

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

v.

VALLEY MOUNTAIN REGIONAL CENTER,

Service Agency.

OAH No. 2016060205

DECISION

A fair hearing was held on August 29, October 11, and November 28, 2016, before Heather M. Rowan, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, in Stockton, California.

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

Claimant's father represented claimant, who was present for one day of hearing.

Evidence was received on August 29, October 11, and November 28, 2016. The record closed and the matter was submitted for decision on November 28, 2016.

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 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 1995. She is currently 21 years old. She resides in her family home with her parents and siblings, and has never lived independently.

2. In 1999 and 2001, claimant requested services from VMRC, and the requests were denied. She submitted a request for services from VMRC in January of 2016, and her request was denied. Claimant appealed from that denial. A fair hearing was held on her appeal.

3. At the start of the fair hearing, VMRC moved to continue the hearing to allow for testing on claimant for autism, which had not been done. VMRC's expert reviewed the documents in the matter only days before the hearing and noted some possible markers of autism spectrum disorder. Because she had not yet been tested for autism, VMRC asserted that the hearing was a waste of judicial resources. Claimant's father opposed the motion. In all the psychological testing claimant underwent in her lifetime, no doctor or psychologist suggested autism was at issue. Due to the timing of the motion and the fact that proceeding with the hearing without an autism assessment does not preclude claimant from later eligibility if claimant is assessed for autism and is found to be autistic, the motion was denied.

4. During the fair hearing, claimant argued that she was eligible for VMRC services under the Lanterman Act because she is an individual with: (1) an intellectual

¹ The language used to describe the developmental disabilities relevant in this matter has changed over time. The Lanterman Act was recently amended to change the term "mental retardation" to "intellectual disability."

disability; and/or (2) 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, EVALUATIONS, AND DIAGNOSES

5. When claimant was four years old, she was diagnosed with Chromosome 9 abnormality. Published case studies refer to only 27 patients who also have this abnormality. Claimant has three distinct abnormalities associated with her ninth chromosome. First, she is missing 14 percent of her ninth chromosome. Second, in the remaining 86 percent of her ninth chromosome, one of the pair of the chromosome forms a ring, where it should be in a straight line, parallel to its pair. Third, in the place where half of the ninth chromosome comes together as a ring, genetic material is deleted. This chromosomal abnormality is referred to herein as Ring 9.

6. Prior to 2016, claimant was evaluated and assessed on numerous occasions by VMRC, Linden Unified School District (LUSD), and Connecting Waters Charter School.

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7. February 2000 VMRC Assessment. At age four years, in 1999, claimant's primary care physician referred her to VMRC for services. Claimant's medical, psychological, and educational records were reviewed by a multi-disciplinary team consisting of a clinical psychologist, physician, and intake coordinator. VMRC denied eligibility based on testing that showed "cognitive ability in the low average range of intelligence," which "rules out mental retardation."

8. February 20, 2001 VMRC Assessment. Claimant, age five, again requested services from VMRC due to marked developmental delays as noted by her parents. Her records were assessed by a clinical psychologist, physician, and intake coordinator. She was referred to a licensed educational psychologist for testing. The educational

psychologist, Robert Mattesich, administered the following tests: Wechsler Preschool & Primary Scale of Intelligence (WPPSI), Peabody Picture Vocabulary Test, Developmental Test of Visual-Motor Integration, and the Vineland Adaptive Behavior Scales. Claimant fell into the borderline range on both the WPPSI (Full Scale IQ of 77) and Peabody Picture Vocabulary Test, and was significantly delayed in Visual-Motor integration and Adaptive behavior. On May 9, 2001, VMRC determined claimant was ineligible for services because she did not have "a substantially handicapping condition."

9. May 11, 2001 LUSD Individualized Education Program (IEP): Total Service Plan, 4 years, preschool. In 2001, claimant was enrolled in preschool and was receiving Speech and Language Therapy through LUSD. Claimant was evaluated by LUSD's Multidisciplinary Assessment Team and was given a psychological evaluation, academic assessment, adaptive physical education assessment, and a speech assessment. This IEP included a referral to a psycho-educational assessor to determine whether claimant qualified for special education services going into kindergarten. Dean Blount, school psychologist, assessed claimant using the same tests that Mr. Mattesich administered. Claimant's score on the WPPSI decreased. Her full scale IQ was 65. Mr. Blount stated that the test results may not reflect claimant's overall intellectual ability due to the discrepancy between her verbal IQ score of 80 and her performance IQ score of 57. Her results in academic achievement ranged from low to average. In reading, her scores were average, and she was in the 50th percentile compared to her peers. In math, her scores were low, and she was in the .3 percentile compared to her peers. In written language, her scores were low, and she was in the second percentile compared to her peers.

In addition, Mr. Blount made the following recommendations:

[Claimant] appears to learn better with much repetition of a small amount of academic material. Consequently, she

should be repeatedly exposed to instructional material in as many ways as possible. A multi-sensory approach is suggested.

Classroom instruction will need to emphasize over-learning and instructional cuing on a regular basis. Errors will need to be corrected on an immediate basis to assist [claimant] with self-correction.

Keep oral directions simple. Present directions one step at a time.

Create and adhere to a specific structure regarding how and when assignments will be given and explained. Consistency has proved to be very valuable for [claimant] as she learned by when the structure of her day remains constant.

Claimant was also assessed by LUSD's speech and language therapist. She was administered the Goldman Fristoe Test of Articulation, and found to have pronunciation difficulties with th/s and th/z. She was administered the Receptive One Word Picture Vocabulary Test and was in the 53rd percentile with an age equivalent of five years, five months. She was administered the Expressive One Word Picture Vocabulary Test and was in the 91st percentile with an age equivalent of seven years, four months. In the Preschool Language Scale, her total language score was an age equivalent of four years. Claimant was approved for continuing speech and language therapy based on her testing results.

Claimant was approved for special education services in speech and language, math, written language, and physical education. LUSD applied the diagnostic code of "Other Health Impaired."

10. October 2, 2001 LUSD IEP: At the request of her elementary school, because of claimant's disruptive behaviors, another IEP was prepared for claimant. No testing was administered. Teachers noted claimant was easily frustrated, reacting angrily, and sometimes aggressively to other students, and could use more assistance in achieving her stated goals. She was assigned a support aide and continued with her assigned resource support learning modules.

11. October 31, 2001 Occupational Therapy Assessment. Melinda Tainton-Brechtel, occupational therapist, assessed claimant after a referral by claimant's parents and neurologist. Ms. Tainton-Brechtel administered the following tests: Sensory Integration Praxis Test, Motor Free Visual Perception Test-Revised, and the Beery Buktenica Test of Motor Integration. Claimant scored below average or below age level in each test. Ms. Tainton-Brechtel made the following observations:

[Claimant] was seen in the clinic for her testing, separating easily from her father. She interacted very briefly with the therapist, answering questions with one-word responses. She was very visually and auditorily distracted and had significant difficulty following some of the standardized directions of the tests administered. She required repeated instruction and both verbal and physical re-directions to task in order to complete the tasks presented. . . . the assessment seems to be an accurate indicator of her abilities.

Claimant was approved for occupational therapy.

12. April 15, 2004 IEP – Triennial Review. In conjunction with claimant's 2004 IEP, she was assessed by Connecting Waters Charter School psychologist, Juanita Fimbrez. Regarding claimant's overall behavior during the testing, Ms. Fimbrez remarked:

[Claimant] was attentive throughout the entire testing process. [She] was cooperative and willingly attempted all the tasks required of her. She listened to directions, she appeared focused, and she did not appear to become frustrated when faced with difficult tasks. [She] put forth good effort and worked diligently, thus it is felt that these test scores provide a valid estimate of her current functioning levels.

Ms. Fimbrez administered the Wechsler Intelligence Scale for Children – Third Edition (WISC-III), the Beery Developmental Test of Visual Motor Integration (VMI), the Test of Auditory Perceptual Skills (TAPS-R), and a student interview. She also conducted a File Review and Student Observation.

On the WISC-III, claimant scored 75 on the verbal portion and 60 on the performance portion for a full-scale IQ of 65, which is in the first percentile as compared to her peers. Claimant was functioning in the borderline range in the verbal portion and in the deficient range in the performance portion, and overall, claimant was functioning in the deficient range. The VMI measures fine motor skills as well as visual perception. Claimant's fine motor skills are in the deficient range. She scored a 53 on this test, which is in the .1 percentile compared to her peers.

The TAPS-R measures a student's ability to perceive auditory stimuli and then process the stimuli. This test assessed auditory processing ability, which includes

auditory short term memory, auditory sequencing, auditory word discrimination, and auditory thinking and reasoning. Claimant Auditory Perceptual Quotient was 63, in the deficient range, which is in the first percentile compared to her peers.

13. April 27, 2006 IEP, 10.5 years, fourth grade. During this IEP, based on claimant's deficits in motor skills, speech and language, and academics, she was offered resource specialist services, speech and language services, and occupational therapy. Her parents declined the resource specialist services because claimant's mother was home schooling her at this point. Claimant's coding was changed to "specific learning disability" and "delays in expressive and receptive language."

14. October 2, 2006 IEP (addendum to April 27, 2006 IEP), 10.8 years, fifth grade. This addendum found that claimant's skill level was commensurate with her apparent learning age at the time. Notes show she was operating in reading and spelling at a second grade level, and in math at a first grade level.

15. May 18, 2007 IEP, Triennial Review, 11.5 years, end of fifth grade. At her parents' request, claimant was administered the Kaufman Brief Intelligence Test (KBIT), which is a more abbreviated measure of intellectual ability than other tests, such as the WISC. In her academic skills, claimant scored in reading at a second grade level and in math at a third grade level. The IEP commented that: "[claimant's] basic reading skills have increased only 8 months since her previous triennial testing" and "she is functioning in a range commensurate with her cognitive abilities and verbal skills." Claimant was exempted from CAT-6/California Standards Test due to "profound academic deficits." Claimant was again coded as "other health impaired."

16. May 14, 2009 IEP, 13, end of seventh grade. Claimant's parents continued to decline resource specialist services as claimant was being home schooled, but continued with speech and language therapy. The IEP notes, "as she grows older, [claimant's] skill levels are reaching a plateau and progress is not as rapid."

17. May 12, 2010 IEP, 14, end of 8th grade. This IEP notes again that, “[w]hile skills have increased, the gap between age and ability remains the same, and may indicate [claimant] is reaching a developmental plateau.” She continued to score in the second to fourth grade levels for reading, math, and written language. Claimant could tell time to the quarter hour, but not to the minute or five minute interval. She was noted to prefer playing with younger children. Claimant was coded “other health impaired” and “speech or language impairment.”

18. May 28, 2016, Psychological Evaluation, Wendy McCray, PhD. At age 20 years, claimant was assessed by Dr. McCray, a clinical psychologist. Dr. McCray’s evaluation was based on the following:

- Interview with claimant’s father
- Interview with claimant
- Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV)
- Wechsler Memory Scale – Fourth Addition (WMS-IV)
- Trail Making Test Part A and B
- Bender Visual Motor Gestalt-II
- Wide Range Achievement Test – Fourth Edition (WRAT – 4)
- Vineland Adaptive Behavioral Scale – II
- Review of the following documentation:
 - Perinatal and Pediatric Specialist Consultation dated 11/11/1999
 - Vista Child Therapy Occupational Therapy Assessment dated 10/31/2001
 - Perinatal and Pediatric Specialist Pediatric Genetics reevaluation dated 10/08/2001
 - Speech and Language Evaluation from LUSD dated 05/03/2001
 - Psychoeducational Report from LUSD dated 05/03/2001
 - Psychological Assessment completed by Robert Mattesich dated 03/10/2001

- Psychological Report completed by Clinton Lukeroth, Ed.D. dated 01/25/2000
- Documentation from Isabelo Artacho, M.D. dated 04/21/2008
- EEG Report from Alan Schaffert, M.D. dated 05/09/2008
- Letter from Nancy Huang-Santos, M.D. dated 05/16/2001
- Central Valley Eye dated 09/07/2001
- Stuart Jacobs, M.D., P.C. dated 01/24/2001
- Modesto Advanced Diagnostic Imaging Center dated 04/12/2006
- IEP from Stanislaus SELPA dated 02/12/2003
- IEP from San Joaquin County Office of Education dated 05/11/2001
- IEP from LUSD dated 10/01/2001
- IEP from Stanislaus County SELPA dated 05/12/2010
- Psychoeducation Team Assessment Report dated 05/05/2010

Dr. McCray reported that claimant's overall scores regarding cognition fell within the mild range of intellectual disability. Claimant demonstrated a relative strength on the Verbal Comprehension Index, which includes the application of verbal skills and information to the solution of new problems, the ability to process verbal information, and the ability to think with words. In this area, claimant's performance was in the borderline range. Regarding the Perceptual Reasoning Index, which is a measure of perceptual organization, claimant fell within the impaired range. Claimant's Working Memory Index and Processing Speed Index were in the impaired range. Her performance on five out of five formal measures of memory was within the impaired range.

Additionally, claimant's performance on three out of three neuropsychological screening tests fell within the impaired range, including visual spatial skills. Her performance on a measure of attention and concentration was in the impaired range. Claimant's performance on a measure of higher reasoning/problem solving skills

requiring the additional abilities of letter number sequencing and cognitive set shifting fell within the markedly impaired range.

Regarding academic achievement, Dr. McCray reported varied results. In reading, claimant fell at a sixth grade level equivalent. Sentence Comprehension and Spelling were at fourth and fifth grade levels. In Math Computation, she fell within a second grade level. On measures of Adaptive Behavior, Communication, Socialization, and Daily Living Skills, claimant fell within the low to moderately low range.

In summation, Dr. McCray noted that claimant is a pleasant young woman who continues to struggle cognitively and with adaptive skills. Dr. McCray opined that claimant's relative strength in vocabulary gives the impression that she is more cognitively capable across the board. Given claimant's long-standing global developmental delays, Dr. McCray disagreed with this impression. Overall, Dr. McCray opined that claimant falls within the mild range of intellectual disability under the DSM-5. She based this opinion on claimant's cognitive and adaptive ability and behavior.

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TESTIMONY

19. Dr. Barbara Johnson testified on behalf of VMRC. Claimant's father testified on claimant's behalf and called two of claimant's aunts to testify. Claimant's father also called Dr. Wendy McCray, clinical psychologist, and Dr. Kamer Tezcan, medical geneticist.

20. Dr. Johnson. Dr. Johnson has been a clinical psychologist since 2007 and a marriage and family therapist since 2005. She has a doctorate in clinical psychology. Dr. Johnson has worked for VMRC for six years. Her duties include reviewing files to determine whether reassessments are warranted, consulting with and training staff, determining guidelines for determining substantial disability, testifying in hearings,

overseeing the counseling program, participating in the legal review team, and providing guidance to staff in conducting evaluations.

21. Dr. Johnson was part of a team that assessed claimant's 2016 request for VMRC services. The team focused on claimant's IEPs, medical records, and psychological testing prior to turning 18 to determine whether claimant had an intellectual disability or had a disabling condition that was closely related to an intellectual disability or required treatment similar to that required for those who have an intellectual disability (fifth category).

22. With regard to claimant's intellectual functioning, Dr. Johnson found that claimant tested within the low average range on those tests that Dr. Johnson considered valid, above the cutoff for intellectual disability. On several assessments, claimant tested in the average range on her verbal scores. These verbal scores were evidence to Dr. Johnson that claimant is not intellectually disabled. She opined, "verbal IQ is a measure of cognitive functioning. It can be as reliable as a full scale IQ."

23. With regard to the fifth category, Dr. Johnson opined that claimant did not have a disabling condition that was closely related to intellectual disability given her test scores. In addition, there was also no indication that claimant needed treatment similar to that required for individuals with an intellectual disability, based on her IEPs that qualified claimant's condition as "specific learning disability" or "other health impaired."

24. Dr. Johnson explained that to be considered "substantially disabled" a person must meet a two-prong test. First, there must be a disability. Second, there must be significant functional limitation in three of seven categories, as listed in Welfare and Institutions Code section 4512, subdivision (l). Those categories are:

(1) Self-care.

(2) Receptive and expressive language.

- (3) Learning.
- (4) Mobility.
- (5) Self-direction.
- (6) Capacity for independent living.
- (7) Economic self-sufficiency.

25. VMRC determined that claimant was ineligible for services because she was not substantially disabled based on this test. Dr. Johnson did not meet or assess claimant in person. To determine prong one, whether claimant has an intellectual disability, the team reviewed claimant's past assessments. Based on these assessments, Dr. Johnson testified that the overall findings show that claimant does not have an intellectual disability or global developmental delay.

26. Dr. Johnson acknowledged the many assessments that were conducted on claimant over the years and that her full scale IQ varied from 59 to 77. In a letter she submitted to VMRC to accompany and explain her testimony, Dr. Johnson wrote, "[eligibility] decisions are not intended to be reflective of test scores alone. Rather, diagnostic decisions are based on test data, observation, background information, collateral report and data from other assessments." The test data, observation, background information, collateral report, and other data over the years prior to claimant turning 18 revealed "no known history. . . to suggest developmental disability with respect to cognitive functioning as defined by W & I Code 4512 (a) (1) or CCR Title 17, Section 54000." Dr. Johnson found that claimant's IEP coding of "Other Health Impairment," "Specific Learning Disability," "Speech Language Impairment," and later, "Multiple Impairment" ruled out evidence of a developmental disability "as it pertains to an intellectual disability or a condition and or services similar to an intellectual

disability.” Dr. Johnson testified that a specific learning disability is mutually exclusive with an intellectual disability. None of claimant’s IEPs identified an intellectual disability, which would have negated the specific learning disability, and would have made claimant eligible for VMRC services.

27. To determine prong two, whether there was significant functional limitation in three of the seven listed areas, in addition to reviewing records, VMRC’s intake coordinator administered the Street Survival Questionnaire, which showed multiple deficits, but because claimant was over age 18, it was not considered relevant.

28. Dr. Johnson considered intellectual functioning and psychological tests that were administered in claimant’s childhood. In 2001, claimant was assessed twice. VMRC referred claimant to Robert Mattesich, licensed educational psychologist, to determine eligibility for services. Mr. Mattesich, as discussed in Factual Finding 8, administered several tests and determined claimant’s full scale IQ to be 77. Also in 2001, R. Dean Blount, a school psychologist for LUSD, assessed claimant and determined her full scale IQ to be 65. Given the discrepancy in scores, Dr. Johnson’s team reviewed the underlying test results and determined, due to the scatter in the underlying strengths and weaknesses, Mr. Blount’s test was not reliable, but Mr. Mattesich’s was. VMRC considers consumers eligible who have a full scale IQ of 75 and below. Claimant must meet each measure, both verbal IQ and performance IQ, separately. Because claimant’s verbal score was not 75 or below in Mr. Mattesich’s administration of the test, Dr. Johnson found no indication of a global delay.

29. In 2004, claimant was again assessed by a school psychologist. (Factual Finding 12.) The results showed a drop in cognitive function. Dr. Johnson discounted this report because, as she noted, it is “an outlier” and not similar to claimant’s other assessments. Had this been the only measure, this assessment “would be suggestive of someone with an intellectual delay.” Dr. Johnson opined that one can do poorly on an

assessment for a variety of reasons, but one “can never do better than [her] capacity.” For this reason, Dr. Johnson placed greater weight on claimant’s higher test score from 2001.

30. Dr. Johnson acknowledged that in 2001, 2010, and 2016, medical geneticists reported “a global developmental delay,” “mild mental retardation,” and “intellectual disability.” She discounted any finding by a medical geneticist because no psychological testing by trained psychologists occurred.

31. Dr. Johnson further discounted any evidence of testing claimant underwent after the age of 18. In 2016, claimant was assessed by Dr. McCray. (Factual Finding 18.) Dr. Johnson reviewed Dr. McCray’s report and found that, even though global deficits were found, because the assessment was administered after claimant turned 18, the results were not relevant. Further, Dr. Johnson testified that Dr. McCray’s results were suspect because she did not review Dr. Lukeroth’s 2000 assessment.²

32. In VMRC’s March, 2016 intake assessment, the intake coordinator noted that claimant was unable to complete high school and she does not have the knowledge it takes to be independent. She described claimant as being “able to dress on her own and pick[] her own clothes.” She noted, however, that claimant was wearing what appeared to be a Spider Man pajama top during the intake interview. She was able to prepare simple foods and bathe herself, but with prompting. The intake coordinator’s recommendation was: “SC to assist with a day program or employment referrals.” VMRC ultimately denied eligibility, however.

33. Dr. Wendy McCray. Dr. McCray testified on behalf of claimant. Dr. McCray is a clinical psychologist and has been licensed since 1998. She holds a master’s degree

² Pursuant to Factual Finding 18 and Dr. McCray’s testimony, there is no basis for assuming Dr. McCray did not consider Dr. Lukeroth’s report.

and a Ph.D. from the California School of Professional Psychology. She specializes in families and children. She has been administering psychological assessments since 1999.

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34. Dr. McCray's overall impression of claimant is that she falls within an impaired range. She is childlike, presents as being about 11 to 12 years old, is cooperative, and easily distracted. She needs more support to be in the world and be safe. Claimant's test results were at or below the first percentile compared to her peers. Notably, her attention, concentration, academic achievement, and behavior all indicated impairment or mild deficits. Claimant's intellectual ability was on a second to fourth grade level. Claimant's adaptive behavior composite scale was in the impaired range. Her full scale IQ was 59.

35. Dr. McCray opined that, based on her review of claimant's records and administering psychometric testing, claimant's overall cognition is impaired. Contrary to Dr. Johnson's testimony, Dr. McCray stated that if claimant had a specific learning disability, the tests would show a discrepancy among different measures. Claimant, however, consistently tested low throughout the testing. While she considered the IQ assessments on claimant when claimant was preschool-aged, she did not afford them much weight because the DSM-5 dictates that mild intellectual disability does not necessarily present in preschool-aged children. The pattern of her performance on the psychometric tests is symptomatic of her cognitive limitations.

36. Dr. Kamer Tezcan, M.D. Dr. Tezcan is a medical geneticist with the Kaiser Permanente Medical Group and has been licensed as a medical doctor since 1987. In 2002, he was licensed in California. Dr. Tezcan specializes in genetic disorders and chromosomal issues. He sees patients with genetic disorders and often sees their family members for genetic testing.

37. Dr. Tezcan assessed claimant when she was 20 years old. The assessment involved an “informal discussion, an exam and discussing the exam findings, talking, observing, asking questions, and putting the patient under stress to see how [she] handles it.” His conclusions were based on observation, genetic testing, and history provided by claimant’s parents. Claimant’s parents described a long-standing history of developmental delays. Dr. Tezcan did not administer psychological testing, but noted that in claimant’s case, “you don’t need a Wexler or other test to understand abilities.” Genetic information, an understanding of Ring 9, and experience with claimant are sufficient to evaluate and make findings.

38. While he sees a lot of genetic disorders in his practice, some, like claimant’s, are incredibly rare and only occur once or twice throughout a geneticist’s career. Claimant’s chromosomal abnormality was “coded” at conception and will continue throughout her life. Dr. Tezcan opined that perhaps because of the rarity, claimant was not diagnosed with this chromosomal abnormality (Ring 9) until she was four years old. Even with an earlier diagnosis, claimant’s prognosis would have been vague because of Ring 9’s rarity. There would not have been a doctor who could have predicted how Ring 9 would have presented throughout claimant’s life. Even so, the research on Ring 9, with which Dr. Tezcan is familiar, and the combination of claimant’s chromosomal disorders, consistently show that the disorders present similarly to an intellectual disability. Indeed, as often occurs in patients with this abnormality, claimant’s history shows that she has been manifesting developmental delays “that evolved into intellectual disabilities” since childhood. In Dr. Tezcan’s opinion, claimant is “not prepared to be an independent adult.”

39. In the report Dr. Tezcan prepared after reviewing claimant, he stated that “the most medically significant feature of [claimant’s] rare chromosome abnormality has been the lifelong intellectual disability that results in impaired judgment and reasoning

ability hindering the ability to live independently, nor provide economic self-sufficiency.” Further, her chromosomal abnormalities are “the cause of her impairments in her understanding, remembering, and carrying out complex instructions. . .”

40. Claimant’s aunts. Two of claimant’s aunts provided testimony regarding their “lay observations” of claimant and their experiences of her within the family. Both commented that claimant requires instructions to be given in increments or she cannot act. For example, when asked to “set the table,” claimant stood and stared and was not able to begin the task. When told to “place one plate in front of each chair,” she was able to act. Additionally, one of claimant’s aunts witnessed claimant’s skills with money when they were both in Hawaii. When purchasing a small candle, instead of asking the merchant the cost, claimant opened her wallet and gave the merchant all the money she had. Her aunt intervened, instructed claimant to give the merchant a \$20 bill, and also had to instruct claimant not to walk away without her change. The other aunt testified that claimant is unable to engage in conversation with the rest of the family unless the conversation addresses her particular interests. She does not have age-appropriate social skills. Additionally, claimant is overly trusting and could be an “easy target.”

41. Claimant submitted two character letters. One from Suzan Cunningham, her horseback riding instructor. The second from Laura Cook, who was claimant’s speech therapist for several years prior to claimant turning 18. Both assessments concurred with claimant’s aunts, in that their experience of claimant is that she is a lovely young woman who faces many challenges. She is trusting, cannot engage on an age-appropriate level, and has difficulty following directions. In horseback riding lessons, claimant had difficulty remembering from lesson to lesson the steps required to groom and mount the horses. Ms. Cook noticed that claimant is dependent on her family, gets confused easily, and does not understand other perspectives. She noted

that claimant's "memory skills, processing skills, and concentration can easily be her challenges on a day to day basis."

42. Claimant's father. Claimant's father testified on her behalf. The beginning of his testimony addressed the IEPs over claimant's educational life. When claimant was in preschool, she was receiving speech and language services through the LUSD elementary school. Before entering kindergarten, the elementary school recommended an initial IEP. This IEP was only months after claimant's Ring 9 diagnosis. At this time, claimant's parents did not know the ramifications of the Ring 9 chromosomal disorder. There was scant medical literature and other cases to which her parents and doctors could refer. At the time of her preschool IEPs and psychological assessments, claimant's parents requested that claimant not be labeled "mentally retarded." Claimant's father stated that if claimant were labeled as "mentally retarded" in her preschool and elementary school years, the diagnosis would follow her forever. No one knew at the time what claimant's potential would be. Each time claimant was assessed for an IEP, her parents again requested that the school avoid labeling her as "mentally retarded."

43. Claimant's father explained the process for claimant's IEPs. He was on claimant's IEP team for all 11 IEPs. The team included claimant's parents, the Director of Special Education from the charter school, a speech pathologist, a certified special education teacher, a licensed occupational therapist, and, every third year, a school psychologist. A clinical psychologist was not on the team. Every third year, there was a "triennial review," that included psychological testing, done by the school psychologist.

44. The IEPs occurred annually and the team had great latitude in determining what code to apply. For example, when claimant's parents requested that the IEP not label claimant as "mentally retarded," the code the IEP team applied was "other health impaired," based on her chromosomal abnormalities. In 2004, when claimant was 8 years old, the code was changed to "multiple disabilities." The rationale for placement in

special education was “chromosomal abnormality causing developmental delays in academic areas.” At this point, claimant was tested (see Factual Finding 12) and found to have a full scale IQ of 65 and was noted to be functioning in the deficit range. Her speech and language therapist noted in the 2004 IEP that claimant was operating in the deficient range and was testing around a first grade level (claimant was in fourth grade).

45. At her first IEP, claimant was found to be eligible for special education services going into kindergarten. She was to continue speech and language therapy, receive occupational therapy, and resource supports in math and written language. In kindergarten, claimant began receiving these services both during the school day and after school. A few months into her kindergarten year, claimant’s teachers requested another meeting with the IEP team. Claimant was exhibiting several problematic behaviors that she had not displayed previously. After several attempts to make the special education program in kindergarten work for claimant, and finding themselves unable to help claimant with the stress she was experiencing, her parents opted to homeschool her. Eventually, the problematic behaviors subsided, and claimant remained in home schooling until she was 20. She was not able to graduate from high school.

46. For most of her IEPs, claimant was coded with “other health impairment” at her parents’ request. Throughout her IEPs, the reports identified cognitive impairment and developmental delays. In 2006, the Director of Connecting Waters Charter School told claimant’s parents that the school could no longer pay for speech therapy unless claimant was labeled as having a “specific learning disability.” Claimant was re-coded and she was able to receive speech therapy and the school was able to fund it. The decision was not based on a clinical assessment, but on logistics and financial need.

47. At her triennial assessment in 2007, when claimant was assessed by the school psychologist, claimants’ parents requested that the school administer the KBIT, as it was not as stressful or as lengthy as other assessment tests. Dr. Johnson stated that

the KBIT showed a “deficit in performance” that did not rise to the level of intellectual disability or fifth category. Claimant’s father provided evidence that the test’s authors, Kaufman and Kaufman, recommend that this test be used for assessments, but not diagnosis and a more comprehensive assessment would be necessary for that purpose. Neither of claimant’s experts testified to this point.

48. Claimant’s father pointed out that the testing and IEPs in 2006 and 2007 show that claimant was “topping out” in her academic abilities. The IEPs note that claimant was reaching a plateau. (Factual Findings 16 and 17.) As she aged, her skill levels remained in the first to third grade levels. The IEPs note that her chromosomal abnormalities “impacted [claimant’s] cognitive abilities and receptive/expressive language skills as well as her academics.”

49. When claimant was in eighth grade and her next step was high school, the IEP team began discussing the standardized testing claimant would need to complete. Until that time, claimant was taking modified standardized tests due to her qualifying for special education. Claimant struggled through the standardized tests and at no point was it a successful experience. Claimant’s parents were told that for claimant to complete high school, she would need to complete the high school equivalency exam in lieu of the high school exit exam. Typically, the high school exit exam is given yearly from ninth to twelfth grades. Claimant’s parents knew at that point they would not put claimant through those tests, and opted to end their relationship with the Charter School. Because it was to be her last IEP, claimant’s parents requested minimal testing at her triennial review.

50. Throughout claimant’s life, her doctors and geneticists have noted, without claimant’s parents’ prompting, that claimant suffers from “mild mental retardation” or “developmental delays.” Now that she is older, claimant requested of her parents that she be allowed more independence. Claimant cannot drive or use public transportation.

Due to the risk she poses to herself and her childlike trusting, her family accompanies her on outings. Her parents attempted for two years to teach her how to use a cell phone and she is approximately 50 percent proficient. She is approximately 75 percent proficient with a landline telephone, but cannot look up a phone number and dial it. When she answers the phone, she continues to tell strangers that she is home alone. She does not understand basic economics of money, spending, and making change. (See also Factual Finding 40.) To respond to claimant's request for more independence, claimant's parents applied to the regional center.

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RING 9

51. As Dr. Tezcan noted, claimant's chromosomal abnormality is incredibly rare. As recently as 2012, only 27 reported cases are known in medical literature. In addition to Dr. Tezcan's report and testimony that characteristics of this chromosomal abnormality include developmental delays that evolve into intellectual disability, claimant's father also presented documentary evidence of the common effects of Ring 9. In the medical literature presented, each case study included a patient with Ring 9, and each had some form of intellectual disability. One report stated, "[m]ental retardation was mentioned in 17 out of the 21 cases reported. In 4 cases, there was no mention of cognitive development."

52. Claimant's medical geneticists throughout her medical history indicated "mild mental retardation" due to her Ring 9 diagnosis. In addition to the medical geneticists' reports, claimant's medical file from her pediatrician and primary care physicians note "mild mental retardation." In 2001, claimant's pediatric specialist issued a report that referred to a neurology exam on claimant by a pediatric neurologist who reported that claimant had a "global developmental delay."

DISCUSSION

53. In a proceeding to determine whether an individual is eligible for regional center services, the burden of proof is on the claimant to establish that he or she has a qualifying diagnosis. The standard of proof required is preponderance of the evidence. (Evid. Code, § 115.) A preponderance of the evidence means that the evidence on one side outweighs or is more than the evidence on the other side, not necessarily in number of witnesses or quantity, but in its persuasive effect on those to whom it is addressed. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

54. Regional centers provide services to individuals who have a “developmental disability” as defined in the Lanterman Act. The developmental disabilities described in the Lanterman Act include intellectual disability and a disabling condition that is closely related to intellectual disability or requires treatment similar to that required for individuals with an intellectual disability (generally referred to as the “fifth category”). The Lanterman Act is a remedial statute; as such it must be interpreted broadly. (*California State Restaurant Association v. Whitlow* (1976) 58 Cal.App.3d 340, 347.)

55. An applicant is eligible for services under the Lanterman Act if he or she is suffering from a substantial disability that is attributable to one of the developmental disabilities identified in the Act. (Welf. & Inst. Code, § 4512, subd. (a).) A qualifying condition must also start before the age 18 and be expected to continue indefinitely. (Welf. & Inst. Code, § 4512.)

56. A regional center is required to perform initial intake and assessment services for “any person believed to have a developmental disability.” (Welf. & Inst. Code, § 4642.) “Assessment may include collection and review of available historical diagnostic data, provision or procurement of necessary tests and evaluations, and

summarization of developmental levels and service needs” (Welf. & Inst. Code, § 4643, subd. (a).) To determine if an individual has a qualifying developmental disability, “the regional center may consider evaluations and tests . . . that have been performed by, and are available from, other sources.” (Welf. & Inst. Code, § 4643, subd. (b).)

57. When all the evidence is considered, the evaluations, assessments and opinions of Drs. McCray and Tezcan, as well as the multitude of doctors claimant has seen in her life were more persuasive than Dr. Johnson’s opinion on behalf of VMRC.

INTELLECTUAL DISABILITY

58. The DSM-5 defines intellectual disability as “a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits 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 function that results in failure to meet developmental and socio-cultural 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.

The DSM-5 identifies four levels of severity for intellectual disabilities: mild, moderate, severe, and profound. In the mild level, the DSM-5 describes the diagnostic criteria and markers for diagnosis in each of the three listed domains:

Conceptual domain: for preschool children there may be no obvious conceptual differences. For school-age children and adults, there are difficulties in learning academic skills involving reading, writing, arithmetic, time, or money, with support needed in one or more areas to meet age-related expectations. . .

Social Domain: compared with typically-developing age-mates, the individual is immature in social interactions. For example, there may be difficulty in accurately perceiving peers' social cues. Communication, conversation, and language are more concrete or immature than expected for age. . . there is limited understanding of risk in social situations, social judgment is immature for age, and the person is at risk for being manipulated by others.

Practical domain: the individual may function age-appropriately in personal care. Individuals need some support with complex daily living tasks in comparison to peers. In adulthood, supports typically involve grocery shopping, transportation, home and child-care organizing,

nutritious food preparation, and banking and money management. . . individuals generally need support to make health care decisions and legal decisions, and to learn to perform a skilled vocation competently. . . .

59. Claimant met her burden to establish that she fits within the definition of intellectual disability under the DSM-5 criteria. Dr. Johnson relied heavily on claimant's preschool IQ tests to show that her verbal score of 80 shows that claimant is not intellectually disabled. Per the DSM-5, however, an intellectual disability in the mild level may not present in a child as young as preschool. It is in school-aged children and adults that difficulties in learning and global delays occur. In claimant's assessment when she was eight and a half years old, her full scale IQ was 65, based on the WISC-III. (Factual Finding 12.) She scored in the .1 percentile on the VMI, which measures whether a student has visual motor issues. (*Id.*) A deficit result such as this suggests the student needs extra time to complete written assignments and assignments might need to be modified. On the TAP-R, which is a measure of a student's ability to perceive auditory stimuli and then process the stimuli, claimant scored in the first percentile. (*Id.*) Pursuant to Factual Finding 12, claimant's IEP stated "chromosomal abnormality causes developmental delays in academic areas" and "[claimant] continues to qualify as an individual with developmental disabilities."

When she was nearly 11 years old, she was reading and spelling at a second grade level and doing math at a first grade level. The CELF-4 summary showed a significant delay across all areas of receptive and expressive language, which is commensurate with her apparent learning age. Though her vocabulary skills remained on a "surprisingly good" level, her standard scores were diminishing compared to her previous testing.

60. In the social domain, claimant was shown to be immature and unable to participate in age-appropriate conversations. Claimant was consistently described as being limited in social encounters. She did not follow conversations and frequently returned to discuss her love for her cats. She performed the tests asked of her, but needed frequent direction – both verbal and physical – to continue. She was described as preferring to play with younger children. (Factual Finding 17.) Most notably, claimant has proved herself to have limited understanding of risk, as described by her aunts and father. (Factual Findings 40 and 50.)

61. In the practical domain, claimant functioned age-appropriately in some areas. She can dress herself and apply her own make-up, but as the intake coordinator at VMRC noted, she was wearing what appeared to be a pajama top at her intake interview, and needs prompting to bathe. (Factual Finding 32.) She can use a cell phone with only 50 percent proficiency and a landline with 75 percent proficiency. She cannot drive or use public transportation, and because of her vulnerability, when she goes out in public, a family member accompanies her. (Factual Finding 50.)

62. While claimant's testing results over the years varied, and her coding³ never reflected "mental retardation" or "intellectual disability," as Dr. Johnson testified, the entire scope of the claimant's history must be assessed. In her letter accompanying her testimony, Dr. Johnson quoted the authors of the WAIS-IV Assessment, who said,

³ Claimant's father responded to Dr. Johnson's claim that a learning disorder and intellectual disability are mutually exclusive. The DSM-5 explicitly states in a section regarding diagnosing Intellectual Disabilities that specific learning disabilities can co-occur with Intellectual Disabilities. Claimant's father interpreted this statement to mean that the fact that claimant was coded as having a specific learning disability does not preclude her from also being intellectually disabled.

"The focus of any assessment is the person being assessed, not the test." In considering claimant's history, her parents' reasoning for not wanting a diagnosis of "mental retardation," the rareness of her chromosomal disorder, and the fact that in nearly every known case of Ring 9, mental retardation or intellectual disability is present, claimant has met her burden to establish she has an intellectual disability.

FIFTH CATEGORY

63. In addressing eligibility under the fifth category, *Mason v. Off. of Admin. Hearings* (2001) 89 Cal.App.4th 1119, 1129, stated:

...The fifth category condition must be very similar to mental retardation, 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.

64. The court confirmed, however, 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 mental retardation (now intellectual disability). A degree of subjectivity is involved in determining whether the condition is substantially similar to mental retardation or requires similar treatment. (*Mason v. Off. of Admin. Hearings, supra*, 89 Cal.App.4th at p. 1130; *Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462, 1485.) This recognizes the difficulty in defining with precision certain developmental disabilities.

65. Even if it may be found that claimant's tests scores were at times too high to qualify her as having an intellectual disability, claimant meets both of the two

independent bases for qualifying for services from VMRC under the fifth category. From the descriptions of claimant offered at hearing, given her chromosomal condition, she presents as an individual who has an intellectual disability. In addition, she requires treatment similar to that required by individuals with intellectual disabilities. In claimant's educational history, she was eligible for special education, was first assigned, and later offered, resource specialist services, received speech and language therapy, was assessed triennially for overall function, and annually to help her IEP team determine her goals. She was subject to modified standardized testing. In 2007, she was exempted from the California Standardized Test due to "profound academic deficits." (Factual Finding 15.) She was observed to learn better with repetition of a small amount of academic material, and should be repeatedly exposed to instructional material in as many ways as possible, including a multi-sensory approach. (Factual Finding 9.) Her teachers were advised that her classroom instruction should emphasize over-learning and cuing, and that oral directions should be simple and presented one step at a time. She was described as needing instructions broken down to one-step increments. (Factual Findings 11 and 40.) While she can make change in the abstract, she does not understand basic finances, and needs support. This type of treatment is identical to that required for individuals with an intellectual disability.

66. When all the evidence is considered, claimant has met her burden that she qualifies for VMRC services under the fifth category.

SUBSTANTIAL DISABILITY

67. Welfare and Institutions Code section 4512, subdivision (l), defines substantial disability as:

(l) The existence of significant functional limitation in three or more of the following areas of major life activity, as

determined by a regional center, and as appropriate to the age of the person:

- (1) Self-care.
- (2) Receptive and expressive language.
- (3) Learning.
- (4) Mobility.
- (5) Self-direction.
- (6) Capacity for independent living.
- (7) Economic self-sufficiency.

68. Pursuant to the Factual Findings, claimant established a significant functional limitation in at least three of the factors above. Namely, claimant established limitations in learning, capacity for independent living, and economic self-sufficiency.

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 Factual Findings, claimant established that she qualifies for services under the Lanterman Act because she is an individual with 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. Claimant also established that her developmental disability constitutes a "substantial disability" as that term is defined in Welfare and Institutions Code section 4512, subdivision (l). Consequently, her appeal must be granted.

ORDER

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

DATED: December 9, 2016

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).)