

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAH No. 2012070850

ANDRES M.,

Claimant,

vs.

NORTH LOS ANGELES REGIONAL CENTER,

Service Agency.

DECISION

This matter was heard by Julie Cabos-Owen, Administrative Law Judge with the Office of Administrative Hearings, on December 4, 2012, in Van Nuys, California. Andres M. (Claimant) was represented by Rafael M., his father and authorized representative, with the assistance of a Spanish language interpreter.¹ North Los Angeles County Regional Center (NLACRC or Service Agency) was represented by its Contract Officer, Rhonda Campbell.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on December 4, 2012.

ISSUE

Does Claimant have a developmental disability entitling him to receive regional center services?

///
///
///
///

¹ Claimant's and his father's initials are used in lieu of their last names to protect their privacy.

FACTUAL FINDINGS

1. Claimant is an 18-year-old male (born May 22, 1994). He seeks to be eligible for regional center services based on a diagnosis of autism or mental retardation or under the “fifth category” of eligibility.²

2. On July 10, 2012, NLACRC sent a letter and a Notice of Proposed Action to Claimant’s father, informing him that NLACRC had determined Claimant is not eligible for regional center services. (Exhibit 1.)

3. On July 19, 2012, Claimant’s father requested a fair hearing. (Exhibit 1.)

4. Claimant attended public elementary, middle and high schools in the Los Angeles Unified School District (LAUSD). In August 2003, when Claimant was in fourth grade, he underwent a Special Education Assessment due to concerns about delays in reading skills. Specifically, a request for the Special Education Assessment noted, “The student has been in Reading 2.1 for two years and has attended all interventions yet no or very little progress has been made academically.” (Exhibit 3.)

5(a). In September 2003, an Individualized Education Plan (IEP) was created for Claimant by LAUSD. Claimant was found eligible for special education services under the category of Specific Learning Disability (SLD). (Exhibit 4.)

5(b). The September 2003 IEP noted that Claimant was performing in the low average range in reading and spelling, but that math was an area of relative strength in which he scored in the average range. A psychological assessment of Claimant’s cognitive ability revealed that his overall cognitive skills were within the average range. Additionally, his performance on the Woodcock Johnson oral language test (which assesses verbal expressive, receptive and reasoning skills) was within the average range. Deficits were noted in Claimant’s visual and auditory memory. Claimant also demonstrated attention and concentration delays. (Exhibit 4.)

5(c). There was no documented concerns regarding Claimant’s communication or social skills. (Exhibit 4.) These types of concerns or deficits would typically be addressed in the IEP. (Testimony of Heike Ballmaier, Psy.D.)

6. Claimant received special education services while attending general education classes, and his special education eligibility remained under the category of SLD for the remainder of his school years. (Exhibits 5, 6, 11, A, B, C, D, E, F and G.) Claimant continued to have difficulties with information retention, and it was noted in several IEPs that, due to deficits in attention and audio/visual processing, Claimant was not able to meet the State grade level standards for language arts. (Exhibits 5, 6, 11, A, B, C, D,

² For an explanation of “fifth category” eligibility, see Factual Finding 12 (b)(1) and Legal Conclusion 5.

E, F and G.) However, by September 2012, Claimant was able to “write a multi-paragraph essay with a thesis statement, supporting evidence and a conclusion and write an interpretive response to a hypothesis and supporting details, the latter three with help.” (Exhibit 11.) Claimant’s mathematics skills remained in the average range until he began taking Algebra and Geometry, at which time his SLD impacted his ability to grasp analytical mathematic concepts. (Exhibits 5, 6, 11, A, B, C, D, E, F and G.)

7. No concerns were ever noted regarding Claimant’s socialization or verbal communication. (Exhibits 5, 6, 11, A, B, C, D, E, F and G.)

8. In his September 2004 IEP, it was noted that Claimant “has no physical, emotional or behavioral issues that require support.” (Exhibit A.) However, in his January 2012 IEP, a Behavior Support Plan was instituted for behavior which was impeding his learning. Specifically, Claimant was visiting with friends and was missing classes during the day. (Exhibit 6.) The IEP team agreed to offer a social emotional evaluation to determine if Claimant would benefit from counseling services. However, the District could not proceed with the evaluation because Claimant’s father did not sign the IEP. (Exhibit 7.)

9. In March 2012 Claimant was given a disciplinary referral at school for possession of marijuana, a pipe and two lighters. (Exhibit 8.) Just a few months prior, in December 2011, Claimant had been issued a citation by the Los Angeles Police Department for drinking alcohol in public. (Exhibit I.)

10(a). On May 21, 2012, on referral by NLACRC, licensed psychologist Efarain A. Beliz, Jr., Ph.D., conducted a psychological evaluation of Claimant to assess his cognitive and adaptive functioning.³ The evaluation included interviews with Claimant and his parents, observations of Claimant, and administration of diagnostic tools for measuring cognitive functioning, academic functioning and adaptive skills. (Exhibit 10.)

10(b). During the interviews, Dr. Beliz noted:

[Claimant] reportedly obsesses about race cars, hordes items, and is withdrawn to his bedroom. His parents believe he has a paranoid view of the world. [Claimant] stated, “They are living their dreams through me and that’s not right. I tend to do things differently.”

[¶] . . . [¶]

³ Dr. Belize has been performing psychological evaluations for NLACRC since 1987. He serves as an expert on a panel of forensic psychologists for the Los Angeles County Superior Court, on the Ethics Panel of the Board of Psychology and as one of the Directors for the Los Angeles County of Mental Health. He has extensive experience in conducting assessments for developmental disabilities and mental health conditions and differentiating between the two. (Testimony of Heike Ballmaier, Psy.D.)

[Claimant] is toilet trained. His appetite is fair with no significant weight gain or loss. . . . A detailed inquiry concerning autistic behaviors yielded negative results. . . .

[Claimant's] parents do not know whether or not he is abusing substances. He was picked up by the police on one occasion for "under the influence" charges but was not arrested and charges were dropped. [Claimant] is not receiving psychiatric treatment. He has never been hospitalized involuntarily. At one point, [Claimant] was referred for counseling and to a local mental health Urgent Care Center. [Claimant] declined services.

[¶] . . . [¶]

[Claimant] will not graduate in June because he does not have sufficient credit. When queried about truancy, [Claimant] responded, "I was there but I didn't feel like turning in the work."

(Exhibit 10.)

10(c). To assess Claimant's cognitive functioning, Dr. Beliz administered the Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV). The measure of his overall intellectual abilities was in the low average range (Full Scale IQ of 85). His perceptual reasoning abilities were on the low end of the average range (92). His verbal comprehension abilities were on the low end of the low average range (91). His short-term memory was borderline (74), and his performance speed was in the low average range (92). (Exhibit 10.)

10(d). To assess Claimant's academic functioning, Dr. Beliz administered the Wide Range Achievement Test – Fourth Edition (WRAT-4). He determined that Claimant's scores were "low but normal scores consistent with normal intelligence." (Exhibit 10.)

10(e). In the area of adaptive functioning, Dr. Beliz administered the Vineland Adaptive Behavior Scales II (Vineland-II), "which yielded an Adaptive Behavior Composite Score of 70, which suggests borderline adaptive skills." Claimant's communication skills and daily living skills were at the borderline level. His social skills were "mildly impaired." (Exhibit 10.)

10(f). Dr. Belize opined:

[Claimant] is an alert but quiet and reserved Hispanic adolescent male with normal intelligence, borderline adaptive skills, and low normal academic abilities. There is no evidence for mental retardation or Autism.

(b)(1). When the NLACRC eligibility committee assesses whether a claimant is eligible for regional center services under the “fifth category,” it must determine whether the person either functions in a manner similar to persons with mental retardation or requires treatment similar to that for persons with mental retardation. The committee first looks at the claimant’s IQ and the configuration of scores from the IQ test to ascertain information about the claimant’s cognitive ability. A person who functions similar to someone with mental retardation typically obtains scores at the lower end of the borderline range of cognitive functioning. As IQ scores rise above 70, the committee looks to the claimant’s adaptive deficits to determine what is causing the deficits and must determine that the adaptive deficits are related to cognitive functioning rather than other factors such as lack of motivation, physical condition or psychological condition. In determining if a claimant needs treatment similar to that for persons with mental retardation, the committee must find that the claimant requires treatment that is concrete and requires skills to be broken down into small steps with repeated practice.

(b)(2). In this case, Claimant’s low average cognitive functioning and his ability to engage in abstract reasoning demonstrated that he was not functioning similar to a person with Mental Retardation, nor that he required treatment similar to a person with Mental Retardation. Consequently, Claimant does not meet the criteria for fifth category eligibility.

13. Claimant’s father testified at the fair hearing. He appeared distraught over his son’s deficits and frustrated with his quest to find help for Claimant. He had difficulty accepting Dr. Beliz’s diagnostic impressions and was upset that, after assessing Claimant, Dr. Beliz “came out and said that [his] son was crazy.” Claimant’s father believed that Dr. Beliz’s report “that [Claimant] is sick in his head,” has made things “worse.”

14. There was no evidence submitted indicating that Claimant had been diagnosed with either Autistic Disorder or Mental Retardation.

15. The totality of the evidence did not establish that Claimant suffers from Autistic Disorder.

16. The totality of the evidence did not establish that Claimant suffers from Mental Retardation.

17. The totality of the evidence presented at the fair hearing did not establish that Claimant suffers from a condition similar to mental retardation or requiring treatment similar to persons with mental retardation.

LEGAL CONCLUSIONS

1. Claimant did not establish that he suffers from a developmental disability entitling him to regional center services. (Factual Findings 1 through 17.)

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 Service Agency's decision. Where a claimant seeks to establish his eligibility for services, the burden is on the appealing claimant to demonstrate that the Service Agency's decision is incorrect. Claimant has not 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. As applicable to this case, 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. . . . This [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 mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

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." Pursuant to Welfare and Institutions Code section 4512, subdivision (1):

"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.

4(b). Additionally, 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, also known as the “fifth category,” 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, subd. (a).) 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, the Service Agency does not have a duty to serve all of them.

5(c). While the Legislature did not specifically define the fifth category, it did 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 and/or adaptive deficits 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. 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 either a psychiatric disorder, a physical disorder, or a learning disability, could still be eligible for services. However, someone whose conditions originate from just 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.

7. Although Claimant maintains that he is eligible for regional center services, he currently does not have any of the qualifying diagnoses. Moreover, his two identified conditions – learning disorder and paranoid personality disorder – are specifically excluded conditions.

8. The DSM-IV-TR discusses autism in the section entitled "Pervasive Developmental Disorders." (DSM-IV-TR, pp. 69 - 84.) The five "Pervasive Developmental Disorders" identified in the DSM-IV-TR are Autistic Disorder, Rett's Disorder, Childhood Disintegrative Disorder, Asperger's Disorder, and PDD-NOS. The DSM-IV- TR, section 299.00 states:

The essential features of Autistic Disorder are the presence of markedly abnormal or impaired development in social interaction and communication and markedly restricted repertoire of activity and interests. Manifestations of the disorder vary greatly depending on the developmental level and chronological age of the individual. Autistic Disorder is sometimes referred to as *early infantile autism*, *childhood autism*, or *Kanner's autism*. (Emphasis in original.)

(*Id.* at p. 70.)

9. The DSM-IV-TR lists criteria which must be met to provide a specific diagnosis of an Autistic Disorder, as follows:

A. A total of six (or more) items from (1), (2) and (3), with at least

two from (1), and one each from (2) and (3):

- (1) qualitative impairment in social interaction, as manifested by at least two of the following:
 - (a) marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction
 - (b) failure to develop peer relationships appropriate to developmental level
 - (c) a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest)
 - (d) lack of social or emotional reciprocity
- (2) qualitative impairments in communication as manifested by at least one of the following:
 - (a) delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gestures or mime)
 - (b) in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others
 - (c) stereotyped and repetitive use of language or idiosyncratic language
 - (d) lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level
- (3) restricted repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least one of the following:
 - (a) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that

is abnormal either in intensity or focus.

- (b) apparently inflexible adherence to specific, nonfunctional routines or rituals.
- (c) stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements)
- (d) persistent preoccupation with parts of objects

B. Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction, (2) language as used in communication, or (3) symbolic or imaginative play.

C. The disturbance causes clinically significant impairment in social, occupational, or other important areas of functioning.

(*Id.* at p. 75.)

10. In this case, Claimant has not been diagnosed with Autistic Disorder. According to the DSM-IV-TR, specific clinical criteria must be evident to diagnose Autistic Disorder. While Claimant may manifest some impairment in his communication and social skills, no psychologist specifically found that he satisfied the required number of elements within the criteria of the DSM-IV-TR to diagnose him with Autistic Disorder. Consequently, Claimant has not established that he is eligible for regional center services under the diagnosis of autism.

11. 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.)

12. 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.)

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. Claimant does demonstrate deficits in certain academic skills and some areas of cognitive functioning (borderline short-term memory), as well as some deficits in adaptive functioning. However, Claimant has Full Scale IQ of 85, and he does not meet all the criteria under the DSM-IV-TR for a diagnosis of Mental Retardation or Mild Mental Retardation. Consequently, Claimant has not established that he is eligible for regional center services under the diagnosis of Mental Retardation.

15. Furthermore, the evidence did not demonstrate that Claimant suffers from a condition similar to Mental Retardation or that he requires treatment similar to that required for mentally retarded individuals. Based on the foregoing, Claimant has not met his burden of proof that he falls under the fifth category of eligibility.

16. The weight of the evidence does not support a finding that Claimant is eligible to receive regional center services.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Claimant's appeal is denied. The Service Agency's determination that he is not eligible for regional center services is upheld.

DATED: January 7, 2013

JULIE CABOS-OWEN
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.