP[3] for claimant, dated January 24, 2001. Claimant was placed in the ninth grade, and was mainstreamed into regular education classrooms, pending receipt of her special education files from Oregon.

12. The CCSD Eligibility Team (IEP team) issued a Statement of Eligibility—Specific Learning Disabilities, dated March 22, 2001, when claimant was age 16 years, 5 months. Claimant was found to be eligible for special education services, under the category of specific learning disabilities, based on the fact that she "exhibits a severe discrepancy between predicted and actual achievement, which is not correctable without special education services, [as] demonstrated in the indicated areas: mathematical calculation; mathematical reasoning; written expression; comprehension in reading." Claimant's IEP, dated March 22, 2001, reflected the following test data, all administered on March 19, 1999:

A. K-TEA—Mathematics grade equivalent 4.8; Reading grade equivalent 7.3; Spelling grade equivalent 5.6.

B. KBIT—Vocabulary IQ score equivalent 85; Matrices IQ score equivalent 109; composite IQ score 93.

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[2] Basic skills is a combined measure of reading, writing, and mathematics skills.
[3] Individualized Education Program.

C. Woodcock-McGrew Achievement Test—Basic Skills grade equivalent 4.0; Reading grade equivalent 6.0; Writing grade equivalent 4.3; Mathematics grade equivalent 3.0; Factual Knowledge grade equivalent 3.0.

The IEP team noted the following "effect[s] on student's involvement and progress in general curriculum:"

* Based on reading scores Amber should be able to access the general curriculum in most subjects. Reading scores are below average but not significantly. She may need after school tutoring or pull-out resource room assistance with some assignments.

* Math scores are significantly below grade level. She may benefit from resource room classes in this subject.

The IEP team developed a transition plan for claimant, which included working toward a standard high school diploma, and vocational training in computer electronics through Job Corps. Claimant continued to be mainstreamed in all classes, with special education and/or supplementary aids and services as follows: "inclusion teacher in math; Amber may receive resource room assistance with assignments and tests as needed determined by student; may need preferential seating to avoid conflict with other students." Claimant did not complete the ninth grade, and did not regularly attend high school thereafter.

13. As part of her participation in CalWORKs, claimant was referred to Tri-County Vocational Services for a learning disability evaluation. Testing was performed by Clayton Mitchell, Ph.D., Clinical Psychologist, and Michael Green, M.S., Vocational Consultant, on April 24, 2006, when claimant was age 21 years, 6 months. The following tests were administered: The Wechsler Adult Intelligence Scale III (WAIS-III); Wide Range Achievement Test—Revision III (WRAT-III); and the Test of Adult Basic Education, Form 8, Level A (Survey).

On the WAIS—III, claimant performed in the below average range of mental ability. She achieved a verbal IQ score of 71, and a performance IQ score of 67, with a full scale IQ score of 66. According to Dr. Mitchell, "scatter between subtests was not significant." On the WRAT-III, claimant achieved the following scores, compared with persons in her age group:

Subtest Test	Percentile	Standard Score
Read Recognition	8	79
Spelling	4	73
Arithmetic	.08	51

Claimant's performance on the reading recognition and spelling portions of the WRAT-III were characterized as "below average." In a report dated April 24, 2006, Dr. Mitchell stated that claimant was "able to read simple words and a few words of intermediate complexity," and she "writes legibly and was able to spell simple words and a few words of intermediate complexity." Claimant demonstrated "substantial difficulties" in mathematical computation, and with sign confusion.

In the Test of Adult Basic Education, Form 8 Level A (Survey), claimant's scores were found to be in the below average range as compared to vocational technical school enrollees, as follows:

Subtest	Percentile	Scaled Score	Grade Equivalent
Reading	4	403	2.4
Applied Math	13	102	3.7
Language[4]	---	---	---
Spelling	22	482	6.6

Dr. Mitchell and Mr. Green concluded that claimant "is currently functioning in the extremely low range of intelligence at approximately the 1st percentile." They concluded that claimant's test and interview data "do not describe a clinical picture consistent with a learning disability diagnosis," in that "there is not a significant difference between her intellectual capacities and academic skills."

14. Claimant's grandmother completed an Adaptive Behavior Assessment System—Second Edition (ABAS-II) concerning claimant on May 10, 2006. Claimant was rated as "extremely low" in the areas of conceptual and social adaptive behaviors, and "borderline" in the area of practical adaptive behaviors. Weaknesses were noted in functional academics, leisure, and community use. Self-direction and social were considered areas of relative strength.

15. FNRC Intake Specialist Susan Rogge conducted a social assessment of claimant on May 8, 2006. The assessment took place at the home of claimant's grandmother. Claimant and her grandmother were both present, as was claimant's two-year-old daughter. The social assessment report noted that claimant was able to prepare simple cooked foods, make her bed, and wash dishes. She required a list and verbal prompting to complete other

[4] Due to claimant's time constraints, this portion of the test was not administered.

household tasks, such as vacuuming and dusting. She needed reminders to take her medication, but was independent in the areas of personal hygiene, bathing, and grooming. Claimant's grandmother described claimant as a "good parent who is able to predict and meet her daughter's needs." Claimant has never held a driver's license, and depends on her grandmother for transportation. Claimant reportedly has difficulty managing money, and is an impulsive shopper. Claimant's grandmother is attempting to teach claimant how to comparison shop.

FNRC Consideration of Eligibility

16. An interdisciplinary team, referred to at FNRC as "core staff," considered claimant's request for services from FNRC. At a conference held on May 31, 2006, the core staff concluded that claimant was not eligible for regional center services, stating: "[Claimant's] records show evidence of impaired cognitive functioning but testing prior to age of 18 does not support a diagnosis of Mental Retardation which is required under definition of 'Developmental Disability' contained in Title 17, California Code of Regulations."

17. FNRC issued its NOA, dated June 1, 2006, and claimant filed her fair hearing request, which was received by FNRC on June 16, 2006. Thereafter, FNRC held an informal meeting with claimant and her grandmother, on June 29, 2006. Judy Kruse, Case Management Supervisor, and Laura Larson, Executive Director, were present on behalf of FNRC. In her letter to claimant, dated June 29, 2006, Ms. Larson upheld the FNRC core staff decision that, while "the records show evidence of a learning disability and impaired cognitive functioning," claimant does not have a developmental disability that would qualify her for services under applicable statutes and regulations, based on testing conducted prior to the age of 18.

Testimony of Jan Edward Freemon, Ph.D.

18. Jan Edward Freemon, Ph.D., is a clinical psychologist employed by FNRC. He was a member of the core staff who evaluated claimant's eligibility for regional center services. Dr. Freemon did not personally evaluate claimant. He reviewed records and test data and consulted with other core staff members, including the FNRC Executive Director; a physician; a nurse; Susan Rogge, Intake Specialist; and Melissa Gruhler, CMS.

19. At hearing, Dr. Freemon stated that, based upon claimant's test data prior to the age of 18, claimant did not have mental retardation, and did not have a condition similar to mental retardation, or which required treatment similar to mental retardation. In his opinion, claimant had a number of test scores in the low average and/or borderline range, well above the score of 70 (two standard deviations below the mean) that is commonly accepted as the cutoff score for mild mental retardation. He noted that a "condition similar" meant test scores in the low 70s, accompanied by major deficits in adaptive functioning. He further noted that a significant degree of global cognitive impairment was required. In particular, claimant's test results from 1994 and 1996 showed that claimant's reading scores

were, at that time, in the low average to average range. Her mathematics scores declined over time, so that by 1999, she was demonstrating a significant deficit in math and arithmetic skills; however, her higher reading and verbal skills indicated an absence of global cognitive deficits. As late as 2001, when claimant was 16 years old, she was identified as having learning disabilities, and was mainstreamed into regular high school classes. Dr. Freemon noted that individuals with mental retardation typically are taught in special day classes to meet their particular academic needs. Thus, claimant did not require treatment similar to individuals with mental retardation.

20. Dr. Freemon acknowledged that claimant's cognitive scores declined between 1999 and 2006. However, there was nothing in the records to indicate brain damage or trauma prior to the age of 18 that would account for the decline. Dr. Freemon noted that many factors may contribute to an individual performing below their actual cognitive ability on standardized tests, but it was not possible for a person to perform above their actual cognitive ability. Thus, claimant's higher test scores are presumed to be a true measure of her cognitive ability prior to the age of 18.

Claimant's Testimony

21. Claimant represented herself at the fair hearing. She appeared to understand most of the testimony of Dr. Freemon, and she was able to express her arguments about why she believed she was entitled to regional center services. Claimant read portions of the Tri-County Vocational Services Evaluation report aloud during the hearing. She was able to "sound out" virtually all of the words. It was also clear that, while she did not understand the meaning of some of the words, she understood the general meaning of the sentences and paragraphs that she read.

22. Claimant believes that "something happened" after about age 14, and that it goes beyond a learning disability. She admitted that she "did a lot of drugs" as a teenager, and "something is not right." While she is 21 years old, she feels that she has the mind of a 13-year-old. She stated that she has trouble comprehending what she is told, and she needs information to be repeated several times before she understands what is said. She also feels unable to explain things so others can understand. She feels she is "slower than everybody else," and believes she was always below grade level in reading as well as her other subjects in school. Claimant does not believe she would be able to get a driver's license because she could not pass the test, and is "afraid" to drive. Claimant cannot follow a recipe to cook a meal; she can make simple items such as macaroni and cheese. She often forgets a pan is hot and burns herself. She is incapable of counting money, and needs assistance with shopping, in order to make change and decipher prices. Claimant worked as a hotel maid for nine months. She was fired because she did not understand instructions given to her. She has not held other employment.

23. Claimant brought her daughter to the hearing. She provided toys and snacks for her child, and acted as a competent and loving parent. She does not feel she is capable of caring for her child without her grandmother's help and instructions.

LEGAL CONCLUSIONS

Applicable Statutes and Regulations

1. Welfare and Institutions Code section 4512, subdivisions (a), and (l), state:

> (a) "Developmental disability" means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.
>
> [¶]…[¶]
>
> (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.
>
> Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.

2. California Code of Regulations, title 17, section 54000, states:

(a) “Developmental Disability" means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

3. California Code of Regulations, title 17, section 54001, subdivisions (a) and (b), state as follows:

(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.

4. California Code of Regulations, title 17, section 54002, states as follows:

"Cognitive" as used in this chapter means the ability of an individual to solve problems with insight, to adapt to new situations, to think abstractly and to profit from experience.

DSM-IV Definitions

5. The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) defines mild mental retardation as an IQ level of 50-55 to approximately 70. The diagnostic criteria for mental retardation are the following:

A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test (for infants, a clinical judgment of significantly subaverage intellectual functioning).

B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of

community resources, self-direction, functional academic skills, work, leisure, health, and safety.

C. The onset is before age 18 years.

6. The DSM-IV describes the diagnostic features of learning disorders as follows:

> Learning Disorders are diagnosed when the individual's achievement on individually administered, standardized tests in reading, mathematics, or written expression is substantially below that expected for age, schooling, and level of intelligence. The learning problems significantly interfere with academic achievement or activities of daily living that require reading, mathematical, or writing skills. A variety of statistical approaches can be used to establish that a discrepancy is significant. *Substantially below* is usually defined as a discrepancy of more than two standard deviations between achievement and IQ. A smaller discrepancy between achievement and IQ (i.e., between 1 and 2 standard deviations) is sometimes used, especially in cases where an individual's performance on an IQ test may have been compromised by an associated disorder in cognitive processing, a comorbid mental disorder or general medical condition, or the individual's ethnic or cultural background. If a sensory deficit is present, the learning difficulties must be in excess of those usually associated with the deficit. Learning Disorders may persist into adulthood.

Eligibility

7. In order to qualify for regional center services, claimant must have a developmental disability that originates before the age of 18. As set forth in section 4512, subdivision (a), "Developmental disability" includes mental retardation, cerebral palsy, epilepsy, and autism; it also includes 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. California Code of Regulations, title 17, section 54000, subdivisions(c)(2), states specifically that a handicapping condition that is solely a learning disability does not meet the definition of a developmental disability.

8. It was not established by a preponderance of the evidence that claimant is mentally retarded or that she has a disabling condition that is closely related to mental retardation within the meaning of section 4512, subdivision (a). The essential feature of mental retardation as set forth in the DSM-IV is "significantly subaverage general intellectual functioning that is accompanied by significant limitation 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." "Significantly subaverage intellectual functioning" is defined as an IQ of about 70 or below. Claimant's IQ scores prior to the age of 18 have consistently been well above 70 (Findings 8 and 12.B).

9. Claimant's low-average IQ scores also rule out a determination that claimant has a "closely related" disabling condition. The Court in *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, at p. 1129, stated in part:

> …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. Furthermore, the various additional factors required in designating an individual developmentally disabled and substantially handicapped must apply as well.

10. There was some evidence to indicate that claimant requires treatment similar to that required by individuals with mental retardation. She needs to have instructions broken down into small steps, with repetition and supervision (Findings 15 and 22). However, her overall level of functioning, as evidenced by her ability to attend and represent herself at the fair hearing, and her ability to independently provide care and supervision to her daughter, demonstrate that she is does not have the global deficits characteristic of an individual with mental retardation (Findings 21 and 23), and she has not in the past required treatment similar to individuals with mental retardation (Findings 12 and 19).

11. The test data supports the conclusion that claimant suffers from learning disabilities in mathematical calculation, mathematical reasoning, written expression, and reading comprehension (Findings 8, 9, 10, and 12). However, learning disabilities do not constitute a developmental disability within the meaning of Welfare and Institutions Code section 4512, subdivision (a), and are in fact specifically excluded from the definition of developmental disability under California Code of Regulations, title 17, section 54000, subdivision and (c)(2).

12. Claimant's most recent testing, at age 21, showed her performing in the range of mild mental retardation, with borderline scores in reading and spelling, and significantly below average scores in arithmetic (Finding 13). Dr. Mitchell's report indicated that claimant was "able to read simple words and a few words of intermediate complexity." This is in contrast to her actual conduct at the fair hearing, where she demonstrated the ability to read and understand the Tri-County Vocational Services Evaluation report (Finding 21). If, in fact, claimant's recent low scores are indicative of claimant's current underlying cognitive ability, it was not established that this level of disability originated before the age of 18.

Conclusion

13. Claimant has not sustained her burden of proof at this time to establish that she is eligible for FNRC services under the criteria set forth in applicable laws and regulations.

ORDER

Claimant Amber H.'s appeal from FNRC's denial of services is DENIED. Amber H. is not eligible for services under the Lanterman Act.

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 of receipt of this Decision.

Dated: _____

_____
CATHERINE B. FRINK
Administrative Law Judge
Office of Administrative Hearings