

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2013010951

**DECISION**

Administrative Law Judge Abraham M. Levy, State of California, Office of Administrative Hearings, heard this matter on March 5, 2014, at San Bernardino, California.

Leigh-Ann Pierce, Consumer Services Representative, represented Inland Regional Center (IRC).

Claimant's mother represented claimant.

The matter was submitted on March 5, 2014.

**ISSUE**

Is claimant eligible to receive regional center services on the basis of mental retardation?

**FACTUAL FINDINGS**

1. Claimant is a twenty-year old man who lives in a group home. His mother is his conservator. Claimant received a certificate of completion from Moreno Valley High

School.<sup>1</sup> According to claimant's most recent Individual Education Plan (IEP), dated January 29, 2013, claimant has an educational handicap of Intellectual Disability, with deficits in independent adaptive skills and in decision making that have a pervasive impact on his learning, social skills, and ability to adapt. In a social assessment report dated January 13, 2012, which was prepared as part of claimant's application for services, IRC documented claimant's deficits in independent adaptive skills. In this assessment, claimant's mother stated that claimant needed assistance with personal hygiene, dressing, and activities of daily living. His mother was specifically concerned that he lacked stranger awareness.

2. IRC denied the application for regional center services in a letter dated August 23, 2012. IRC concluded that claimant did not have a qualifying condition. On January 15, 2013, claimant requested a fair hearing.

*Michelle Lindholm, Ph.D.*

3. IRC based its determination that claimant is not eligible for regional center services on a psychological assessment dated July 10, 2012, completed by Michelle M. Lindholm, Ph.D. Dr. Lindholm testified at the hearing. Her testimony is summarized as follows:

Dr. Lindholm concluded that by history, claimant has Attention Deficit Hyperactive Disorder (ADHD), a learning disorder, and Bipolar Disorder. She further concluded that claimant was not eligible for regional center services on the basis of mental retardation or a condition similar to mental retardation.

To evaluate claimant, Dr. Lindholm assessed claimant by using the Wechsler Adult Intelligence Scale -4th Edition (WAIS-IV); Comprehensive Test of Nonverbal Intelligence; Scale of Independent Behavior; Street Survival Skills Questionnaire; and the Structured Inventory of Malingered Symptomology (SIMS). She also interviewed claimant and his mother. In addition, Dr. Lindholm reviewed records and reviewed the reports of clinicians who evaluated claimant, including Edward Pflaumer, Ph.D., Edward Frey, Ph.D., and Robert Marselle, Psy.D., R.N.

The assessment scores Dr. Lindholm obtained showed low intellectual functioning. Under the WAIS-IV, claimant had a verbal comprehension score of 68, a working memory score of 60, a perceptual reasoning score of 69, a processing speed score of 62, and a full

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<sup>1</sup> A certificate of completion is awarded to a student as an alternative to a high school diploma. It certifies that the student has satisfactorily completed a prescribed alternative course of study, has met the goals of his/her IEP, or has participated in high school instruction and has met the objectives of the statement of transition services. Students can participate in graduation ceremonies if they receive a certificate of completion. A certificate of completion is not a high school diploma.

scale IQ of 59. The Comprehensive Test of Nonverbal Intelligence scores were: 53 for pictorial scale; 50 for geometric scale; full scale 48; the SIMS score total was 44 with the clinical cutoff of 14. Under the SIMS score, Dr. Lindholm stated that claimant's scores were significantly above the cutoff for an individual taking the test.<sup>2</sup> This suggested to Dr. Lindholm that factors other than intellectual ability were interfering with claimant's test-taking.

4. In significant part, Dr. Lindholm based her opinion that claimant does not have mental retardation on the reports of two psychologists who had previously evaluated claimant for regional center services: Dr. Frey and Dr. Pflaumer. Dr. Frey found, in his April 19, 2006, assessment, that claimant had borderline intellectual functioning, according to the Wechsler Intelligence Scale of Children (WISC) assessment he performed. Dr. Frey noted, however, that there was significant scatter. Claimant's WISC IQ scores were: 71 for verbal reasoning; 84 for perceptual reasoning; 94 for working memory; 65 for processing speed; and 72 for full scale IQ. To Dr. Frey, claimant's overall profile suggested that claimant has a learning disability.

5. In his 2009 assessment, Dr. Pflaumer found that claimant was significantly delayed under the WISC, but he found the scores invalid. The WISC results revealed a full scale IQ of 40, with 45 for verbal comprehension, 51 for perceptual reasoning, 50 for working memory, and 50 for processing speed. Dr. Pflaumer speculated that this was due to claimant's emotional disturbance, altered perceptions, problems at school, substance use, medical conditions, sleep disturbance, motivational issues, poor attention, or malingering.

6. In his report dated June 27, 2006, Dr. Marselle diagnosed claimant with mental retardation. He prepared his report for the school district. In arriving at this diagnosis, Dr. Marselle employed the WISC and the Wide Range Achievement Test (WRAT) assessments, conducted a mental status examination, and reviewed claimant's educational history. After employing these procedures and assessments, Dr. Marselle concluded that claimant "clearly falls in the mild mental retardation diagnostic criteria. (Claimant) is in the 1 percentile." According to Dr. Marselle, claimant's full scale IQ measurement was 64.

7. Dr. Lindholm found it especially significant that Dr. Frey's report and Dr. Marselle's report contained different score results. Dr. Lindholm interpreted this to mean that something other than intellectual ability caused the change in claimant scores in the two months between Dr. Marselle's assessment and Dr. Frey's.<sup>3</sup>

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<sup>2</sup> Dr. Lindholm did not explain claimant's SIMS score and what the "cutoff means."

<sup>3</sup> Dr. Lindholm observed that claimant's reading scores significantly decreased a few years later, as documented in Dr. Pflaumer's November 10, 2009 assessment. To Dr. Lindholm, this also suggested that something other than intellectual ability was causing these variances.

8. In her report, Dr. Lindholm also identified a psychological assessment completed by Robert R. Butterworth, Ph.D. dated June 2, 2007. Dr. Butterworth based on tests he administered concluded that claimant has mild mental retardation: the WISC-IV; the Bender Visual Motor Gestalt Test; Projective Drawing Tests, Sentence Completion Tests; Roberts Apperception Test; Devereux Scales of Mental Retardation; Trail Making Test; and the Beck Depression Inventory. Of note, under the WISC-IV, claimant scored 69 in verbal comprehension, 77 in perceptual reasoning, 77 in working memory, 62 in processing speed, and had a full scale IQ of 65. Dr. Lindholm discounted Dr. Butterworth's findings because claimant had a Global Assessment of Functioning (GAF) range between 35 and 40. Dr. Lindholm felt this low GAF score could result in slow processing and a failure to respond without reflecting mental retardation.<sup>4</sup>

9. Dr. Lindholm added that claimant's performance on the California Performance Achievement Scores (CAPA) supported her conclusion that claimant does not have a global intellectual deficit. This test showed that he was significantly advanced, although she candidly noted that she was not familiar with the CAPA. Under the CAPA math section, claimant scored in the advanced range, which was well above claimant's other scores Dr. Lindholm recorded.

10. Dr. Lindholm testified that claimant's deficits in mental functioning began before he turned 18.

*Robert Sutter, Ph.D.*

11. Claimant called Robert L. Sutter, Ph.D., Psy.D., as a witness. Dr. Sutter is a forensic psychologist who evaluated claimant on September 24, 2013. As part of his evaluation, Dr. Sutter administered the WISC test and the SIMS test. He also administered a second test to rule out malingering: Test of Memory Malingering. Dr. Sutter also reviewed the reports of Dr. Frey, Dr. Marselle, Dr. Pflaumer, and Dr. Lindholm. He interviewed claimant and conducted a mental status examination.

12. Dr. Sutter testified that claimant has mild mental retardation. He found that, according to the WISC, claimant has a full scale IQ of 64, with verbal comprehension at 70, perceptual reasoning at 67, working memory at 71, and processing speed at 71. Dr. Sutter noted that the test results of each clinician consistently showed that claimant has mild mental

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<sup>4</sup> The record also references three reports prepared for claimant's school district regarding claimant's intellectual abilities: a report dated November 9, 2005 from Richard D. Goerman, Ed.D. an assessment report dated August 22, 2008 from school psychologist Brad Rice, and a report dated September 5, 2002, prepared by S. Hansen, Ph.D. Dr. Lindholm did not discuss these reports in her testimony in any detail, except to note that claimant's mother told Dr. Rice that she "wants mental retardation eligibility to qualify for other agencies." Dr. Sutter, claimant's expert, also did not discuss these reports in his testimony. As a result, the Goerman, Rice and Hansen reports were given little weight...

retardation, with the exception of Dr. Pflaumer's test results, which Dr. Sutter felt was an outlier. According to Dr. Sutter, the results of both the SIMS test he conducted and the Test of Memory Malingering ruled out the possibility that his WISC score for claimant was invalid.

13. Dr. Sutter believed that the consistency of test results supported their validity and did not suggest malingering. The tests were administered over an extended period and were different versions of the same instrument. The tests were also within the statistical deviation range.

14. Dr. Sutter said he understands Dr. Lindholm's concerns regarding a "dampening effect" on claimant's intellectual ability due to mental health issues. However, in his opinion, it would be "remarkably unlikely" that claimant has a clinical mental health disorder that would have the same dampening effect on his IQ as recorded by several psychologists where none of these clinicians diagnosed him with a mental health disorder. Dr. Sutter also noted that none of the clinicians diagnosed claimant with a clinical mental health disorder; Dr. Lindholm said there was a mental health diagnosis by "history."

#### *Other Evidence Presented by Claimant*

15. Jerry Scott testified on claimant's behalf. Mr. Scott works at Moreno Valley High School as an Educational Specialist. He has been a teacher for 35 years and has worked in the special education field for 13 years.

16. Mr. Scott was claimant's teacher over a four year period starting when claimant was in the 8th grade. Claimant was in Mr. Scott's severe handicapped class at Moreno Valley. Claimant was in Mr. Scott's class because of "intellectual disability," the term the school district uses for mental retardation. Mr. Scott noted that the CAPA is given to students with significant cognitive disabilities whose disabilities prevent them from taking the Standardized Testing and Reporting Test (STAR).

17. Claimant's mother also testified. She stated that, in his present living situation in a group home, he is supervised at all times because he cannot protect himself. She believes claimant has low functioning in all domains of daily living. As evidence of his deficits in adaptive functioning, she submitted a copy of an administrative hearing decision dated September 6, 2012. This decision granted her request that In Home Supportive Services authorize 24 hours per day of protective supervision, assistance with personal hygiene and grooming, medical transportation, bowel and bladder care, respiration services, and dressing services. In this decision, the administrative law judge found that "(claimant) has mental retardation and other mental impairments which have made him non self-directing, confused, and in need of 24 hour per day supervision, and the supervision need is substantially more than a [sic]18 year old who does have his disabilities."

Claimant's mother strongly believes that claimant has mental retardation, and she would like regional center services for him to ensure he is taken care of when she is no longer able to look after him.

*Evaluation*

18. The Diagnostic and Statistical Manual of Mental Disorders (4th edition, Text Revision, 2000, American Psychiatric Association, also known as DSM-IV-TR), provides that the "essential feature of Mental Retardation is significantly sub-average general intellectual functioning . . ." It must be 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.

Both Dr. Sutter and Dr. Lindholm thoughtfully evaluated the question whether claimant has a diagnosis of mental retardation. But, Dr. Sutter's opinion is credited over Dr. Lindholm's opinion. Dr. Sutter testified convincingly that claimant has mental retardation with a full scale IQ below 70, per the Diagnostic and Statistical Manual of Mental Disorders (4th edition, Text Revision, 2000, American Psychiatric Association, also known as DSM-IV-TR).<sup>5</sup> His opinion is based on claimant's full scale IQ score that he obtained, and the full scale IQ scores recorded by other psychologists, including Dr. Lindholm, Dr. Marselle, Dr. Frey, and Dr. Butterworth. Dr. Sutter convincingly explained why any possible mental disorders did not dampen claimant's IQ scores. Similarly, Dr. Sutter convincingly explained that these IQ scores were not the result of malingering. Dr. Sutter utilized two tests to determine that the WISC scores he obtained were not invalid due to malingering. Further, claimant's condition is accompanied by significant functional limitations in at least three areas of daily living: learning, self-care, and self-direction, and the onset of claimant's mental retardation was before he turned 18.

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<sup>5</sup> 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, Kaufmann Assessment Battery for Children). Significantly sub-average intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean). 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).

## LEGAL CONCLUSIONS

1. In a proceeding to determine if an individual is eligible for services, the burden of proof is on the claimant to establish that he or she has a qualifying diagnosis. The standard of proof required is preponderance of the evidence. (Evid. Code, § 115.)

2. A preponderance of the evidence means that the evidence on one side outweighs or is more than the evidence on the other side, not necessarily in number of witnesses or quantity, but in its persuasive effect on those to whom it is addressed. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* ( 2009) 171 Cal.App.4th 1549, 1567.)

3. Under the Lanterman Developmental Disabilities Services Act (the Act), the State of California accepts a responsibility for persons with developmental disabilities. (Welf. & Inst. Code, § 4501.) As defined in the Act, a developmental disability is a disability that originates before age 18, that continues or is expected to continue indefinitely and that constitutes a substantial disability for the individual. Developmental disabilities include mental retardation, cerebral palsy, epilepsy, autism, and what is commonly known as the “fifth category,” a disabling condition found to be closely related to mental retardation or requiring treatment similar to that required for mentally retarded individuals. (Welf. & Inst. Code, § 4512, subd. (a).) Handicapping conditions that consist solely of psychiatric disorders, learning disabilities or physical conditions do not qualify as developmental disabilities under the Lanterman Act. (Cal. Code Regs., tit. 17, § 54000, subd. (c).)

4. “Substantial disability” is defined by regulations to mean “a condition which results in major impairment of cognitive and/or social functioning.” (Cal. Code Regs., tit. 17, § 54001, subd. (a).) Because an individual’s cognitive and/or social functioning is multifaceted, regulations provide that the existence of a major impairment shall be determined through an assessment that addresses aspects of functioning including, but not limited to: 1) communication skills, 2) learning, 3) self-care, 4) mobility, 5) self-direction, 6) capacity for independent living and 7) economic self-sufficiency. (Cal. Code Regs., tit. 17, § 54001, subd. (b).) To constitute a substantial disability under the Act, an individual must have “significant functional limitations in three or more” of these areas. (Welf. & Inst. Code, § 4512, subd. (l).)

5. Claimant has met his burden to establish, by a preponderance of the evidence, that he suffers from a condition that qualifies him for regional center services. He has a diagnosis of mental retardation; it began before he turned 18; and it constitutes a substantial disability for him.

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ORDER

Claimant's appeal from the regional center's determination that he is not eligible for Lanterman Act services is granted. Claimant is eligible for Lanterman Act services under the category of mental retardation.

Date: March 18, 2014.

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ABRAHAM M. LEVY  
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.**