

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

v.

VALLEY MOUNTAIN REGIONAL CENTER,

Service Agency.

OAH No. 2018020336

DECISION

A fair hearing was held on May 22, 2018, before Heather M. Rowan, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, in Stockton, California.

Anthony Hill, Attorney at Law, Legal Affairs Advisor, represented Valley Mountain Regional Center (VMRC).

Claimant's mother represented claimant, with Spanish/English interpretation by certified translator Jennifer Gibson.

Evidence was received, the record was closed, and the matter was submitted for decision on May 22, 2018.

ISSUE

Does claimant qualify for services from VMRC under the Lanterman Developmental Disabilities Services Act (Lanterman Act), Welfare and Institutions Code section 4500 et seq., because she is an individual with autism or an intellectual disability, or because she has a disabling condition that is closely related to intellectual disability

or requires treatment similar to that required for individuals with an intellectual disability?¹

FACTUAL FINDINGS

1. Claimant was born in 2003. She is currently 14 years old. She requested services from VMRC in 2017, and her request was denied. Claimant appealed from that denial. A fair hearing was held on her appeal.

2. During the fair hearing, claimant argued that she was eligible for VMRC services under the Lanterman Act because she is an individual with: (1) autism; (2) an intellectual disability; and/or (3) a disabling condition that is closely related to intellectual disability or requires treatment similar to that required for individuals with an intellectual disability (also known as the "fifth category").

PRIOR ASSESSMENTS AND EVALUATIONS

3. In January 2006, when she was 25 months old, claimant qualified for the Early Start Program at VMRC based on her "developmental delay in speech and language." Her parents were concerned that, at two years old, claimant had very few words, and lacked the focus to complete a task. The stated goals for claimant's speech therapy were that she would "use words to communicate what she wants and needs," "use 15 words in the right way, put two or more words together, use about 50 words,

¹ The language used to describe the developmental disabilities relevant in this matter has changed over time. The Lanterman Act was amended to change the term "mental retardation" to "intellectual disability." The Lanterman Act still uses the term "autism" but that developmental disability is now called an "autism spectrum disorder" in the DSM-5.

name 20 things in pictures, and imitate sounds." Claimant received speech therapy through VMRC funding until she was three years old. In August 2006, testing showed claimant's "communication age" was eight months behind her chronological age. Her "IQ Equivalence" score was 88. In December 2006, additional testing showed claimant's "communication age" was 10 months behind her chronological age and her "IQ Equivalence" was 94.4.

4. At three years old, she aged out of the Early Start Program, and was assessed by her local school, Modesto City Schools. On December 13, 2006, Modesto City Schools, and claimant's parents created her first Individualized Education Program (IEP). The IEP stated that claimant had a "developmental delay in speech and language skills," and that her primary disability was a Specific Language Impairment (SLI).

5. On December 14, 2006, VMRC's interdisciplinary eligibility review team found claimant was not eligible for VMRC services. VMRC determined that claimant's receptive and expressive communication skills were impaired. The speech therapist suspected claimant suffered from Apraxia of Speech. At that point, she had been approved through Modesto City Schools to receive speech therapy two times per week. VMRC found that claimant's needs were being met by Modesto City Schools. Gary Westooth, Ph.D., stated that claimant's "cognitive and adaptive abilities are above the mentally retarded range." While he found indication of language delay, he did not find a "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." On January 18, 2007, claimant was denied regional center services.

6. On October 27, 2009, Wendy Summers, MA, evaluated claimant's speech and language skills. Claimant was five years, ten months old. Ms. Summers completed

the tests in both Spanish and English,² and stated that the results were a valid estimate of claimant's skills. Ms. Summers found that claimant was able to use full sentences in Spanish, with some minor errors for syntax. Claimant had difficulty, however, in responding to "wh-" questions and telling how two items were similar. Her teacher expressed concerns that claimant was not retaining classroom instructions in her memory. Ms. Summers opined that this was "a typical pattern" for English language learners. Ms. Summer recommended that claimant remain in speech therapy as she was making progress.

7. On January 31 and February 7, 2012, school psychologist Thomas Crocker, MA, performed a psychoeducational evaluation on claimant. She was eight years, one month old, and in the second grade. Mr. Crocker administered the California English Language Development test, and determined that the assessments would be appropriate in English. Mr. Crocker interviewed claimant, her teacher, her mother, observed claimant in her classroom, and reviewed her records. He also administered the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV), Tests of Auditory Perceptual Skills, Third Edition (TAPS-3), and the Woodcock-Johnson II: Tests of Academic Achievement (WJ-III).

Claimant's teacher expressed concerns that claimant was "very low in all areas," and lacked motivation to do her work. Claimant's mother was concerned that claimant had a learning disability.

² Claimant's primary language during her first few years was Spanish. Her parents speak Spanish at home. But at school, and among her three sisters, she speaks English. Her primary language is now considered to be English.

On the WISC-IV, claimant received the following scores: Verbal Comprehension, 79; Perceptual Reasoning, 104; Working Memory, 86; Processing Speed, 94. Because the differential among the scores was 25 points, a Full Scale IQ could not be determined. Mr. Crocker stated that scores between 90 and 109 are considered average. On the TAPS-3, claimant's Auditory Processing, Auditory Cohesion, and Auditory Memory scores were in the low range, and her Phonological Skills were low to low average. On the WJ-III, claimant's scores "suggest[ed] [her] Math Calculation Skills and her Basic Reading Skills to be a relative strength and her Reading Comprehension and Math Reasoning to be a relative weakness." Mr. Crocker concluded that claimant had a Specific Learning Disability (SLD): "Auditory Processing," and that there was no evidence of an intellectual disability or emotional disturbance.

8. On October 30, 2014, when claimant was 10 years, 10 months old, Amanda Aldrich, School Psychologist, assessed claimant as part of her triennial IEP. Ms. Aldrich administered the WISC-IV, TAPS 3, Beery-Buktenica Developmental Test of Visual-Motor Integration-6 (Beery VMI-6), and the WJ-III. She also observed claimant in her classroom, and interviewed claimant and her teacher. On the WISC-IV, claimant received the following scores: Verbal Comprehension, 79; Perceptual Reasoning, 110, Working Memory, 91; Processing Speed, 78. Because the differential among the scores was 25 points, a Full Scale IQ could not be determined. On the WJ-III, claimant's math calculation skills were "extremely low," her basic reading skills, reading comprehension, written expression, and reading fluency were "borderline," and her math reasoning was "low average." Claimant's TAPS-3 results indicated "Below Average" functioning on the Cohesion Index. Ms. Aldrich noted, "[Claimant] appears to understand what she has heard (auditory comprehension - Average) but struggles to draw conclusions based on what she heard (auditory reasoning - Below Average)." The Beery-VMI tests the ability of the eyes and hands to work together in smooth, efficient patterns. Claimant's visual-

motor integration was "average." Ms. Aldrich concluded that claimant met the standard for an SLD because there was a severe discrepancy between her intellectual ability and her academic achievement.

9. In 2016, claimant was seen by a medical doctor at the Family Partnership Center, Mental Health Unit. In 2017, Dr. Ricardo Gonzales assessed claimant, based largely on claimant's mother's observations. He noted that claimant functioned "about three years behind her age," she did not care for herself like a girl her age would, her play was age-inappropriate, and she struggled with school and memory. Claimant's diagnoses were Separation Anxiety Disorder and Learning Disorder. Claimant was also diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). Claimant's mother declined psychotropic drug prescriptions that were suggested to treat claimant's anxiety. The Family Partnership Center referred claimant to VMRC to request services.

CURRENT REQUEST FOR SERVICES AND EVALUATION

10. In March 2017, claimant's mother requested services from VMRC. Claimant was age 14, four months, and was in seventh grade. The basis for the request was that claimant had difficulty with the tasks of daily living, learning in school, and with her memory, and that she struggled with inattention, anxiety, and impatience. Additionally, claimant's mother stated that claimant's emotional and mental age was much younger than her chronological age. VMRC assigned claimant to Jessica Swope-Barrios for an intake assessment. Ms. Swope-Barrios described claimant as shy and uncomfortable, and explained:

She had difficulty understanding certain questions when asked in Spanish and in English. ... [Claimant] provided one to three word answers. It was a struggle for her to engage in to and fro conversation. [Claimant] relied on her mother to

simplify and restate the questions asked of her. ... It was a struggle for her to understand and to respond.

Claimant's mother reported that claimant had difficulty shampooing her hair, brushing her teeth, toileting, and dressing herself. Claimant's mother also stated that claimant uses short phrases, rather than complete sentences, is difficult to understand based on compromised clarity of speech, does not engage in story-telling, cannot relate details about her life, and has difficulty putting her thoughts into words. Ms. Swope-Barrios noted that claimant was unable to comprehend simple words and directions, follow simple conversation, follow multi-step directions, and remember simple directions and tasks. Ms. Swope-Barrios opined that claimant's "lack of receptive language skills is a combination of anxiety and problems with auditory processing."

Claimant continued to have difficulty in school. She was enrolled in Special Education, and struggled with reading and math, though reportedly was doing "fine with Special Education level math." She also could not understand cause and effect and consequences. In Ms. Swope-Barrios' opinion, claimant was unable to make appropriate decisions, and did not display good judgment. She did not understand the concept of money, required constant supervision from her family, and was sensitive to noise. She demonstrated social anxiety in her inability to go out into the community away from her mother. She was reported to be socially isolated, but stated that she ate lunch with friends at school.

Based on her assessment of claimant, Ms. Swope-Barrios recommended that claimant be referred for a formal autism evaluation.

11. On June 27, 2017, claimant underwent a Psychological (Autism Spectrum Disorder) Evaluation with Dr. Michael Jones, Clinical Psychologist. Claimant was age 13 years, six months, and entering eighth grade. Dr. Jones reviewed claimant's records from Family Partnership Center, interviewed her mother, and administered the Vineland

Adaptive Behavior Scales-Third Edition (VABS-3), the Autism Diagnostic Observation Schedule-Second Edition (ADOS-2), and an abbreviated Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V).

12. Dr. Jones noted that claimant was entering eighth grade, was in a special day class, and “[h]er academic skills are at a second grade level. His review of her prior psychoeducational testing revealed “delays of about three years” and verbal comprehension and processing speed skills in the borderline range. He observed that claimant was a “passive” subject during testing, and remained quiet if the problems were too difficult. She made eye contact, used descriptive gestures, and gave limited verbal responses. Claimant’s overall total on the ADOS-2 was five, which is below the cutoff of seven for autism spectrum and below “the more conservative cutoff of nine for autism.” The testing showed a low number of autism spectrum related behaviors.

The diagnostic criteria for an autism spectrum disorder set forth in the DSM-5 include: (A) “Persistent deficits in social communication, and social interaction across multiple contexts. ...”; (B) “Restricted, repetitive patterns of behavior, interests, or activities ...”; (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 later in life)”; and (D) “Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning.” While claimant met some of the criteria, claimant’s overall assessment did not suggest a diagnosis of autism spectrum disorder.

13. Dr. Jones administered the WISC-V, but not all of its subtests. Claimant’s verbal comprehension Index score was 81, which placed claimant in the low average rank of intellectual ability. Her Fluid Reasoning Index score was 73, which is in the borderline range of intellectual ability. Dr. Jones did not calculate claimant’s Working Memory Index, Visual Spatial Index, or Processing Speed Index scores. He did, however,

calculate a Full Scale IQ of 72, which is in the borderline range of general intellectual ability.

Claimant's mother served as the informant for the VABS-3, through a Spanish/English interpreter. The VABS-3 gauges daily living skills and self-sufficiency. Claimant's scores were all in the low to deficient range, with an overall score of 41. Dr. Jones noted that claimant's "self-sufficiency skills are undoubtedly severely impacted, it appears that her mother's reports overstate her deficits and that her functioning is closer to within the upper-end of the Low/Deficient range rather than at a level similar to a child her age with a moderate intellectual disability." Dr. Jones opined that claimant's low receptive language scores were the result of her cognitive delays and ADHD symptoms. All of her scores were impacted by her anxiety.

Dr. Jones opined that claimant's cognitive and adaptive functioning are compromised by ADHD, Predominantly Inattentive Type. She also has an unusual sensory interest "typical of a sensory integration disorder, coded as Other Specified Neurodevelopmental Disorder (F88)," and is sensitive to a wide variety of noises. He noted a prior diagnosis of separation anxiety, but opined that a more accurate diagnosis is likely Generalized Anxiety Disorder. Dr. Jones's testing, observations, review of claimant's history, and parent reports caused him to rule out autism spectrum disorder. Dr. Jones concluded that claimant has an intellectual disability in addition to ADHD and generalized anxiety.

TESTIMONY

14. Dr. Barbara Johnson is a Clinical Psychologist for VMRC, and is on VMRC's eligibility committee. At hearing, Dr. Johnson reviewed and interpreted the evaluations, assessments, and records VMRC had received regarding claimant. Dr. Johnson explained that VMRC's multi-disciplinary team, which consists of a psychologist, service coordinator, and intake coordinator, reviewed claimant's file in total and determined

that claimant was not eligible for regional center services. Dr. Jones's assessment ruled out autism spectrum disorder. Dr. Johnson explained that, on testing for intellectual functioning, individuals cannot score higher than their abilities, but they can score lower, and that mental health conditions may depress their scores. Dr. Jones's finding that claimant's Full Scale IQ was 72 must be interpreted in conjunction with claimant's prior testing, and the results must weigh in the fact that Dr. Jones did not administer a complete WISC-V. Based on her review of claimant's records, Dr. Johnson concluded that claimant has a specific learning disability and mental health diagnoses, but not an intellectual disability. Dr. Johnson opined that claimant's specific learning disability and speech/language impairment in conjunction with her mental health diagnoses were not conditions closely related to intellectual disability and did not require treatment similar to that required for individuals with an intellectual disability.

15. Claimant's mother testified on claimant's behalf. Claimant lives with her parents, both of whom speak Spanish, and her sisters, all of whom speak English and Spanish. She explained that claimant has difficulty completing everyday tasks. She cannot independently manage her personal hygiene, complete her chores at home, or remember basic instructions. Claimant's memory and attention are so poor that claimant's mother is worried she will never be able to live independently. Claimant's mother requested services from the regional center because she wanted help finding resources for claimant that will help her develop the skills she needs to be independent.

DISCUSSION

16. When all the evidence is considered, claimant did not establish that she qualifies for regional center services on the basis of autism spectrum disorder or an intellectual disability, or because she has a disabling condition that is closely related to intellectual disability or requires treatment similar to that required for individuals with an intellectual disability.

17. No evidence was presented to support a finding of eligibility based on the development disability of autism spectrum disorder. While VMRC's intake coordinator found sufficient cause to test claimant for autism spectrum disorder, Dr. Jones's assessment was conclusive that the diagnosis does not apply. Claimant did not establish that she was eligible for regional center services on the basis of autism spectrum disorder.

18. California Code of Regulations, title 17, section 54000, subdivision (b) explains that to be considered a developmental disability, the disability must:

- (1) Originate before age eighteen;
- (2) Be likely to continue indefinitely;
- (3) Constitute a substantial disability for the individual as defined in the article.

Additionally, a developmental disability is not a psychiatric disorder "where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder." (*Id.* at §54000, subd. (c).) It is also not due to a learning disability, "which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance ..." (*Ibid.*)

19. Claimant's intellectual testing shows that she falls in the low, low average, and average ranges of ability. Her most recent testing by Dr. Jones showed markedly lower results, and a Full Scale IQ of 72. Dr. Jones's assessment, however, did not include all of the subtests in the WISC-V, and his report did not explain the basis of his Full Scale IQ finding. Claimant has been identified as having a "speech/language impairment" and a "specific learning disability." Additionally, claimant's assessments consistently stated that her learning disability and her mental health diagnoses had an impact on her cognitive function. Based on the definition of developmental disability, claimant's performance on intellectual assessments, her diagnosed learning disability, and her

mental health diagnoses, claimant did not establish that she has the type of general or global cognitive deficits required to find that she has an intellectual disability.

Consequently, her request for eligibility for VMRC services under this developmental disability category must be denied.

20. Claimant's learning disability and speech/language impairment are not comparable to an intellectual disability, and do not require treatment similar to that of a person with an intellectual disability. While claimant established a low level of adaptive functioning, the evidence established that her low adaptive functioning is primarily due to her auditory processing learning disability, ADHD, and anxiety. When all the evidence is considered, claimant failed to establish that she has a disabling condition that requires treatment similar to that required for individuals with an intellectual disability.

21. The legislature made the determination that only individuals with the five specified types of disabling conditions identified in the Lanterman Act are eligible for services from regional centers. The legislature chose not to grant services to individuals who may have other types of disabling conditions, including mental health disorders and learning disabilities, if they cannot show that they fall within one of the five categories delineated in the Act. Although the result may seem harsh, the legislature did not grant regional centers the authority to provide services to individuals whose disabilities fall outside the five specified categories. Because claimant did not show that she currently has autism, an intellectual disability, or a disabling condition that is closely related to an intellectual disability or requires treatment similar to that required for individuals with mental retardation, she did not establish that she is eligible for services under the Lanterman Act.

LEGAL CONCLUSIONS

1. Under the Lanterman Act, regional centers provide services to individuals with developmental disabilities. As defined in Welfare and Institutions Code section 4512, subdivision (a), a “developmental disability” is:

a disability that originates before an individual attains 18 years of age; continues, or can be expected to continue, indefinitely; and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability, but shall not include other handicapping conditions that are solely physical in nature.

2. 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).)

3. As set forth in the Findings, claimant did not establish that she qualifies for services under the Lanterman Act because she is an individual with autism or an intellectual disability, or because she has a disabling condition that is closely related to intellectual disability or requires treatment similar to that required for individuals with an intellectual disability. Her handicapping conditions consist of psychiatric disorders and learning disabilities. Consequently, her appeal must be denied.

ORDER

Claimant's appeal is DENIED. Valley Mountain Regional Center's denial of services to claimant under the Lanterman Act is SUSTAINED.

DATED: May 31, 2018

HEATHER M. ROWAN

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 90 days of receipt of the decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)