

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Eligibility of:

TYRISE J.

Claimant,

vs.

VALLEY MOUNTAIN REGIONAL
CENTER,

Service Agency

OAH No. N 2004090096

DECISION

Administrative Law Judge M. Amanda Behe, Office of Administrative Hearings, State of California, heard this state level fair hearing in Stockton, California, on November 15, 2004.

Claimant was represented by his mother, Consuelo S.

Gary Westcott, Ph.D., represented Valley Mountain Regional Center.

The matter was electronically recorded and the evidentiary record closed on November 15, 2004.

ISSUE IN DISPUTE

Is claimant Tyrise J. eligible for further regional center services?

FACTUAL FINDINGS

1. Tyrise J. (claimant) was born on February 18, 1996.
2. On August 16, 2004, the regional center wrote to claimant's representative transmitting a Notice of Proposed Action and a Fair Hearing Request Form. The Notice of

Proposed Action stated that the regional center would close the file based on the eligibility criteria for services.

3. Claimant's representative appealed on August 23, 2004, and asserted in her Fair Hearing Request that claimant has a problem with not doing what he is supposed to at his age level and there has not been any change. She also noted she was requesting a hearing to have claimant tested in her presence.

4. Claimant's case began with a request for services by claimant's mother in 2000. She was concerned that he was showing developmental delays, and requested any support available through case management.

On September 29, 2000, a Social Assessment was conducted by Beverley Johnson, MFT #32675, the regional center's Intake Coordinator. Claimant's representative, his mother, was the informant. At the time claimant lived in a three bedroom apartment with his two siblings, his mother, and his maternal grandfather. Claimant's mother, then 25 years old, had attended special education classes to the 12th grade and had never been employed. Her nephews and nieces are mildly mentally retarded or have Attention Deficit-Hyperactive Disorder (ADHD). Claimant's father is incarcerated and a drug abuser. Claimant's two siblings, from two of his mother's different partners, were drug exposed at birth.

At the Social Assessment claimant's mother said she had difficulty monitoring her children, and claimed to repeatedly "discover" them behaving in a dangerous manner. Ms. Johnson opined that claimant's mother would benefit from a better understanding of positive behavior management methods.

Claimant mumbled and slurred his words during the assessment, was overactive, and had difficulty responding to structure. He was able to respond to redirection and showed good motivation. Claimant was enrolled at Parklane Preschool and was receiving supplemental speech and language services.

Ms. Johnson administered the Developmental Profile II, a standardized inventory of physical, self-help, social, academic, and communication skills which depict developmental age. Claimant was 55 months old chronologically and scored 40-42 months physical age, 34 months self-help age, 28 months social age, 30 months academic age, and 30 months communication age. Claimant was assessed as having developmental delays and possible ADHD, and psychological evaluation was proposed to determine cognitive functioning levels.

5. On October 27, 2000, Clinton Lukeroth, Ed.D., conducted a psychological assessment of claimant. By that time claimant and his family lived with his maternal grandmother in a single-family house. Dr. Lukeroth observed that claimant was alert, cooperative, organized in his approach to problem solving, and that he made a sustained effort to complete difficult test items. His speech articulation was poor but he produced several sentences of three or four words.

On the DAS Preschool Test claimant's scores indicated functioning in the lower extreme range of General Cognitive Ability, which placed him in the borderline range for verbal functioning and deficient range for nonverbal activities. On the Vineland Adaptive Behavior Test he scored a composite of 50, which indicated deficiencies in communication, daily living skills, and motor skill development. Dr. Lukeroth concluded that claimant was at risk for mental retardation, with relative strength in verbal reasoning and information processing.

6. On December 20, 2000, the Lodi Unified School District conducted a Psycho-educational Evaluation of claimant using the Ordinal Scales of Development, Developmental Profile II, observations, interviews with his teacher and mother, and review of records. The District's evaluation noted that his mother used drugs during pregnancy and claimant suffered respiratory distress at birth and was hospitalized for a week.

During an hour-long classroom observation claimant sat next to his teacher and watched attentively, and spoke up when he could not see the pictures in a story book. He properly participated in clapping for each child during roll call, and spontaneously neatly stacked the name cards for the teacher. He was more attentive than many children, and happily pedaled a tricycle and played with others. He was eager to attempt the task presented by his teacher and the evaluator, and followed directions during the forty minutes of testing.

On the Ordinal Scales of Development claimant passed all items at the Sensorimotor Stage 6, but was unable to perform any of the tasks at the Preoperational Stage 2. On the Developmental Profile his motor skills were within normal range. Although his mother reported that he could not feed himself and display other adaptive skills, claimant was able to perform those tasks in the classroom. At school he feeds himself appropriately using utensils, opens his own milk carton, independently uses the toilet, etc. He scored 30 months social age, 38 months academic age, and 28 months communication age. The language, speech and hearing specialist found significant delays in expressive language development and articulation errors.

Claimant was assessed as having developmental delays with his cognitive development below age expectancy. However, he paid attention and learned at preschool, and displayed better self help skills there than his mother reported at home. Because of his language delays he qualified for special education services.

7. Claimant continued in special education classes at the Lodi Unified School District. On July 17, 2002, another Psycho-educational Evaluation was performed. Claimant's mother did not return the Health and Developmental History Questionnaire. Claimant's behavioral issues in school were prominent, including shoving peers, and his attendance problem was severe. The report stated: "In the school setting he is often defiant, such as refusing to work, not trying tasks that he does not want to do, and he has been known to cry if the task appears difficult to him."

On the other hand, claimant scored in the high borderline to low average range in the Woodcock-Johnson Third Edition (WJ-III), a measure of academic functioning. His sight reading was at the cutoff between mild delay and borderline, but reading comprehension was low average and he had difficulty writing. The report concluded that claimant was probably more in the borderline to low average area of functioning, rather than mentally retarded.

8. Claimant continued in special education at the Lodi Unified School District. In 2002 the modifications which had been implemented for his kindergarten class were small group work, one-on-one assistance, extra time for assignments, peer tutor to review information, asking claimant to repeat information back to the teacher or aide, and supplementary material.

9. Two years later claimant's mother sought additional services from the regional center, noting behavioral problems including property damage. His case was referred to the regional center's Telepsychiatry Clinic for psychotropic medication. Gary Westcott, Ph.D., determined that an updated evaluation was needed before medicating claimant for behavioral issues, especially because there was concern that he was not mentally retarded at all.

Dr. Westcott noted that claimant's early test results indicated he was at risk for mental retardation. Test results for a child at such a young age are quite dubious because the DAS and similar tools are based on the presumption that all children develop at the same rate. Dr. Westcott described that the younger a person is when tested the less likely their scores are of predicting their state later on. In consequence, school districts require retesting every three years.

Claimant was referred for a psychotherapy evaluation on May 20, 2004.

10. On June 16, 2004, claimant was evaluated by Arnold E. Herrera, Ph.D. With regard to the July 17, 2002, Psycho-educational Evaluation, Dr. Herrera noted that claimant's performance on those academic tests argued against mental retardation. Furthermore, the school's evaluation was correct in noting that claimant's severe attendance problems and behavioral issues were affecting his performance level. Dr. Herrera reported that

The emerging picture was of learning inefficiency secondary to either learning disability or behavioral issues, including inattention and resistiveness; it could also be a combination of both. However, it appeared that mental retardation was, in fact, not present in this case, an impression that was validated by today's test finding where he revealed functioning at least within the low average range.

Claimant's mother advised Dr. Herrera that claimant had been suspended 20 times and talked back to teachers, refused to do work, and hit his classmates. She stated he qualified for SSI based on mental retardation, but Dr. Herrera found that assertion unlikely given his mental status. Claimant's mother wanted a prescription of Ritalin for claimant.

The Autism Screening Checklist was negative, and there was no history of Autism Spectrum Disorder. Dr. Herrera observed that claimant had a restive disposition, and structure and reinforcement were used to redirect him. After claiming he could not do something claimant could be coaxed into completing it rapidly. This indicated to Dr. Herrera that, while his behavioral disposition clearly detracts from performance, “when focused he can demonstrate relatively strong cognitive functioning.”

Dr. Herrera administered the Wechsler Intelligence Scale for Children - Third Edition (WISC-III), Vineland Adaptive Behavior Scales, and Wide Range Achievement Test - Revision Three. Claimant’s WISC-III results, including a Full Scale IQ of 92, indicated intellectual abilities at the low average to average level, despite inattention and selective engagement which apparently related to his failing easy items and correctly answering more difficult ones. Claimant’s academic scores on the Wide Range Achievement Test were Standard Scores of 84 in reading and 99 in arithmetic abilities. Dr. Herrera reported that the latter result following claimant stating that he could not add, but clearly he was able to do so. Dr. Herrera opined that overall claimant has low to average intelligence with selective learning inefficiency due to behavioral problems, but not a learning order per se.

On the Vineland Adaptive Behavior Scales, a measure of personal and social sufficiency and adaptive functioning, claimant displayed low average communication skills. He used complete sentences when he was willing to elaborate. His social skills were in the borderline to low average range, a measure depressed by his resistiveness and impatience. Claimant’s adaptive abilities were in the low average range. Dr. Herrera noted that claimant has adequate gross and fine motor functioning, understands table games, can use the telephone and make purchases, and has basic self care abilities.

Dr. Herrera’s diagnosis was Attention Deficit Hyperactivity Disorder, NOS, with features of Oppositional Defiant Disorder. He concluded that claimant has at least low average to average intelligence. Dr. Herrera recommended that the school district reevaluate the basis for special education programming, and that counseling at school or referral to mental health be provided for his behavior.

11. On July 17 and 19, 2004, Jean Finley, a School Psychologist with the Lodi Unified School District, conducted a Psycho-education Evaluation of claimant. Claimant had been referred to determine his special education eligibility.

Claimant was attending a special education first grade class. His school attendance, which was noted as a significant problem in 2002, remained a major difficulty. In the 2001-02 school year he was absent or tardy 72 out of 165 days, with 2 unverified, 41 unexcused, and 5 excused absences. In short, claimant was absent 48 percent of his school career. In the first month of the 2002-03 school year he was absent four days and tardy seven days.

Dr. Finley noted that claimant will perform classroom tasks well when he wants to, and will take turns playing games, and had appropriate gross motor skills. Of concern were his behaviors of shoving peers, refusing to do work in a class that he does not like, and poor

memory and fine motor skills. Claimant could not write his name, had difficulty following directions, and recognized only a few letters. He was receiving speech and language services twice a week, and had been receiving those services since preschool. Claimant's mother indicated that his overall adaptive skills were significantly delayed.

Because claimant is African-American school districts are prohibited from conducting an intellectual assessment. Dr. Finley used permitted alternative instruments, the Learning Disability Evaluation Scale, NEPSY neuropsychological assessment, the Woodcock-Johnson III Test of Achievement, and observation. The Attention Deficit Disorders Evaluation Scale, the Adaptive Behavior Evaluation Scale, and the Health History and Development Questionnaire were not returned by claimant's representative.

On the Learning Disability Evaluation Scale the responses of claimant's teacher indicated that his learning potential falls in the borderline to low average range. In the classroom he shows average spelling and math skills, but other skills are at risk and he requires that concepts be broken down for comprehension.

The NEPSY is a comprehensive measure of neuropsychological development. In the attention subtest claimant performed in the low average to average range, on the language-communication subtest he was in the borderline range, and on the visuo-spatial subtest his results indicated low average ability. His overall performance on the memory subtest was borderline to low average memory skills.

Claimant's kindergarten teacher was the respondent for the Attention Deficit Disorder Evaluation Scale. Her responses indicated that claimant is in the at-risk range in the categories of Inattentive and Hyperactive-Impulsive. His resource specialist teacher administered the Woodcock-Johnson test which indicated borderline to low average math skills, and significant difficulties with reading and written language skills.

Claimant was observed during his reading recovery class, which had two other students. During the evaluation he was well mannered and cooperative but restless and fidgety, and had difficulty focusing on tasks. Claimant was not consistent in a spelling activity, and could only print the letter "T" of his name. The teacher noted that it was the first week of the class and claimant had already been absent two days. Dr. Finley summarized that claimant's severe attendance problems were significantly interfering with his academic progress. In the preceding year he had missed almost half of the school year due to absences and tardies, and as a result he was continuously behind his peers. When he is absent he misses new information that is presented and does not have the opportunity to practice new skills.

Claimant's test results indicated borderline to low average ability, but additional assessment could not be performed due to his not attending school regularly or on time. Dr. Finley concluded that claimant does not meet eligibility standards as an individual with exceptional needs, and his attendance problems contributed to the educationally significant discrepancy exists between his ability and achievement scores.

Dr. Finley particularly recommended that, because consistent school attendance is critical to his school success, it is essential that he be at school on time every day. She also suggested that at home he play memory games, be quizzed after stories have been read to him, and have more activities such as pasting and cutting.

12. Claimant's mother, who is 29 years old, was in special education from the second grade. She testified that at home claimant bangs his head against doors, cuts himself and that he stabbed a cat to death.

Claimant's mother testified that claimant does not dress himself, and that she dresses him. She testified that he cannot add because she helps him do that, and that they "have a difficult time doing adding together." Her testimony suggested that rather than prompting him to do these tasks by himself she performs them for him. The discrepancy between her experience and the reports of Dr. Herrera and other evaluators may be explained by their observations that claimant would successfully do tasks, even those he said he could not do, with appropriate prompting and encouragement. Apparently his mother simply assumes he cannot dress himself or add.

Claimant's mother stated that he is now in a second grade¹ special education class with 13 students. His early reading teacher said claimant is coming along but still has problems. He is now 8 years old and has received speech therapy since kindergarten.

Claimant's mother presented claimant's Individualized Educational Plan prepared by the Lodi Area Special Education Region. Those documents indicated that claimant is classified as having a specific learning disability, rather than cognitively impaired. That is, he is determined to have a specific learning problem rather than mentally retarded (cognitively impaired).

Claimant's mother stated that Dr. Herrera's test results were wrong, and she wanted another test for her son while she was present. While she disagrees with his conclusions, no evidence suggested that Dr. Herrera's evaluation was incorrect or improperly administered.

13. Claimant's mother did not offer any explanation for her failure to get claimant to school on time and regularly. His poor attendance is particularly alarming because it has continued since at least 2002, and multiple evaluators have noted that it affects claimant's ability to succeed in school.

14. The DSM-IV-TR² describes mental retardation as significantly sub-average general intellectual functioning (an IQ of 70 or below) accompanied by significant

¹ The Individualized Education Plan states that claimant is in the third grade.

² The current Diagnostic Statistical Manual, Fourth Edition, Text Revised, published in 2000 by the American Psychiatric Association, is the authoritative text for the diagnostic categories for mental disorders.

limitations in adaptive functioning in at least two of the skill areas of: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, and functional academic skills, work, leisure, health and safety.

“General intellectual functioning” is defined by the intelligence quotient (IQ) or its equivalent obtained by one or more of listed standardized tests, noting a measurement error of approximately five points depending upon the instrument. The DSM-IV-TR notes that it is possible to diagnose a person with an IQ between 70 and 75 to be diagnosed with mental retardation if that individual exhibits significant deficits in adaptive behavior, and, conversely, not diagnose an individual with an IQ below 70 who has no significant impairments in adaptive functioning.

15. The “Fifth Category” under Welfare and Institutions Code section 4512, subdivision (a), requires the presence of a condition that is closely related to mental retardation or requiring treatment similar to that required for mentally retarded individuals. As with the four other developmental disabilities identified in section 4512, subdivision (a), a Fifth Category disability must have an onset before age 18 and must constitute a substantial handicap.

16. Claimant has consistently tested in the borderline to low-average IQ range, which is wholly inconsistent with mental retardation or a condition closely related to mental retardation.

LEGAL CONCLUSIONS

Claimant’s borderline to low average intellectual functioning is not a qualifying condition for regional center services within the parameters of Welfare and Institutions Code section 4512, subdivision (a), and California Code of Regulations, title 17, section 54000, subdivisions (a), (b) and (c)(1). A substantial handicap is defined by regulation to be “a condition which results in major impairment of cognitive and/or social functioning.” California Code of Regulations, title 17, section 54001, subdivision (a). Claimant is not substantially handicapped in three or more of the aspects of functioning identified in California Code of Regulations, title 17, section 54001, subdivision (b).

ORDER

Claimant Tyrise J.’s appeal of the regional center’s decision IS DENIED. Claimant is not eligible for regional center services.

NOTICE

This is the final administrative decision in this matter and both parties are bound by its contents. Either party may appeal this decision to a court of competent jurisdiction within ninety days.

Dated: _____

M. AMANDA BEHE
Administrative Law Judge
Office of Administrative Hearings