BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: DAVID R., Claimant, and EASTERN LOS ANGELES REGIONAL CENTER, Service Agency.	OAH Nos. 2010070421

DECISION

Administrative Law Judge Ralph B. Dash heard this matter in Alhambra, California on September 13, 2011, and December 13, 2011.

Nicole Hodge Amey, Attorney at Law, represented Daniel R. (Claimant).

Felipe Hernandez, Chief of Consumer Services, represented Eastern Los Angeles Regional Center (ELARC or Regional Center).

The record was held open until January 31, 2012, to allow Claimant to provide an expert's report that was not available at the hearing and to allow Regional Center's expert witness to review and comment thereon. On his own motion, the Administrative Law Judge extended the time for submission of documents until February 10, 2012. Neither party submitted any evidence not presented at the hearing. The matter was deemed submitted on February 10, 2012.

ISSUE

The parties agreed the issue to be resolved is whether Claimant is eligible for services from the Regional Center.

FACTUAL FINDINGS

1. Claimant is 19 years old (date of birth January 22, 1993). He resides with his mother who is also his conservator. His qualifying diagnoses for the special education classes he receives from the Montebello Unified School District are "Specific Learning Disability" and "Other Health Impairments." These other health impairments include psychiatric disorders (Impulse Control Disorder NOS, Mood Disorder NOS, Cannabis-Related Disorder NOS, and Learning Disorder NOS) and medical conditions (Diabetes Insipidus, Hypothyroidism, and Langerhans Cell Histiocytosis (LCH) in remission).[1] According to his mother, Claimant began treatment for LCH with radiation and chemo therapy beginning when he was three years old.

2. In addition to the psychiatric disorders noted above, over the past several years Claimant has also been diagnosed as having Attention Deficit/Hyperactivity Disorder "combined type (rule-out Obsessive Compulsive Disorder)," Conduct Disorder, and Oppositional Defiant Disorder. He has also been diagnosed as having mild mental retardation.[2] Claimant had a psychiatric hospitalization in January 2010 after he cut his arms with a broken compact disc. Claimant's mother also referenced a "72-hour hold" in March 2010 while Claimant was in Juvenile Hall (Exhibit D). Also according to Exhibit D (Mental Health Assessment prepared by the Los Angeles Department of Mental Health), Claimant "was taken via emergency to the hospital for medical care on May 7, 2010. It is reported that [Claimant] overdosed on his mother's Adavan (*sic*, Ativan)[3] prescription medication."

3. In 2004 Claimant's IQ was measured using the Wechsler Intelligence Scale for Children Third Edition (WISC III). He achieved a full scale IQ (FSIQ) of either 67 or 69.[4] In February 2010, an ELARC psychologist administered the Wechsler Adult Intelligence Scale-

---

[1] According to the National Institutes of Health, "Langerhans cell histiocytosis is a disorder in which excess immune system cells called Langerhans cells build up in the body. Langerhans cells, which help regulate the immune system, are normally found throughout the body, especially in the skin, lymph nodes, spleen, lungs, liver, and bone marrow. In Langerhans cell histiocytosis, excess immature Langerhans cells usually form tumors called granulomas."

[2] This diagnosis is found in Exhibit 10, an "initial psychiatric evaluation" from Providence Community Services. However, the evaluation does not contain the basis for this diagnosis and is given little weight.

[3] Ativan is the brand name for lorazepam, a benzodiazepine used to treat anxiety disorders or anxiety associated with depression.

[4] Exhibit 7 is a psycho-educational summary provided by Claimant's then Middle School. In the section concerning cognitive functioning, Claimant's FSIQ was stated to be 67, with a remark that Claimant's "overall reasoning abilities exceed those of approximately 1% of children his age." In the test results section, his FSIQ was stated to be 69. As set forth below, the difference in the results have no distinction.

Third Edition. Claimant achieved a FSIQ of 73.

4. In preparation for his most recent Individualized Education Program (IEP), dated May 31, 2011 (Exhibit H), Claimant was assessed for his academic achievement by administration of the Woodcock-Johnson Tests of Achievement III (WJ III).[5] At the time of this assessment, Claimant was in the 12th grade.[6] The IEP (Exhibit H) makes reference to Claimant's WJ III, in part, as follows:

> **Content Area: Reading**
>
> **Present Levels of Educational Performance:**
>
> When administered the WJ III, [Claimant] tested at a 3.1 grade equivalent in Letter-Word Identification and a 2.6 equivalent in Passage Comprehension. . . .
>
> [¶] . . . [¶]
>
> **Content Area: Math**
>
> **Present Levels of Educational Performance:**
>
> When administered the WJ III, [Claimant] tested at a 3.0 grade equivalent in Calculation and a 3.1 grade equivalent in Applied Problems. . . .
>
> [¶] . . . ¶]
>
> **Content Area: Written Language**
>
> **Present Levels of Educational Performance:**
>
> When administered the WJ III, (Claimant) tested at a 4.9 grade equivalent in Writing Fluency. . . .

5. Claimant has numerous deficits in his activities of daily living. According to his mother, he needs prompts to bathe, brush his teeth and wear clean clothing. Claimant cannot properly handle money; he never counts change when purchasing an item. He cannot take public transportation by himself. He is unable to set up the various medications he takes. While he can make a sandwich, he cannot properly use cooking appliances. He cannot make friends. He has gone up to strangers and asked if he could live with them. He elopes.

---

[5] The WJ III measures many aspects of academic achievement and is widely used by school districts.

[6] Claimant is now a student at Tobinworld, a non-public school.

6. ELARC does not contest that Claimant has severe adaptive behavioral deficits. Heike Ballmaier, Psy.D., a staff psychologist, evaluated Claimant on February 16, 2010. In her written assessment (Exhibit 16), Dr. Ballmaier began the section on Adaptive Functioning with the following:

> [Claimant's] adaptive functioning was measured by the Adaptive Behavior Assessment System, Second Edition. Specifically, Conceptual Skills (Communication, Functional Academics, Self-Direction) were in the "extremely low" range (SS=57), Social Skills (Leisure, Social) were in the "extremely low" range (see previous section under Social/emotional/Behavioral Functioning), and Practical Skills (Community Use, Home Living, Health and Safety, and Self-Care) were also in the "extremely low" (SS=57). Overall, general adaptive functioning earned a score that is indicative of significant deficits (SS=54).

7. Randi Bienstock, Psy.D. testified on ELARC's behalf. She did not evaluate Claimant personally. Rather, she based her testimony on the various reports regarding Claimant that were admitted in evidence at the hearing. Dr. Bienstock did not believe Claimant is mentally retarded. She based this testimony on the fact Claimant had "scatter" among the various sub-tests of the various intelligence instruments used to evaluate him. That is, some scores were significantly higher than other scores. According to Dr. Bienstock, "You usually do not see such fluctuation in people with mental retardation." Dr. Bienstock also took into account evidence that Claimant had met early developmental milestones which, she stated, typically is <u>not</u> the case with a mentally retarded person.

8. Dr. Bienstock admitted she had difficulty in determining whether Claimant was eligible for services under the "fifth category," more fully discussed below, or whether Claimant was not eligible for services because he had borderline intelligence. She also testified that Claimant's developmental disabilities "were not solely psychiatric in nature." According to Dr. Bienstock, when a psychologist evaluates a person with borderline intelligence and low adaptive functioning, such as Claimant, the fifth category "must always be considered." Dr. Bienstock stated that she "went back and forth" between determining whether Claimant had borderline intelligence or was more properly placed in the fifth category. Her opinion was that "because there was so much evidence" that Claimant had mental health problems, he was not eligible for the fifth category because "services [provided to Claimant by the Regional Center] would be different" from services aimed at helping a mentally retarded person. Dr. Bienstock did not elaborate as to the nature of the services to which she was referring or why they would not help Claimant.

9. Delaina Martinez, Psy.D., a licensed educational psychologist, testified on Claimant's behalf. She had two counseling sessions with Claimant before reviewing any records in this case. Dr. Martinez' first impression of Claimant was that he had cognitive impairment. She found that he could not care for himself, he did not eat properly (only junk food only when left on his own), he can't plan meals, he has diabetes but he could not set up his own medications, he could not get on a bus by himself "without training," and he cannot drive a

car because of his low impulse control. Dr. Martinez likened Claimant to a person with "frontal lobe damage."[7]

10. Dr. Martinez reviewed all of the documents in evidence in this matter. Her conclusion, based upon her personal interviews with Claimant and the record review, was that Claimant "was clearly fifth category." She also opined that Claimant could be mentally retarded. She based her testimony on the information that is already set forth in Findings 4 through 6 above and need not be repeated here. It was Dr. Martinez' opinion that, even with borderline intelligence, because Claimant demonstrates such significant deficits in adaptive functioning, he is actually functioning in a manner that is similar to that of a person with mental retardation. His academic and functional academic skills are well below age and grade level, consistent with those of a second, third or fourth grade student, despite receiving special education services for numerous years. In addition, even when Claimant's psychiatric issues are under control he continues to struggle with adaptive skills and independent living. She opined that Claimant has a "dual diagnosis," meaning that Claimant's psychiatric conditions alone have not caused his developmental delays.

LEGAL CONCLUSIONS

1. Claimant has established that he suffers from a developmental disability entitling him to regional center services. (Factual Findings 3 through 10.)

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

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

> a disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual, and includes mental retardation, cerebral palsy, epilepsy, autism, and disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

---

[7] The frontal lobes of the brain are involved in motor function, problem solving, spontaneity, memory, language, initiation, judgment, impulse control, and social and sexual behavior.

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

4(b). California Code of Regulations, title 17, section 54001 states, in pertinent part:

(a) "Substantial disability" means:
(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and
(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:
(A) Receptive and expressive language;
(B) Learning;
(C) Self-care;
(D) Mobility;
(E) Self-direction;
(F) Capacity for independent living;
(G) Economic self-sufficiency.

5(a). In addition to proving a "substantial disability," a claimant must show that his disability fits into one of the five categories of eligibility set forth in Welfare and Institutions Code section 4512. The first four categories are specified as: mental retardation, epilepsy, autism and cerebral palsy. The fifth and last category of eligibility is listed as "Disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation." (Welf. & Inst. Code, § 4512.) This category is not further defined by statute or regulation.

5(b). Whereas the first four categories of eligibility are very specific, the disabling conditions under this residual fifth category are intentionally broad to encompass unspecified conditions and disorders. However, this broad language is not intended to be a catchall, requiring unlimited access for all persons with some form of learning or behavioral disability. There are many persons with sub-average functioning and impaired adaptive behavior. Under the Lanterman Act, a regional center does not have a duty to serve all of them.

5(c). While the Legislature has not defined the fifth category, it does require that the qualifying condition be "closely related" (Welf. & Inst. Code, § 4512, subd. (a)) or "similar" (Cal. Code. Regs., tit. 17, § 54000) to mental retardation or "require treatment similar to that required for mentally retarded individuals." (Welf. & Inst. Code, § 4512, subd. (a).) The definitive characteristics of mental retardation include a significant degree of cognitive and adaptive deficits. Thus, to be "closely related" or "similar" to mental retardation, there must be a manifestation of cognitive or adaptive deficits, or both, which render that individual's

disability like that of a person with mental retardation. However, this does not require strict replication of all of the cognitive and adaptive criteria typically utilized when establishing eligibility due to mental retardation (e.g., reliance on I.Q. scores). If this were so, the fifth category would be redundant. Eligibility under this category requires an analysis of the quality of a claimant's cognitive and adaptive functioning and a determination of whether the effect on his performance renders him like a person with mental retardation. Furthermore, determining whether a claimant's condition "requires treatment similar to that required for mentally retarded individuals" is not a simple exercise of enumerating the services provided and finding that a claimant would benefit from them. Many people could benefit from the types of services offered by regional centers (e.g., counseling, vocational training or living skills training). The criterion is not whether someone would benefit. Rather, it is whether someone's condition requires such treatment.

6. Claimant's intellectual functioning cannot be determined with complete specificity. His various IQ tests have placed him in the range of mild mental retardation (67/69) and borderline intelligence (73). However, as noted above, IQ alone does not determine whether an individual is mentally retarded. One must also look at the Claimant's adaptive functioning. As set forth in CCR section 54001, subdivision (b), because an individual's cognitive and/or social functioning are many-faceted, there are at least seven categories relative to adaptive functioning that must be examined. These categories are the same or similar to the categories of adaptive functioning skills listed in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revised (DSM-IV-TR) that, to support a diagnosis of mental retardation, requires a finding of significant limitations in at least two such skills. Applying the evidence to the seven listed categories reveals the following:

(1) Communication skills: Claimant's communication skills problems, by themselves, are neither severe enough nor sufficiently impairing to constitute a developmental disability. There was no evidence presented that Claimant did not know the meaning of ordinary words, nor that he could not use those words appropriately.

(2) Learning: The evidence shows Claimant is severely impaired in his ability to learn (Finding 4).

(3) Self-care: Claimant's ability to take care of himself is significantly impaired (Finding 5).

(4) Mobility: Claimant's mobility is impaired in that he is 19 years old and cannot use public transportation at all without assistance.

(5) Self-direction: Claimant has no self direction, and cannot plan, organize or accomplish even simple tasks without direction, prompting and supervision.

(6) Capacity for independent living: Claimant cannot live independently, nor is he likely ever to be able to live independently.

(7) Economic self-sufficiency: There was no evidence that Claimant has any skills or abilities to perform any marketable service.

7. It was established that Claimant has, at best, borderline intelligence and he also has major impairments in adaptive functioning. Thus, based on all of the evidence as set forth above, it is determined that Claimant suffers from a condition that is similar to mental retardation.

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

9. The Diagnostic and Statistical Manual of Mental Disorders (4th edition, Text Revision, 2000, American Psychiatric Association, also known as DSM-IV-TR) is a well respected and generally accepted manual listing the diagnostic criteria and discussing the identifying factors of most known mental disorders. The manual uses a number system for the different disorders which is accepted by most medical and psychotherapeutic professionals (and insurance companies) as a shorthand method to designate the disorders that are more specifically described in the manual.

10. The DSM-IV-TR describes mental retardation as follows:

> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.
>
> *General intellectual functioning* is defined by the intelligence quotient (IQ or IQ-equivalent) obtained by assessment with one or more of the standardized, individually administered intelligence tests (e.g., Wechsler Intelligence Scales for Children—Revised, Stanford-Binet, Kaufman Assessment Battery for Children).

> Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean). It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior. Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning. . . . When there is significant scatter in the subtest scores, the profile of strengths and weaknesses, rather than the mathematically derived full-scale IQ, will more accurately reflect the person's learning abilities. When there is a marked discrepancy across verbal and performance scores, averaging to obtain a full-scale IQ score can be misleading.
>
> Impairments in adaptive functioning, rather than a low IQ are usually the presenting symptoms in individuals with Mental Retardation. *Adaptive functioning* refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting. Adaptive functioning may be influenced by various factors, including education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with Mental Retardation. Problems in adaptation are more likely to improve with remedial efforts than is the cognitive IQ, which tends to remain a more stable attribute.
>
> (DSM-IV-TR at pp. 39 - 42.)

11. Regarding mild mental retardation (I.Q. level of 50-55 to approximately 70), the DSM-IV-TR states:

> [Persons with mild Mental Retardation] typically develop social and communication skills during the preschool years (ages 0-5 years), have minimal impairment in sensorimotor areas, and often are not distinguishable from children without Mental Retardation until a later age. By their late teens, they can acquire academic skills up to approximately the sixth-grade level. By their adult years, they usually achieve social and vocational skills adequate for minimum self-support, but may need supervision, guidance, and assistance, especially when under unusual social or economic stress. With appropriate supports, individuals with Mild Mental Retardation can usually live successfully in the community, either independently or in supervised settings.
>
> (*Id*. at pp. 42 - 43, emphasis added.)

12. Claimant fits all of the criteria of mild mental retardation expressed above. According to Dr. Bienstock, because Claimant did not exhibit early developmental delays, he should not be considered mentally retarded. Her opinion is diametrically opposite to the portion of the DMV-TR IV emphasized above. She offered no basis for her contradictory opinion.

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

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

(*Id*. at p. 48.)

14. It is important to note that, IQ is a statistical concept, derived by psychological testing. Mental retardation has been defined as two standard deviations below the mean, (the lower two to three percentile ranges of the population). With an average or mean IQ score being 100 and with a standard deviation being 15, an IQ score of 70 falls within the mentally retarded range, as long as the other criteria are met. But, as set forth in the DSM-IV TR, there is no such thing as an absolute IQ score. The "margin of error" can be as much as five points, up or down. Thus, based on Finding 3, Claimant's FSIQ could be anywhere from 78 (definitely "borderline intelligence") down to 62 (definitely mild mental retardation). This is exactly the type of score range that, given Claimant's adaptive deficits, clearly would place him in the fifth category.

15. Based upon the evidence presented, Claimant has met his burden of proof that he has a substantial disability as defined by Welfare and Institutions Code section 4512, and California Code of Regulations, title 17, section 54001. He has a condition that is similar to mental retardation. He also has significant adaptive deficits.

16. The law is clear as to the weight to be given the testimony of the two expert witnesses in this matter. The testimony of Dr. Martinez, who spent two counseling sessions with Claimant in addition to reviewing all of the records, is given greater weight than the testimony of Dr. Bienstock, who conducted a record-review only. The Court in *People v. Bassett* (1968) 69 Cal.2d 122, had occasion to do a detailed analysis of the use of expert testimony when the issue is one of mental competence. The Court stated, commencing at page 141:

> Mental illnesses are of many sorts and have many characteristics. They, like

> physical illnesses, are the subject matter of medical science. They differ widely in origin, in characteristics, and in their effects on a person's mental processes, his abilities, and his behavior. . . . Description and explanation of the origin, development and manifestations of the alleged disease are the chief functions of the expert witness. The chief value of an expert's testimony in this field, as in all other fields, rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion; in the explanation of the disease and its dynamics, that is, how it occurred, developed and affected the mental and emotional processes . . . it does not lie in his mere expression of conclusion . . .both [doctors who testified for the State] conceded on the stand that they had never talked with this defendant, and the record does not disclose they had ever seen him . . . [A] distinguished federal court recently surveyed the medical writings on this subject, and concluded, "The basic tool of psychiatric study remains the personal interview, which requires rapport between the interviewer and the subject . . ." [The doctors for the state] left no doubt on cross-examination that their regular practice was to conduct personal examinations and that they would have preferred to do so in this case.

The Court in *Bassett* gave little weight to the testimony of the experts who had not examined the defendant therein, but merely conducted a record review. The Court did give substantial weight to the evidence presented by the defendant's experts who thoroughly examined, tested and interviewed the defendant. For these reasons, and because she was contradicted in her testimony on a key point by an authoritative source, Dr. Bienstock's expert testimony is given less weight than that of Dr. Martinez.

17. Dr. Bienstock conceded that Claimant's adaptive deficits are not caused solely by his psychiatric condition (Finding 8). The evidence fully supports a finding that Claimant is eligible to receive Regional Center services under the fifth category.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

ELARC's's determination that Claimant is not eligible for regional center services is overruled, and Claimant's appeal of that determination is granted. ELARC shall accept Claimant as a client forthwith.

DATED:_____

_____
RALPH B. DASH
Administrative Law Judge
Office of Administrative Hearings

Notice

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.