BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CLAIMANT, vs. VALLEY MOUNTAIN REGIONAL CENTER, Service Agency.	OAH No. 2015081049

DECISION

This matter was heard before Administrative Law Judge Danette C. Brown, State of California, Office of Administrative Hearings, on July 7, and September 8 and 9, 2016, in Modesto, California.

Anthony Hill, Attorney at Law and Assistant Director of Case Management, represented Valley Mountain Regional Center (VMRC).

Claimant's mother represented claimant. Certified interpreters Samuel Gallardo and Jennifer Gibson provided interpreter services on July 7, 2016. Certified interpreter Oscar Ramirez provided interpreter services on September 8 and the morning of September 9, 2016. Certified interpreter Jose Fernandez provided interpreter services in the afternoon of September 9, 2016.

Evidence was received, the record was closed, and the matter was submitted for decision on September 9, 2016.

ISSUES

1. Is claimant eligible to receive services and supports from VMRC under the Lanterman Developmental Disabilities Services Act, Welfare and Institutions Code section 4500 et seq., (Lanterman Act) by reason of a diagnosis of autism?

2. Is claimant eligible to receive services and supports from VMRC by reason of a diagnosis of intellectual disability?

3. If claimant is not eligible for services under the categories of autism or intellectual disability, is he eligible under the "fifth category" because he has a condition closely related to intellectual disability, or that requires treatment similar to that required for individuals with intellectual disability?

FACTUAL FINDINGS

BACKGROUND AND HISTORY

1. Claimant was born in 1996. He was diagnosed with cystic fibrosis at approximately seven months old. He also had intestinal problems and an electrolyte imbalance. From 1997 to 2001, claimant was treated for his cystic fibrosis at the University of California, San Francisco (UCSF), Pediatric Pulmonary Division, Cystic Fibrosis Center, and its satellite clinic in Modesto. Claimant received Early Start[1] services from VMRC until his third birthday. On October 13, 1999, VMRC notified claimant's parents that claimant no longer qualified for services because he did not have a developmental disability as defined in Welfare and Institutions Code section 4512.

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[1] The Early Start Program provides early intervention services to infants and toddlers who have developmental delays or are at risk of having a substantial developmental disability. (http://www.dds.ca.gov/EarlyStart/WhatsES.cfm.)

2. In 2000, claimant began receiving special education services from the Stanislaus County Office of Education. He was eligible for special education services under the "Other Health Impairment" (OHI) category due to his cystic fibrosis. He had an instructional aide by first grade, and in his early years of elementary school, he was placed in a separate classroom. He then transitioned into a special education classroom with an aide, and later transitioned into some general education classes. He received intensive individual instruction, speech and language services, occupational therapy, and adaptive physical education. Claimant's Individualized Education Program Summaries (IEPs) show that he had a one-on-one aide until approximately the fifth grade.

3. By the time claimant reached the twelfth grade, he was still receiving special education services under OHI due to his cystic fibrosis. Much of claimant's academic difficulties were the result of his many absences due to his health condition. His IEP in 2014 showed that he was reading at a tenth grade level, and his reading comprehension skills and spelling were at the sixth grade level. Claimant did not pass his high school exit examination, but remained on a diploma track and was offered transitional services to Turlock Adult School. In May 2015, claimant received his high school diploma. Claimant has no employment history, lives at home with his parents, and receives social security benefits. The Social Security Administration determined that claimant was eligible for social security benefits due to cystic fibrosis and borderline intellectual development. Claimant's mother qualified for in-home support services, and currently provides care to claimant.

4. On August 11, 2015, when claimant was 18 years old, VMRC re-determined that claimant was not eligible for regional center services based on current and previous intake assessments, current medical and psychological assessments, and

claimant's IEPs from kindergarten through twelfth grade.[2] VMRC commented in its eligibility review that claimant's presentation was:

> …consistent with his educational and psychoeducational records, but inconsistent with his mother's report. Due to [claimant's] condition, his parents have been overprotective and he's led a sheltered life. There appear to be many things he is capable of doing on his own, but he has not been given the opportunity by his parents …
>
> The Psychologist concluded that while [claimant] "has oddities in his presentation, [the psychologist] did not see a lot of symptoms of ADHD or Autism." He was diagnosed with Dysthymic Disorder[3] and Borderline Intellectual Functioning. An adaptive assessment was not completed, but would have been irrelevant due to his cognitive score. Though [claimant] appears inexperienced and immature, he is not intellectually disabled and does not have an eligible condition for regional center services.

5. On August 26, 2015, claimant's mother filed a fair hearing request for claimant. Her reasons for requesting a fair hearing were "To inform you more on [claimant's] needs. It would also help you understand my son's case." She stated further, "I have no compliant [*sic*], I would just like my son to be evaluated over a couple more

[2] VMRC had previously evaluated and denied claimant services in 1999 and 2007.

[3] Dysthymic Disorder is a mild form of depression.

times. When you first meet him you have only identified half the problems he deals with. Its [*sic*] later on you can see that there's more." Claimant's mother contends that claimant is eligible for regional center services based upon a diagnosis of autism, an intellectual disability, a condition closely related to an intellectual disability, or because he requires treatment similar to that required by individuals with an intellectual disability.

6. Under the Lanterman Act, VMRC accepts responsibility for persons with developmental disabilities. 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 intellectual disability, cerebral palsy, epilepsy, autism and what is commonly known as the "fifth category" – a disabling condition found to be closely related to an intellectual disability or to require treatment similar to that required for individuals with an intellectual disability. (Welf. & Inst. Code, § 4512, subd. (a).) The fifth category encompasses two separate grounds for eligibility - a condition that is closely related to an intellectual disability, or that requires similar treatment to that required for individuals with an intellectual disability.

CHRONOLOGY OF CLAIMANT'S ASSESSMENTS AND IEPS FROM 2000 TO 2016

2000 VMRC Intake Assessment

7. Claimant received services from VMRC under the Early Start Act until October 30, 1999. In June 1999, VMRC evaluated him to determine whether he was eligible for ongoing services under the Lanterman Act. On May 19 and June 2, 2000, VMRC conducted an intake assessment update on claimant. Maryam Esho, M.D., was noted as claimant's primary physician, and Gerd J. Cropp, M.D., Ph.D., with the UCSF satellite clinic in Modesto, treated claimant for his cystic fibrosis. VMRC's Intake

Coordinator, Ron Schmitz, administered the Developmental Profile II, which is a standardized inventory of skills designed to assess a child's development from birth through age nine. This instrument determines a child's strengths and weaknesses in five key areas of development: physical; self-help; social; academic; and communications.

The results of the Developmental Profile II showed claimant to have mild delays in his physical and social age, significant delays in his self-help and communication age, and a low average delay in his academic age. VMRC found that claimant was not eligible for services under the Lanterman Act, based on psychological testing performed one year earlier. Claimant was three and half years old.

January 2001 IEP

8. Stanislaus Special Education Local Plan Area prepared an IEP dated January 26, 2001. The IEP indicated that claimant would benefit from speech and language services prior to entering kindergarten in the 2001-2002 school year. One hundred percent of claimant's day would be spent in a special education setting. The IEP did not indicate that claimant displayed any symptoms of, or had a diagnosis of autism or an intellectual disability requiring special education programs or services. An IEP Team Meeting held on November 5, 2001, noted concerns that claimant had "the potential to be absent a great deal due to his illness." The team decided that claimant needed a one-on-one aide to be successful in the classroom.

February 2003 IEP

9. Claimant's February 4, 2003 IEP primarily addressed claimant's hydration issues related to his cystic fibrosis. The IEP team meeting notes did not indicate that claimant displayed any symptoms of, or had a diagnosis of, a developmental disability.

September 2003 Psychoeducational Assessment

10. In September 2003, the Turlock Unified School District (TUSD) conducted a psychoeducational assessment on claimant. Claimant was re-evaluated at that time at the request of his mother. The tests administered were: (1) Wechsler Intelligence Scale for Children III (WISC-III); (2) Bilingual Verbal Abilities Test; and (3) the Beery-Buktenica Developmental Test of Visual Motor Integration.

The WISC-III measures cognitive abilities in auditory recall and verbal reasoning skills. Claimant had good vocabulary and abstract thinking skills. His long and short term recall was below average. He demonstrated weakness in comprehension. Claimant's bilingual verbal abilities were in the low average range, as was his English language proficiency. His visual motor skills were in the average range. Based on his test results, it was recommended that claimant learn in a visual format, that instructions be kept short, and that claimant be allowed to study in a quiet place to eliminate distractions. The examiner, school psychologist Nadie Smaby, did not note any observations of symptoms related to a developmental disability.

2004 to 2006 IEPs

11. Claimant's 2004, 2005 and 2006 IEPs indicated continued qualification for special education services under "Other Health Impaired" category. Services provided were in the areas of speech and language. Claimant spent over 50 to 60 percent of his day in a special education setting. His April 28, 2006 IEP stated that he was "at risk of not passing the exit exam." At that time, claimant was nine years old, and in fourth grade. The IEP did not indicate that claimant displayed any symptoms of, or had a diagnosis of, a developmental disability.

2006 Psychoeducational Assessment

12. In September 2006, the TUSD conducted another psychoeducational assessment on claimant, as a triennial requirement to determine growth and to facilitate appropriate educational planning and placement. The tests administered were: (1) Kaufman Assessment Battery for Children-II (KABC-II); (2) Bender Visual Motor Gestalt Test (Bender); (3) Beery-Buktenica Developmental Test of Visual Motor Integration (Beery VMI); and (4) Test of Auditory Perceptual Skills Revised (Spanish) (TAPS-R).

The KABC-II test results showed that claimant's memory and learning were significantly stronger than his problem solving abilities. The TAPS-R test results showed that claimant was very weak in auditory processing, as he would mis-translate what was said into English, then try to answer the question. Overall, his score was in the extremely low range of 54 out of 100. Claimant's Bender test results showed that his visual memory was average when compared to other children his age. Claimant's Beery VMI test results showed that he had a mild deficit in visual motor integration development.

Ms. Smaby, the school psychologist that conducted the psychoeducational assessment, as well as the previous one in 2003, concluded that claimant's visual processing deficits were more apparent, and his visual motor integration skills have not shown any growth. Claimant had good auditory memory skills, and could learn well from repetition. The assessment also highlighted that claimant needed demonstrations and examples of new instruction before understanding and recalling the material. When problem solving, claimant used his words to talk his way through what he was working on. Ms. Smaby noted that this was a great strategy. When written work was required, claimant needed extra time.

Ms. Smaby did not note any observations of symptoms related to autism, intellectual disability, or any other developmental disability.

September 2006 IEP

13. Claimant's September 19, 2006 IEP showed continued qualification for special education under the "Other Health Impairment" category. It was noted that claimant's progress was "not as fast as it could be due to health issues." Claimant was described as friendly, trying hard, and well-adjusted. Claimant's areas of need were language development, written language, reading and math. Claimant was placed on Home and Hospital Instruction until the end of the school year due to his health concerns and an upcoming surgery. There was no suggestion of claimant exhibiting symptoms of, or having a developmental disability.

December 2006 VMRC Intake Assessment Update

14. On December 27, 2006, VMRC conducted an Intake Assessment Update. An intake assessment appointment was scheduled after claimant was re-referred by his mother, after a doctor told her that claimant might have autism. At that time, claimant was taking multiple medications for his cystic fibrosis, as well as Xanax for anxiety, and Adderall for Attention Deficit Hyperactivity Disorder (ADHD). Claimant's mother's concerns were that claimant did not know how to dress or bathe himself, or catch a ball. He was uncoordinated and had no strength in his muscles. Claimant had no facial recognition, and no sense of direction. Claimant's mother reported that claimant had some difficulty getting along with children at school, because he liked to tell lengthy stories, and wanted others to listen. She also reported that until that time, claimant walked on his toes and used to do some "hand flapping" when running. Claimant also became scared when people talked in a loud tone.

The Kaufman Brief Intelligence Test, Second Edition (K-BIT2), was administered, which measures verbal and nonverbal intelligence. Claimant's verbal score was 74, his nonverbal score was 105, and his Intelligence Quotient (IQ) composite score was 88. His

scores indicated cognitive functioning in the average range. His delay in gross motor skills was possibly attributed to his cystic fibrosis.

Claimant's Intake Assessment Update did not note any concerns with symptoms of a developmental disability. The intake coordinator summarized that while claimant may have demonstrated some behaviors similar to children with possible autism, those behaviors are few in claimant's case. The VMRC Interdisciplinary Eligibility Review Team determined that claimant was not eligible for regional center services under the Lanterman Act.

January 2007 VMRC Interdisciplinary Eligibility Review

15. On January 22, 2007, VMRC deemed claimant ineligible for regional center services, noting the comments by Gary L. Westcott, Ph.D., who stated:

> Claimant's cognitive and academic abilities are well above the mentally retarded range. There is indication of a language delay, but not the widespread pattern of delays that would create a condition similar to mental retardation or that would give rise to a need for services similar to those required by individuals with mental retardation. There is no evidence of substantially handicapping autism, epilepsy, or cerebral palsy. What handicapping condition does exist appears to be solely physical in nature. Handicapping conditions that are solely physical in nature are excluded from regional center eligibility per Title 17, Section 54000(c)(3) of the California Code of Regulations.

February 2007 IEP

16. Claimant's February 26, 2007 IEP Summary showed continued qualification for special education under the "Other Health Impairment" category, due to his cystic fibrosis. Claimant needed remedial instruction in math, written language, reading comprehension and reading. With regard to communication, claimant was able to share information on many topics, but had difficulty taking the viewpoint of another person in conversations and staying on a shared topic. Socially, claimant was friendly, tried hard, and seemed well-adjusted. Claimant's academic difficulties were due, in part, to his many absences as a result of his cystic fibrosis. There were no concerns that claimant exhibited symptoms of a developmental disability.

March 2007 Notice of Proposed Action

17. On March 8, 2007, VMRC issued a Notice of Proposed Action deeming claimant ineligible for regional center services, based upon its January 22, 2007 Interdisciplinary Eligibility Review. VMRC's interdisciplinary team, composed of a clinical psychologist, physician, and intake coordinator, reviewed claimant's medical, psychological and educational records, and family history, and determined that claimant did not have an intellectual disability, cerebral palsy, epilepsy, autism, or another condition similar to an intellectual disability or which requires similar services.

The team determined that claimant's cognitive and academic abilities were well above the intellectual disability range. Claimant had indications of a language delay, but not the widespread pattern of delays that would create a condition similar to an intellectual disability or that which would give rise to a need for services similar to those required by individuals with an intellectual disability.

The team found no evidence of "substantially handicapping cerebral palsy, epilepsy or autism." However, the team did determine that claimant had a handicapping condition that was solely physical in nature – cystic fibrosis. VMRC informed claimant's

parents that a handicapping condition that is solely physical in nature was excluded from regional center eligibility.

November 2007 Assessment

18. In November 2007, TUSD evaluated claimant for school anxiety. Ms. Smaby performed the evaluation. She administered the Behavior Assessment System for Children-2 (BASC-II), completed by claimant's teacher, and made behavioral observations of claimant in the classroom. Ms. Smaby found that claimant's "anxiety and somatization (the tendency to express emotions through physical complaints) are in the clinically significant range, and depression is average." Attention was a developing problem. Ms. Smaby noted that claimant's learning problems were average, and that his adaptability, social skills, study skills and functional communication scored within the average range. Ms. Smaby further noted that the results suggested that claimant had good capacity to be flexible and to respond to stressful situations. There were no concerns that claimant exhibited symptoms of autism, intellectual disability or any other developmental disability.

April 2008 Teacher's Observations

19. On April 4, 2008, claimant's teacher at Cunningham School, Mrs. Ponte, wrote to claimant's parents stating her general observations of claimant in the classroom, as requested by claimant's mother. She wrote, in part:

> [Claimant] has many friends in the classroom. He is social and tends to play imaginative games at free play times with other students in the class. However, while he is social, it is not clear that he has a best friend with whom he particularly enjoys to play, but a group of three to four children.

> Generally speaking, he does not break school rules and is rarely in trouble …
>
> When attending to instruction he has become prompt reliant on the adult that works with him and is often has [*sic*] to be refocused throughout a lesson. Academically speaking, he is stronger in reading than math. He is at a high third or beginning fourth grade level in reading, which is quite an accomplishment considering he has missed quite a bit of school due to issues related to his cystic fibrosis.
>
> [Claimant's] interests center mainly on chickens/poultry. He is still somewhat egocentric which should ease as he matures. It has been a wonderful experience to be a part of [claimant's] life and academic growth these past four years. I expect he will do well in 7th grade. I will miss him.

Claimant appeared to be social and academically productive. Mrs. Ponte did not observe or note any symptoms of autism, intellectual disability, or any other developmental disability.

April 2009 Assessment

20. On April 22, 2009, TUSD performed a psychoeducational evaluation on claimant, who was 12 and a half years old, and in seventh grade. School psychologist Rebecca Luis, M.A., performed the evaluation. The purpose of the evaluation was to determine claimant's academic needs.

Ms. Luis administered the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV), which measures general intellectual ability. Ms. Luis determined that

claimant's general cognitive ability was in the borderline range of intellectual functioning, as measured by his full scale IQ (FSIQ) of 73. Claimant's verbal comprehension ability was in the low average range with a Verbal Comprehension Index Score of 83, and his general perceptual reasoning abilities were in the borderline range, with a Perceptual Reasoning Index Score of 77. Ms. Luis noted that claimant's ability to sustain attention, concentrate, and exert mental control were a weakness relative to his verbal reasoning abilities. She noted that a weakness in mental control "may make the processing of complex information more time-consuming for [claimant] …" Claimant continued to qualify for special education services under the eligibility criteria of "Other Health Impairment." Ms. Luis noted that claimant continued to have limited vitality or alertness due to chronic or acute health problems, resulting in depressed educational performance. Ms. Luis did not note any observations of symptoms of autism, an intellectual disability, or any other developmental disability.

It should be noted that claimant's low FSIQ of 73 could have qualified him for regional center services as intellectually disabled or in the fifth category (FSIQ of 75 or less), as it was not otherwise explained by Ms. Luis.

May 2009 IEP

21. Claimant's May 11, 2009 IEP noted that he had significant growth in vocabulary and verbal expression, which would not be indicative of an intellectual ability or autism. He continued to have difficulty with patterns and auditory memory. Claimant's parents were concerned with his anxieties and forgetfulness. Claimant remained eligible for special education on the basis of "Other Health Impairment" due to his cystic fibrosis.

October 2009 Assessment

22. On October 14, 2009, Robert L. Morgan, Ph.D., performed a psychological evaluation on claimant for purposes of a Department of Social Services Disability Determination. Dr. Morgan administered the WISC-IV, Vineland Adaptive Behavioral Scale II (VABS-II), and Bender-Gestalt II.

On the WISC-IV, which measured claimant's general intellectual functioning, claimant's FSIQ was 78, which Dr. Morgan characterized as "borderline." Claimant's verbal comprehension, verbal reasoning, working memory, and attention span fell in the low average range. His processing of simple or visual material fell within the borderline range.

On the VABS-II, claimant scored in the low adaptive level for communication, daily living skills, socialization and interpersonal relationships, and motor skills, with a scaled score of 67.

On the Bender-Gestalt II, which measures visual and motor skills, claimant's global score was in the low average range, with a score of 87.

Dr. Morgan noted that claimant's verbal IQ of 83 and his perceptual reasoning score of 88 were in the low average range. Claimant's IQ assessed over the years varied considerably, from extremely low functioning in 2002, to low average as assessed by the school district. Dr. Morgan also noted claimant's placement in the special education system, for reasons unclear to him. However, IEP records clearly indicated claimant's qualification for special education services under "Other Health Impaired" category due to claimant's cystic fibrosis. Dr. Morgan also noted that findings on the Vineland II suggested mild developmental difficulties, which would raise the question of possible Asperger's disorder. He lastly noted claimant's ADHD and anxiety, which seemed to be relative to claimant's functioning in school.

Dr. Morgan's diagnostic impressions were to rule out Asperger's disorder. He assessed claimant with phonological disorder, ADHD, anxiety disorder, low average FSIQ in the borderline range of functioning, cystic fibrosis, persistence of intestinal and digestive problems, pulmonary difficulties, and psychosocial stressors. There was no mention of autism, intellectual disability, or any other disability in Dr. Morgan's diagnoses.

May 2010 IEP

23. Claimant's May 6, 2010 IEP showed improved reading, writing and math skills. He was noted to have worked well with his peers. His gross motor development was age appropriate and not a concern. The IEP team did not note any observations of autism, intellectual disability or any other signs of a developmental disability.

September 2010 Social Worker Assessment

24. In her letter to claimant's school dated September 2, 2010, Katherine Reed, LCSW, Cystic Fibrosis Care Center, Children's Hospital of Central California, wrote that cystic fibrosis is a progressive terminal disease which requires aggressive evidence-based multiple lines of treatment, including chest physiotherapy and individual administration of multiple medications throughout the day. Ms. Reed noted that claimant's inability to fully absorb the nutrients he eats causes more odorous flatulence and bowel movements, which all young adolescent cystic fibrosis patients struggle with as "an almost unbearable burden." She further wrote:

> [Claimant] however has an additional set of issues to contend with; he is slightly developmentally delayed. The cruel irony of his developmental delays is that they are so mild the [*sic*] he can almost pass as normal, but not quite. It is as though he has the disadvantages of the disorder –

> everything is much harder for him, without the advantages – added services and or obliviousness to the differences. [Claimant] is intelligent enough to worry constantly about meeting the requirements placed upon him. His lowered IQ has deprived him of the resilience he needs to get through high school and manage his medical disability.

Ms. Reed requested protected bathroom accommodations for claimant to prevent him from being bullied, and a shortened day to remove "two of the most intolerable activities in [claimant's] school day, P.E. and lunch break." While she noted a slight developmental delay in claimant, Ms. Reed did not indicate any signs or symptoms of a developmental disability.

April 2011 IEP

25. Claimant's April 15, 2011 IEP showed that he transitioned well to high school, was cooperative when working in groups, and got along with his peers. Claimant was able to read independently at an eighth grade level and write multiple sentence paragraphs with correct punctuation and grammar. He mastered addition, subtraction and multiplication. Claimant was noted as making excellent progress in his general education curriculum, and had generally good behavior. He still qualified for special education services under the "Other Health Impaired" category due to his cystic fibrosis. At this time, claimant was 14, and in the ninth grade.

April 2011 Language Survey

26. The following year, TUSD administered the Woodcock-Munoz Language Survey to claimant. The results indicated that claimant was more proficient in English than in Spanish. His scores reflected limited listening, speaking, reading, writing and comprehension skills in English. The same skills in Spanish were very limited or

negligible. His limited language skills in Spanish were more reflective of a lack of language proficiency rather than his ability to learn.

March 2012 Assessment

27. On March 28, 2012, TUSD conducted a triennial psychoeducational evaluation of claimant. School psychologist Elizabeth Ladine performed the assessment. Ms. Ladine and her team reviewed claimant's records, interviewed claimant and his teachers, made observations, and administered tests. Ms. Ladine administered the KABC-II, Woodcock Johnson Tests of Cognitive Abilities, Third Edition (WJ-III, Cog), Beery VMI, and the TAPS, Third Edition (TAPS-III).

The KABC-III measured a range of abilities, including processing, learning, reasoning, and crystallized ability. Claimant scored below average in the areas of short term memory (score of 74), comprehension/knowledge (score of 75), long term memory (score of 84) and fluid reasoning (score of 88). He scored in the well below average range for visual processing (score of 82).

The Beery VMI measured fine motor skills as well as visual perception. This test required claimant to copy geometric designs in a developmental sequence. Claimant scored below average, with a scaled score of 67.

The TAPS-III measured auditory skills necessary for the development, use and understanding of language used in academic and everyday activities. Claimant's auditory processing was well within the average for students his age (score of 104), and was considered a relative strength. WJ-III, Cog measured cognitive abilities, such as processing speed, reflecting claimant's ability to quickly process printed material and subsequently generate written paper/pencil responses. Claimant's performance in this area was well below average for students his age, as reflected by his decision speed score of 63, and his pair cancellation score of 76.

Ms. Ladine noted that claimant's academic achievement in the areas of English language arts and mathematics fell well below expected grade level standards. In addition, psychological processing deficits continued to exist in sensory motor skills and cognitive processing. Claimant's processing deficits and health impairments impacted his academic skills, and adversely affected his progress in the general curriculum. Claimant's low scores put him in the intellectual disability range, even though Ms. Ladine did not specifically state so in her report.

March 2014 IEP

28. Claimant's last IEP was conducted on March 13, 2014, when claimant was 17 years old, and in the twelfth grade. The IEP team determined that claimant could achieve a high school diploma instead of a certificate of completion, if he was able to pass the high school exit exam. The IEP team projected that claimant would graduate in May 2018. According to a VMRC Intake Assessment Update on May 26, 2015, claimant graduated on May 20, 2015 with a high school diploma after transferring to Turlock Adult School.

July 2015 Assessment by Philip M. Cushman, Ph.D.

29. Claimant was referred to Dr. Cushman by the Department of Social Services to evaluate his cognitive functioning. Dr. Cushman performed a psychological evaluation of claimant on July 13, 2015. Dr. Cushman administered the Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV), which found claimant to be intellectually functioning in the highest end of the borderline mentally deficient range. Claimant's FSIQ was determined to be 79. Dr. Cushman also administered the Wechsler Memory Scale IV, which assessed claimant's memory abilities. Claimant was noted to have difficulties with immediate recall. Dr. Cushman concluded that while claimant had oddities in his presentation, he did not see a lot of symptoms of ADHD or autism. Based

on the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV),[4] Dr. Cushman made the following diagnostic impressions:

AXIS I:	300.4	Dysthymic Disorder, early onset
AXIS II:	V62.89	Borderline Intellectual Functioning
AXIS III:	History of significant developmental delays as well as cystic fibrosis	
AXIS IV:	Psychosocial Stressors: History of special education in school, recent graduation with diploma from an adult school, lack of driver's license, living with parents	
AXIS V:	GAF: 60	

AUTISM SPECTRUM DISORDER EVALUATIONS

August 2015 Evaluation by Uvaldo Palomares, Ph.D.

30. On August 20, 2015, Dr. Palomares, a licensed psychologist in Livermore, performed an Autism Spectrum Disorder (ASD) evaluation on claimant, after claimant's mother requested a comprehensive diagnostic evaluation through Beacon Health Services, claimant's mental health counselor. Claimant was referred to Dr. Palomares for "diagnostic clarification," as stated by Dr. Palomares in his report, which was admitted into the record. Dr. Palomares did not testify at hearing.

[4] The DSM, Fifth Edition (DSM-V) was published on May 18, 2013. Dr. Cushman did not note why he used the previous version, the DSM-IV, in making his diagnostic impressions.

31. Dr. Palomares reviewed claimant's family history, and past psychological assessments. He conducted a clinical interview of claimant's parents and observed claimant during his examination. Dr. Palomares also administered the Autism Diagnostic Observation Schedule 2 (ADOS-2), which is a standardized assessment of communication, social interaction, play, imaginative use of materials, and restricted repetitive behaviors. He also used the Modified Checklist for Autism in Toddlers, Revised, with "Follow-up M-CHAT-R/F in addition to the ADOS-2."

32. Dr. Palomares found that claimant's total scores on the ADOS-2 met or exceeded ASD cutoff scores in all three areas of communication and social interaction. He wrote:

> On the basis of a careful review of his medical and developmental history, as well as his current behavior, [claimant] is diagnosed with ASD. Early in his education [claimant] was diagnosed intellectual disability[5] [*sic*] and placed in a special education class where he excelled academically sufficient to be mainstreamed at the junior high level. He was not able to cope with the regular classroom and school environment thus, leaving high school. During all this time his parents felt that he had symptoms supporting a possible ASD condition. The district, VMRC, and other agencies would allude to the possibility but would not

[5] Claimant's records do not reflect a diagnosis of intellectual disability under the Lanterman Act at any point in his life. Claimant qualified for special education services under the "Other Health Impairment" category due to his cystic fibrosis. Claimant received continued special education services primarily in speech and language.

support a serious assessment until Beacon came into the picture.

33. Dr. Palomares' diagnostic impressions were:

Autism Spectrum Disorder

Severity level for social communication; Level 1, requiring substantial support

Severity level for restricted, repetitive behaviors; Level 2, requiring very substantial support

Without accompanying language impairment

With Cognitive Impairment

Not associated with a known medical or genetic condition or environmental factor

Not associated with another neurodevelopment, mental or behavioral disorder

Symptoms present in early developmental period

Symptoms are causing clinically significant impairment in social and other areas of current functioning.

(Italics in original.)

34. Dr. Palomares recommended genetic testing for claimant. He also recommended Applied Behavior Analysis or similar interventions to improve claimant's focus, off-task behaviors, and social skills.

April 2016 Evaluation by Dorcas L. Roa, Ph.D.

35. VMRC commissioned an autism assessment after being provided with Dr. Palomares' report. VMRC retained Dr. Roa, who testified at hearing. Dr. Roa is a licensed clinical psychologist and neuropsychologist, and is presently a Psychologist II at the M.I.N.D. Institute in Sacramento. Dr. Roa is a contracted provider for VMRC and other regional centers. Part of Dr. Roa's responsibilities is to assess children to rule out autism, Asperger's Syndrome, ADHD, intellectual delays, and other disorders. The regional centers do not have authority over her independent clinical judgment. Dr. Roa is familiar with the DSM-V and the Lanterman Act.

36. Dr. Roa performed a psychological evaluation of claimant on April 1, 2016. She wrote a report, which was admitted into the record. Dr. Roa performed her evaluation to determine if claimant met the diagnostic criteria for ASD. She also assessed claimant's cognitive and adaptive living skills to assist VMRC with eligibility determination decisions.

37. Claimant's mother informed Dr. Roa that her concerns were claimant's development and functioning since he was a toddler. She explained that he met early developmental milestones quite late. In school, he was behind his peers and required a one-on-one aide and special education supports. Socially, claimant did not greet others, had difficulties with conversations, and had difficulty with friendships. Claimant could not care for his medical needs related to his cystic fibrosis. Claimant's mother believed that the ASD diagnosis explained why her son has difficulties in so many areas of his life.

38. In performing her psychological evaluation of claimant, Dr. Roa reviewed all available records, conducted a clinical interview of claimant and his mother, and administered the following tests: (1) WAIS-IV, (2) Social Communication Questionnaire, Lifetime (SCQ), (3) Autism Diagnostic Observation Schedule, Second Edition (ADOS-2-Module 4); and (4) Adaptive Behavior Assessment System, Third Edition (ABAS-3).

The WAIS-IV resulted in a FSIQ of 72. When compared to adults of similar age, claimant was functioning below age-based standards across all cognitive areas: verbal comprehension; perceptual reasoning; working memory; and processing speed. He also placed in the borderline to low average range in vocabulary, verbal abstraction skills, acquired knowledge, visuomotor construction, auditory memory, and processing speed. He showed strength in visual reasoning.

Claimant's mother completed the SCQ, which quantifies the caregiver's report of behaviors that may be symptomatic of ASD. Her responses yielded a score of 21. According to Dr. Roa, scores above 15 are considered elevated, and indicate that further assessment may be required to rule out ASD. Some of the behaviors that claimant's mother reported were lack of friendships, reduced empathy, reduced sharing of enjoyment, lack of social chat, and saying things repeatedly. Claimant wanted to wear the same clothes every day, and organized his shoes in a particular way. Claimant's mother described the presence of repetitive motor mannerisms, however, Dr. Roa considered the behaviors observed in a video characteristic of anxiety and not the stereotypical mannerisms of individuals with ASD.

The ADOS-2 is a structured observation tool used to diagnose ASD, providing opportunities for social interaction and communication. Dr. Roa found that claimant spoke in full sentences and his speech was comprehensible. He was consistently responsive to social overtures, and his social insight was adequate. He created cohesive and creative stories using novel materials. He did not demonstrate any unusual sensory interest or sensory seeking behaviors, and did not display any repetitive hand or finger mannerisms, and there was no evidence of other complex whole body movements. There was no evidence of ritualistic or compulsive behavior.

Claimant's adaptive skills under the ABAS-3 showed that claimant's overall level of adaptive functioning was very low, with a General Adaptive Composite score of 51.

The GAC score is comprised of different domains, including conceptual, social and practical functioning, which, in turn, reflect adaptive behavior across several distinct areas including communication, community use, home living, health and safety, self-care, self-direction, leisure, social and academics. Claimant was rated as having low ability across all of these areas.

Dr. Roa noted no history of psychiatric illness that could account for claimant's difficulties, and although ADHD was raised as a possibility in the past, claimant did not have the outward presentation of an individual with ADHD.[6] She further noted that claimant was identified as having high anxiety levels, but it was thought to be a learned behavior. Given claimant's medical risk factors and cognitive delays, his mother has been quite protective, and it was very likely that her insecurities about claimant's health, safety and overall well-being transferred over to him. Claimant now views many aspects of his world as potentially unsafe. Throughout the years, claimant developed an overacting orienting response to any possible dangers in his environment. Dr. Roa noted that claimant's anxiety would be best treated with behavior and/or therapy (including a systems/family perspective), not necessarily anti-anxiety medication.

APPLICATION OF DSM-V ASD CRITERIA BY DR. ROA

39. To diagnose ASD, one must find that the individual has persistent deficits in social communication and social interaction across multiple contexts, as manifested by: (1) deficits in social-emotional reciprocity; (2) deficits in nonverbal communicative behaviors used for social interaction; and (3) deficits in developing, maintaining and

[6] VMRC's 2006 Intake Assessment Update indicates that claimant was taking Adderall for ADHD, but only for a short time. A Department of Social Services determination in October 2009 also showed a diagnostic impression of ADHD.

understanding relationships. These diagnostic criteria are known as Criteria A in the DSM-V.

Claimant did not have any of the deficits set forth in Criteria A. Based on direct observation, claimant was immature, and he was reciprocal in his actions. He shared his interests and engaged in social chat. Dr. Roa found that while he had social deficits, they were due to his cognitive limitations, not a lack of reciprocity. Furthermore, claimant did not have deficits in eye contact, gestures or facial expressions when communicating. Dr. Roa also found that his cognitive limitations may account for his difficulties with peer interactions and making friends.

40. In addition to deficits in social communication and interaction, to be diagnosed with ASD, claimant had to show restricted, repetitive patterns of behavior, interests or activities, as manifested by at least two of the following: (1) stereotyped or repetitive motor movements, use of object, or speech; (2) insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior; (3) highly restricted, fixated interests that are abnormal in intensity or focus; or (4) hyper- or hypo-reactivity to sensory input or unusual interest in sensory aspects of the environment. These diagnostic criteria are known as Criteria B in the DSM-V. Dr. Roa determined that claimant met two of these criteria: fixated interests on poultry and artists/movie producers, and sensitivity to noise in his school auditorium, as noted in claimant's history. However, Dr. Roa ultimately determined that claimant did not meet the criteria for ASD.

41. Dr. Roa's diagnostic impressions were:

- Borderline intellectual functioning
- Anxiety Disorder
- Complex medical issues

42. Dr. Roa recommended that given claimant's "processing vulnerabilities," repetition and clarification should be given regularly and with great patience. Claimant would also benefit from visual cues and organizers. Information should be simple. Dr. Roa, like Dr. Palomares, also recommended genetic testing to rule out any genetic factors that may be contributing to claimant's cognitive delays and other medical problems.

VMRC'S EXPERT BARBARA JOHNSON, PH.D.

43. Dr. Johnson is a licensed clinical psychologist for VMRC. She is also a licensed Marriage and Family Therapist. Dr. Johnson conducts file reviews for eligibility determination of regional center services. She has had extensive training and education in developmental disabilities and is familiar with the eligibility requirements under the Lanterman Act. She is also familiar with the DSM-V and ASD Criteria.

44. Dr. Johnson testified that eligibility for regional center services is a two-prong test. The first prong is establishing that an individual has a developmental disability, and the second prong is that the developmental disability is a substantial disability for that individual. There are three exclusion areas which disqualify an individual from regional center services: (1) solely physical conditions; (2) solely learning disabilities; and (3) solely psychiatric conditions.

45. Dr. Johnson also explained that in order for an individual to be diagnosed with ASD, he must meet all three criteria under Criteria A in the DSM-V. Under Criteria B, he must satisfy two of the four criteria. An individual must also meet Criteria C, D and E, stated in the DSM-V as follows:

> C. Symptoms must be present in the early developmental period (but may not become fully manifest until social

demands exceed limited capacities, or may be masked by learned strategies in later life).

D. Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning.

E. These disturbances are not better explained by intellectual disability (intellectual developmental disorder) or global developmental delay. Intellectual disability and autism spectrum disorder frequently co-occur, to make comorbid diagnoses of autism spectrum disorder and intellectual disability, social communication should be below that expected for general developmental level.

46. Dr. Johnson was on the VMRC Eligibility Review Team that reviewed claimant's chronological history of VMRC Intake Assessments, psychological evaluations, and IEPs, from birth to age 19. The team also reviewed the recent psychological evaluations of Drs. Cushman, Roa and Palomares.

47. Dr. Johnson stated that claimant's early diagnosis of cystic fibrosis qualified him for the VMRC's Early Start Program, which provided services for claimant at six months old due to his medical condition. Early Start also provides services for those infants and children three years of age or less if they are at risk of developing a developmental disability.

48. At six months old, Dr. Johnson pointed out that claimant's physical therapy examination showed claimant as alert, curious, playful and happy. Claimant showed that he engaged with other people. When looking for signs of autism, "we are looking for

signs at birth and going on." Dr. Johnson opined that practitioners will start to see autistic features as they develop. No deficits were noted at the time.

49. When claimant was re-assessed by VMRC at three and a half years old, Dr. Johnson opined that the evidence continued to suggest that claimant could engage in social relationships, which does not speak to autism. Claimant's cognitive functioning, with a score of 85, was above the "cutoff" of 75. Claimant's 85 score indicated that his cognitive functioning was not related to an intellectual disability, or a condition similar to an intellectual disability.

50. In kindergarten, claimant received special education services for speech and language impairment, which were not services related to a developmental disability. His vocabulary growth indicated that he had the capacity to learn new information, which speaks against an intellectual disability or fifth category. Claimant's auditory processing disorder was related to a specific learning disability, not a developmental disability.

51. In second grade, claimant still received speech and language services, but his teacher felt that he would do better in a smaller classroom, and could be mainstreamed for some classes, which was further evidence of his capacity to learn new material. He also made good eye contact with others, and spoke in a normal manner, which is not indicative of autism. Moreover, claimant's FSIQ was 89, well above the range of an intellectual disability or fifth category.

52. Dr. Johnson noted that in claimant's triennial assessment in September 2006, claimant had 56 absences in 3rd grade. This was a concern, according to Dr. Johnson, because learning is cumulative. Claimant played interactive games with his friends, including football, basketball and soccer. This showed that claimant was ambulatory, and had friends. Dr. Johnson opined that such interactions are not something that an autistic child would do. Claimant's IEP of the same date confirmed

claimant's many absences due to surgeries, tardiness, and illness, but not lack of ability. Dr. Johnson asserted that claimant was not at school, and therefore could not benefit from instruction.

53. Dr. Johnson noted that claimant was prescribed Adderall for ADHD at age 10. A formal assessment was not warranted for autism at the time, because all of claimant's mother's concerns pointed to a medical disability, not a developmental disability.

54. Claimant's next triennial evaluation was conducted in June 2009. Dr. Johnson noted that claimant's test scores were a "snapshot in time," and the eligibility review team looked for a trend over time. She stated, "incrementally, statistically, you are demonstrating reliability and accurate reflection of the person's abilities. We look at the totality of the information so that we are not misled by a single score or single time. We're looking at it over time." Dr. Johnson opined that claimant's FSIQ of 73 was not indicative of his full scale capacity at that point in time. Dr. Johnson conceded that "73 could fall within fifth category," however his FSIQ was not indicative of claimant's overall cognitive deficit, but rather, "merely reflective of someone who has a weakness in an area." Dr. Johnson further opined that claimant continued to have significant difficulty with short term auditory memory and visual motor integration, which was bringing down his test scores. She opined that claimant's deficits were not due to a developmental disability.

55. Dr. Johnson identified another triennial evaluation in 2012, showing claimant's KABC-II scores of 88 in reasoning abilities, and 82 in nonverbal skills. Dr. Johnson opined that claimant's scores exceed an intellectual disability/fifth category score of 75. Speed was a weakness for claimant, which may have explained his deficits in learning. Dr. Johnson stated that a person with an intellectual disability/fifth category cannot achieve an 88.

56. Dr. Johnson reviewed Dr. Cushman's psychological evaluation report. She noted that Dr. Cushman did not provide a listing of records that he relied upon in making his diagnosis and conclusions. She stated that it is common to provide a listing. Dr. Johnson asserted that the lack of identified records undermined the validity of Dr. Cushman's findings.

57. Dr. Johnson also addressed Dr. Palomares' report. She stated that the eligibility review team did not rely on Dr. Palomares' report because he is not considered to be an expert in the field of autism. Dr. Palomares was previously an active vendor for VMRC, performing immigration evaluations. He is currently inactive. Dr. Johnson stated, "We require our vendors to have a certain amount of expertise and experience in autism evaluations, which he did not have based on our criteria." Dr. Johnson noted Dr. Palomares identified two records which he reviewed, and he did not provide a best practice evaluation because he did not conduct a full review of the records. Furthermore, Dr. Palomares administered the M-CHAT, which is an instrument used for toddlers. Claimant was 18 at the time.

58. Dr. Johnson also testified that there was conflicting information as to how the ADOS-2 was scored. Dr. Palomares referenced the DSM-V ASD Criteria, which "requires Criteria A1, 2, and 3 to be satisfied, as well as B1 to 4." Dr. Johnson pointed out that there was "no evidence in his report that he used these criteria. He merely talks about specificity. First, you have to satisfy the criteria, and then [identify] what the specificity is. This is not a best practice situation." Dr. Johnson stated that the DSM-V "makes it very clear that you do not use the ADOS for a diagnosis [of ASD]."

Dr. Johnson also questioned the validity of his finding of ASD based on just two records. Dr. Palomares reviewed claimant's Wechsler results, "which has to do with academics. There's just no relevance, and it's meaningless information." Dr. Johnson also pointed out that Dr. Palomares referred to claimant in his report as a four year old.

CLAIMANT'S EVIDENCE

59. Claimant's mother was the only witness that testified on claimant's behalf. She strongly believes that claimant has autism and an intellectual disability, despite claimant's history of assessments that indicate otherwise. Claimant's mother has observed claimant's behaviors since his birth. She asserted that claimant has no friends or social skills. He flaps his hands up and down. He had help of an aide each year which enabled him to pass his classes. He cannot care for himself. He cannot cook or clean. He spends his time isolated in his bedroom. He cannot go places by himself. He cannot take his medications without help. She submitted a copy of a monthly calendar containing claimant's handwriting, which she characterized as "writing and scribbling" not indicative of a 20 year old. The superior court recently granted claimant's parents conservatorship over claimant's affairs.

60. Claimant's mother relied on a report written by Lorenzo Aguilar, M.D., a neurologist. Dr. Aguilar did not testify. His report dated October 9, 2015, was admitted into the record. According to Dr. Aguilar, he assessed claimant for neurological deficits. He wrote that claimant has "mild mental retardation, he has some cognitive deficit." Dr. Aguilar did not list the documents he relied upon to form this conclusion, and admitted in his report that he did not have any of claimant's medical records to evaluate claimant's degree of mental retardation.

61. Claimant's mother also relied on letters written in 2015 and 2016 by Razan Taha, M.D., and Maryam Esho, M.D., who confirmed that claimant was diagnosed with autism. Dr. Taha is a family practitioner for Golden Valley Health Centers, where claimant receives mental health services. Dr. Esho has been claimant's pediatrician since his birth, and relied on Dr. Palomares' report to confirm his diagnosis of autism.

DISCUSSION

Autism

62. Dr. Palomares' report, in which he diagnosed claimant with ASD, was given little weight, due to the lack of best practices in failing to cite the records he relied upon, and thus failing to show that he conducted a full review of the records. Furthermore, Dr. Palomares administered the M-CHAT, which is administered to toddlers. Those results were not provided in his report. Furthermore, Dr. Palomares did not provide an analysis of the DSM-V Criteria which led to his ASD diagnosis. Dr. Johnson persuasively noted that Dr. Palomares was not an expert in the field of autism. Therefore, Dr. Palomares' report, upon which claimant's mother, Mr. Aguilar, Dr. Taha, and Dr. Esho relied, is given little weight. Consequently, Mr. Aguilar's report, and the letters of Drs. Taha and Esho are also given little weight.

63. Dr. Roa's testimony and report, on the other hand, were given great weight. Dr. Roa regularly assesses children for autism, is the contracted provider for VMRC to perform such assessments, and has the experience and knowledge to do so. Dr. Roa determined that claimant did not meet the criteria for autism under the DSM-V.

64. It was not demonstrated through other evidence, oral or documentary, that claimant has autism. (Findings 39, 40, 62 and 63.) The weight of the evidence demonstrates otherwise. Accordingly, claimant is not eligible for VMRC services based upon a diagnosis of autism.

Intellectual Disability

65. Although claimant scored low FSIQ's of 73 in March 28, 2012, and 72 on April 1, 2016, Dr. Johnson's explanation of why these low scores did not reflect respondent's general cognitive abilities was persuasive for the following reasons: (1) claimant's test scores were evaluated over time, so as not to rely on a single score at a

single time; and (2) claimant's FSIQ reflected weaknesses in certain areas, such as speed, which brought down his test scores; and (3) an individual with an intellectual disability cannot achieve scores of 88 (in reasoning abilities), and 82 (in nonverbal skills) on the KABC-II, when the cutoff for an intellectual disability is 75. Claimant's diagnosis of borderline intellectual functioning is persuasive, in that he did not meet the criteria for an intellectual disability.

66. It was not demonstrated through other evidence, oral or documentary, that claimant has an intellectual disability. (Findings 38, 41, 54, 55, and 65.) Accordingly, claimant is not eligible for VMRC services based upon a diagnosis of an intellectual disability.

Fifth Category Analysis

67. In *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, the appellate court held that "the fifth category condition must be very similar to mental retardation,[7] with many of the same, or close to the same, factors required in classifying a person as mentally retarded. Furthermore, the various additional factors required in designating an individual developmentally disabled and substantially handicapped must apply as well." (*Id.* at p. 1129.)

68. It is therefore helpful to review the factors required for a diagnosis of intellectual disability. The DSM-V provides that the "essential features" of intellectual disability (intellectual developmental disorder) are deficits in both intellectual and

[7] Mental retardation is no longer a term used under the Lanterman Act or in the DSM-V. The term "intellectual disability" has replaced mental retardation, and is the term in common use by medical, educational, and other professions and by the lay public and advocacy groups. (*Intellectual Disabilities*, DSM-V, 2013, page 33.)

adaptive functioning in conceptual, social, and practical domains. The following three criteria must be met:

(a) Deficits in intellectual functions such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.

(b) Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.

(c) Onset of intellectual and adaptive deficits during the developmental period.

(DSM-V, p. 33.)

DEFICITS IN INTELLECTUAL FUNCTIONING

69. Dr. Roa determined claimant's FSIQ to be 72. Although a FSIQ score of 72 would place claimant in the intellectual disability category, Dr. Roa explained that claimant's performance revealed cognitive limitations consistent with his existing diagnosis of borderline intellectual development. Claimant exhibited relative strengths on a task of visual reasoning, but otherwise his scores were consistently at a borderline to low average level. Dr. Roa and Dr. Johnson did not conclude that claimant has this "essential feature" of intellectual disability.

DEFICITS IN ADAPTIVE FUNCTIONING

70. Despite claimant's diagnosis of borderline intellectual functioning, claimant still believes he is eligible because his deficits in his adaptive functioning

suggest that he has a condition closely related to an intellectual disability, or that he requires services or treatment similar to that received by individuals with an intellectual disability. Claimant's mother asserted that claimant needs her help for everything. However, fifth category eligibility determinations typically begin with a threshold consideration of whether an individual has deficits in intellectual functioning. This is done prior to consideration of other fifth category elements related to similarities between the two conditions, or the treatment needed. Claimant seeks to move past such threshold consideration of intellectual functioning, and focus instead on his significant limitations in adaptive functioning, and need for services similar to that provided to individuals with intellectual disabilities.

71. Claimant's adaptive functioning was determined by Dr. Roa to be very low, scoring a General Adaptive Composite Score (GAC) of 51 on the ABAS-III. Claimant was rated as having low ability across all the areas of communication, community use, home living, health and safety, self-care, self-direction, leisure, social and academics. It was established that claimant has this "essential feature of a developmental disability.

ONSET OF INTELLECTUAL AND ADAPTIVE DEFICITS PERIOD DURING DEVELOPMENTAL PERIOD

72. Claimant's history reflects cognitive deficits and adaptive deficits existed during the developmental period, from birth to age 18.

Samantha C. Case

73. When considering whether an individual is eligible for regional center services under the fifth category, that eligibility may be based on the established need for treatment similar to that provided for individuals with an intellectual disability, and notwithstanding an individual's relatively high level of intellectual functioning.

(*Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462.)

In *Samantha C.*, the individual applying for regional center services did not meet the criteria for intellectual disability. Her Wechsler Adult Intelligence Scale-III (WAIS-III) test results scored her above average in the areas of abstract reasoning and conceptual development and she had good scores in vocabulary and comprehension. She did perform poorly on subtests involving working memory and processing speed, but her scores were still higher than persons with an intellectual disability.

The court understood and noted that the Association of Regional Center Agencies had guidelines which recommended consideration of fifth category for those individuals whose "general intellectual functioning is in the low borderline range of intelligence (I.Q. scores ranging from 70-74)." (*Id.* at p. 1477.) However, the court confirmed that individuals may qualify for regional center services under the fifth category on either of two independent bases, with one basis requiring only that an individual require treatment similar to that required for individuals with an intellectual disability, and the other basis being that an individual have a condition closely related to an intellectual disability.

Condition Closely Related to Intellectual Disability

74. Claimant seeks eligibility based upon his condition being closely related to an intellectual disability, his primary focus being upon his impairments in adaptive functioning. 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.

75. Claimant's mother's credible testimony demonstrated that claimant needs daily help in cooking, medications, shaving, chores, transportation to appointments,

scheduling, and ensuring his personal safety. However, claimant does some things on his own for a 19 year old, such as basic hygiene, picking up after himself, using the microwave, and folding his clothes, under some direction. His adaptive functioning is in the below average range overall, and he appears to be substantially impaired. Claimant was administered the ABAS-3 by Dr. Roa. (Finding 38.) Dr. Roa noted that it is possible that he may have greater potential in certain areas of adaptive living (such as self-care and home living skills) if given greater opportunities to perform these independently, however claimant's capacity to live independently would be impacted by his cognitive limitations. Further, she stated:

> While his cognitive test performance is best linked to a diagnosis of borderline intellectual development, it is important to note that without appropriate supports, he may indeed function at a lower level (i.e., similar to an individual with intellectual disability) when faced with complex daily living demands.

76. Dr. Roa persuasively opined that claimant's cognitive deficits pose a "significant threat" to his adaptive living capacity. There is room for improvement with appropriate supports. The evidence falls into traditional fifth category analysis that looks for subaverage intellectual functioning "accompanied by" significant limitations in adaptive functioning.

In this case, claimant's borderline range of intellectual functioning, and his adaptive deficits caused by his cognitive limitations, manifest as a condition similar to an intellectual disability.

Condition Requiring Treatment Similar to that Required by Individuals with an Intellectual Disability

77. Fifth category eligibility may also be based upon a condition requiring treatment similar to that required for individuals with an intellectual disability. Preliminarily, "treatment" and "services" do not mean the same thing. They have separate meanings. Individuals without developmental disabilities, including those without any diagnosed disabilities, may benefit from many of the services and supports provided to regional center consumers. Welfare and Institutions Code section 4512, subdivision (b) defines "services and supports" as follows:

> "Services and supports for persons with developmental disabilities" means specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives.

Regional center services and supports targeted at improving or alleviating a developmental disability may be considered "treatment" of developmental disabilities. Thus, section 4512 elaborates further upon the services and supports listed in a consumer's individual program plan as including "diagnoses, evaluation, *treatment*, personal care, day care, domiciliary care, special living arrangements, physical, occupational and speech therapy, training, education, supported and sheltered employment, mental health services,…." (Welf. & Inst. Code, § 4512, subd. (b). Italics supplied.) The designation of "treatment" as a separate item is a clear indication that it is

not merely a synonym for services and supports, and this stands to reason, given the broader mission of the Lanterman Act:

> It is the intent of the Legislature that regional centers assist persons with developmental disabilities and their families in securing those services and supports which maximize opportunities and choices for living, working, learning, and recreating in the community.

(Welf. & Inst. Code, § 4640.7, subd. (a).)

78. Eligibility under fifth category must be based upon an individual requiring "treatment" similar to that required by individuals with an intellectual disability. The wide range of services and supports listed under section 4512, subdivision (b), are not specific to intellectual disabilities. One would not need to suffer from an intellectual disability, or any developmental disability, to benefit from the broad array services and supports provided by VMRC to individuals with an intellectual disability. They could be helpful for individuals with other developmental disabilities, or for individuals with mental health disorders, or individuals with no disorders at all. The Legislature clearly intended that an individual would have a condition similar to an intellectual disability, or would require *treatment* that is specifically required by individuals with an intellectual disability, and not any other condition, in order to be found eligible.

79. In *Samantha C.*, no attempt was made to distinguish treatment under the Lanterman Act as a discrete part or subset of the broader array of services provided to those seeking fifth category eligibility. Thus, the appellate court made reference to individuals with an intellectual disability and with 5th category eligibility both needing "many of the same kinds of treatment, such as services providing help with cooking, public transportation, money management, rehabilitative and vocational training,

independent living skills training, specialized teaching and skill development approaches, and supported employment services." (*Samantha C. v. State Department of Developmental Services, supra*, 185 Cal.App.4th 1462, 1493.)

This broader characterization of "treatment" cannot properly be interpreted as allowing individuals with difficulties in adaptive functioning, and who require assistance with public transportation, vocational training or money management, to qualify under the fifth category without more. For example, services such as vocational training are offered to individuals without an intellectual disability through the California Department of Rehabilitation. This demonstrates that it is not necessary for an individual to have an intellectual disability to demonstrate a need for services which can be helpful for individuals with an intellectual disability.

Individuals with an intellectual disability might require many of the services and supports listed in Welfare and Institutions Code section 4512, which could benefit any member of the public: assistance in locating a home, child care, emergency and crisis intervention, homemaker services, paid roommates, transportation services, information and referral services, advocacy assistance, technical and financial assistance. To extend the reasoning of *Samantha C.*, an individual found to require assistance in any one of these areas could be found eligible for regional center services under the fifth category. This was clearly not the intent of the Legislature.

Thus, while fifth category eligibility has separate condition and needs-based prongs, the latter must still consider whether the individual's condition has many of the same, or close to the same, factors required in classifying a person as having an intellectual disability. (*Mason v. Office of Administrative Hearings*, *supra*, 89 Cal.App.4th 1119.) Furthermore, the various additional factors required in designating an individual as developmentally disabled and substantially handicapped must apply as well. (*Id.* at p.

1129.) *Samantha C.* must therefore be viewed in context of the broader legislative mandate to serve individuals with developmental disabilities only.

A degree of subjectivity is involved in determining whether the condition is substantially similar to an intellectual disability and requires similar treatment. (*Id.* at p. 1130; *Samantha C. v. State Department of Developmental Services*, *supra*, 185 Cal.App.4th 1462, 1485.) This recognizes the difficulty in defining with precision certain developmental disabilities. Thus, the *Mason* court determined: "it appears that it was the intent of those enacting the Lanterman Act and its implementing regulations not to provide a detailed definition of 'developmental disability' so as to allow greater deference to the [regional center] professionals in determining who should qualify as developmentally disabled and allow some flexibility in determining eligibility so as not to rule out eligibility of individuals with unanticipated conditions, who might need services." (*Id.* at p. 1129.)

For all the above reasons, the treatment needs of claimant will be viewed within the narrower context of those services and supports similar to and targeted at improving or alleviating a developmental disability similar to an intellectual disability.

CLAIMANT'S TREATMENT NEEDS

80. Dr. Roa provided persuasive testimony on her recommended treatment for claimant's processing vulnerabilities: keep information "short and simple;" use repetition and clarification of information; and provide visual cues and organizers. She suggested that claimant continue to work with Esperanza Therapy Services to strengthen his independent living skills. She recommended that in the future, claimant may require a "semi-structured supported living environment (if he is not able to continue to reside with his family)." She also recommended genetic testing to rule out genetic factors that could be contributing to his cognitive delays and other medical problems. She also recommended a medical alert/special needs bracelet, and that the family consider

conservatorship to facilitate their continued involvement with claimant's medical care, financial matters and any legal issues. Such treatment recommendations are similar to that required by individuals with an intellectual disability.

81. The above matters have been considered, along with the relative experience and expertise that Dr. Roa and Dr. Johnson have in assessing individuals with developmental disabilities. Claimant did not call witnesses who were specialists in the field and had the educational or professional experience commensurate with Dr. Roa or Dr. Johnson. However, claimant's mother's testimony regarding claimant's adaptive deficits was given considerable weight. Claimant's adaptive behavior deficits arise from his cognitive limitations, as determined by Dr. Roa, and he requires treatment similar to that received by individuals with an intellectual disability.

82. It was established that claimant is eligible to receive regional center services and supports by reason of a condition found to be closely related to an intellectual disability or to require treatment similar to that required for individuals with an intellectual disability. Claimant has a condition that is closely related to an intellectual disability. He has borderline general intellectual functioning with significant adaptive deficits. As such, claimant has a developmental disability under the fifth category as defined under the Lanterman Act and claimant qualifies for services through VMRC.

LEGAL CONCLUSIONS

1. Under the Lanterman Developmental Disabilities Services Act, the State of California accepts responsibility for persons with developmental disabilities and an obligation to them which it must discharge. (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 intellectual disability, cerebral palsy, epilepsy, autism, and what is commonly known as the "fifth category" – a

disabling condition found to be closely related to intellectual disability or requiring treatment similar to that required for individuals with an intellectual disability. (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).)

2. "Substantial handicap" 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).)

3. In seeking government benefits, the burden of proof is on the person asking for the benefits. (See, *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) The standard of proof in this case is a preponderance of the evidence, because no applicable law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) Because claimant is requesting services and supports not authorized by VMRC, he bears the burden of proof.

4. It was established that claimant has a developmental disability that originated before age 18 and that continues, and that constitutes a substantial disability for him. He does not have autism. (Finding 64.) He does not have an intellectual disability. (Findings 65 and 66.) He does, however, have a disabling condition closely related to intellectual disability or requiring treatment similar to that required for individuals with an intellectual disability, qualifies under the fifth category. (Findings 67

to 82.) Claimant is therefore eligible to receive services through Valley Mountain Regional Center.

ORDER

Claimant's appeal from the Valley Mountain Regional Center's denial of services is GRANTED. Claimant is eligible for services under the Lanterman Act.

DATED: September 23, 2016

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DANETTE C. BROWN

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within ninety (90) days of receipt of the decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)