

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,<sup>1</sup>

vs.

VALLEY MOUNTAIN REGIONAL CENTER,

Service Agency.

OAH No. 2017091034

DECISION

This matter was heard by John E. DeCure, Administrative Law Judge with the Office of Administrative Hearings, on January 29, 2018, in Modesto, California.

Claimant, who was not present, was represented by her father, J.M., and mother, V.M.

Valley Mountain Regional Center Inc. (VMRC or service agency) was represented by Anthony Hill, VMRC's Legal Affairs Advisor, and attorney at law.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on January 29, 2018.

ISSUE

Was the previous determination that claimant was eligible for regional center services under the Lanterman Act on the basis of Autism Spectrum Disorder (ASD) "clearly erroneous?"

---

<sup>1</sup> Claimant's and her parents' names are omitted to protect their privacy.

## FACTUAL FINDINGS

1. Claimant is a seven-year-old female who was born in October 2010. In approximately November 2012, J.M. referred her to the Early Start Program due to what the parents perceived as claimant's autism-like behaviors. On January 3, 2013, the parents, a VMRC intake coordinator, a VMRC service coordinator, a Sacramento Office of Education representative, and a VMRC service-providing vendor named B.E.S.T. (Behavioral and Educational Strategies and Training) signed an Early Start Individual Family Service Plan (IFSP) designed to address claimant's suspected ASD and associated developmental delays. The IFSP detailed a recent assessment, an M-CHAT (Modified Checklist for Autism in Toddlers) screening, behavioral observations, and parental observations and concerns.

### THE INITIAL IFSP

2. The IFSP reported that J.M. had concerns that claimant: was oversensitive to certain textures and avoided touching them, "freaks out" when seeing her paternal grandparents; fixated on jumping in and out of the water during a swim lesson, ignored the swim instructor, mechanically flips through pages of books without regard for their contents, runs in circles, covers her ears, walks tip-toed, no longer makes animal sounds, plays pretend with a phone or bottle-feeding a doll or plays with children's toys, flaps her hands, and "spaces out." However, J.M. described claimant as having many strengths, including: being very smart and picking up skills without instruction, being a good problem-solver, communicating her wants or needs with one-word prompts, and waiting by the door when she hears J.M. returning home.

3. Claimant participated in an M-CHAT screening in January 2013 at the age of two years old. Claimant's M-CHAT autism screening, which included the parents' input, revealed that claimant: looked in her assessor's direction while testing items and

looked at her parents without direct eye-contact, repeated taking a block in and out, remained almost entirely quiet, only briefly looked her assessor in the eye, imitated the sound "ball," transitioned between activities without protest, lifted her arms and opened and closed her fingers to indicate wanting to be picked up, moved on to the next activity when having difficulty with a current activity, and was reportedly potty-trained.

4. Claimant's social skills included: increased dependence on her mother during the walking stage, increased resistance to bedtime and willingness to be near adults, stranger anxiety, common temper tantrums, picking up toys upon request, claiming and defending ownership of her things, and initiating her own play activities. As a result of the observations and additional developmental testing, the assessment team rated claimant's social skills at a developmental level of 18 months, or approximately seven months behind claimant's current age (of approximately 25 months).

5. At age two, claimant's communication skills included: not saying "mo" (for more) as often, saying "es" (for yes) with prompts, signing the words "help please," and using hand-leading to indicate her needs. As a result of the observations and additional developmental testing, the assessment team rated claimant's communication skills at a developmental level of 13 months, or approximately 12 months behind claimant's current age.

6. At age two, claimant's adaptive self-help skills included: vocalizing and gesturing to indicate wants, holding a cup and drink with some spillage, fetching or carrying familiar objects, using a spoon with little spillage, walking upstairs with one hand held or her hand on a rail and creeping backward downstairs, moving about the house without supervision, handing off empty dishes after eating, sitting in an adult chair without assistance, and using the toilet when accompanied. As a result of the observations and additional developmental testing, the assessment team rated

claimant's adaptive self-help skills at a developmental level of 18 months, or approximately seven months behind claimant's current age.

7. At age two, claimant's gross motor skills included: walking upstairs assisted while non-alternating her footsteps, kicking a ball twice in five attempts, standing on one foot assisted, walking upstairs, alternating her feet and walking on tip-toes for four of five steps. As a result of the observations and additional developmental testing, the assessment team rated claimant's gross motor skills at a developmental level of 22 months, or approximately three months behind claimant's current age.

8. At age two, claimant's fine motor skills included: inserting seven to eight blocks; turning pages one at a time, making directional strokes with a crayon, putting pennies in a horizontal slot, and stacking three to five blocks vertically. As a result of the observations and additional developmental testing, the assessment team rated claimant's fine motor skills at a developmental level of 20 months, or approximately five months behind claimant's current age.

9. At age two, claimant's cognitive skills included: turning a cup right-side up, object associations in free play or as demonstrated, looking for a car under washcloths, opening and closing a book, attending to a picture, finding a covered and displaced teddy bear, placing two shapes into a four-piece puzzle, matching two objects without naming, and nesting (i.e., snugly stacking) three cups. As a result of the observations and additional developmental testing, the assessment team rated claimant's cognitive skills at a developmental level of 19 months, or approximately six months behind claimant's current age.

10. As a result of the IFSP, VMRC made claimant a client eligible for regional center services based on the assessment team's determination of ASD, referred her to

the Early Start Program,<sup>2</sup> and assigned a VMRC coordinator of autism services to her case.

### MARCH 2013 PSYCHOLOGICAL ASSESSMENT

11. On March 20, 2013, James McCray, Psy.D., conducted a psychological assessment of claimant, who was then 29 months old. Because claimant was resistant to testing, Dr. McCray noted that this would have a negative effect on test results. However, he reported that on the Bayley intellectual testing results she received a standard score of 85, which is in the lower end of the average range and the cognitive equivalent of 22 months. Claimant's adaptive skills measure, which was based on V.M.'s reporting, was "very delayed," a result likely due to claimant having autism. Claimant's Adaptive Behavior Assessment System (ABAS-II) testing resulted in extremely low scores. Her Childhood Autism Rating Scale-2 (CARS-2) testing was based on behavioral observations, parental reports, and a review of records, and resulted in a finding of "mild to moderate symptoms" of ASD. Claimant could engage in eye-contact with others, but did so infrequently, and she did not engage others, preferring to play independently. Dr. McCray's interaction with claimant revealed moderate delays in her use of eye-contact and directing facial expressions.

12. Dr. McCray considered the criteria for ASD and Asperger's syndrome set forth in the Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition – Text

---

<sup>2</sup> Early Start refers to a statewide program in which early intervention services are offered to infants and toddlers under three with disabilities, and to their families. (Title 17, California Code of Regulations, sections 52000-52175.)

Revision (DSM-IV-TR),<sup>3</sup> which requires a person to clearly meet at least six criteria to be diagnosed with autism. Regarding claimant, Dr. McCray noted seven DSM-IV-TR categories of significant delay, including: marked impairment in the use of multiple non-verbal behaviors to regulate social interaction; failure to develop appropriate peer relationships; lack of spontaneous seeking to share enjoyment, interests, or achievements with others; lack of social or emotional reciprocity; delay or lack of development in spoken language; lack of varied, spontaneous, make-believe play or social imitative play; inflexible adherence to specific, nonfunctional routines or rituals; and stereotyped and repetitive mannerisms.

13. In conclusion, Dr. McCray's diagnosis was: Axis I, 299.00, autistic disorder; Axis II, V71.09, no diagnosis (low-average IQ per current test results); and Axis III, staring spells of unknown etiology. He recommended claimant continue to receive services to address ASD, but stated that if claimant's behaviors "do not continue to be fully consistent with her diagnosis of autism, then a reevaluation may be warranted."

#### B.E.S.T.'S PROVISION OF SERVICES

14. In January and February of 2013, when claimant was approximately 27 to 28 months of age, B.E.S.T. initially evaluated claimant to determine her current levels of functioning and areas of need. She began the assessment with significant crying and screaming, which decreased the second day. She did not independently play with toys for long, but played appropriately with several cause-and-effect toys. Her eye-contact and joint attention skills showed she was learning to provide eye-contact when called by

---

<sup>3</sup> The Administrative Law Judge takes official notice of the Diagnostic and Statistical Manual of Disorders as a generally accepted tool for diagnosing mental and developmental disorders.

name for at least one second. Her conversation skills showed she could non-verbally reciprocate greetings by providing eye-contact and waving. Functional communication skills included pointing toward a desired item when asked what she wanted, and learning to use a Picture Exchange Communication System (PECS) by removing icons from the book and making exchanges with another communicator. Claimant's motor skills included the ability to throw and kick a ball, peel stickers, and manipulate additional fine motor and oral motor items and objects. Claimant's non-verbal imitation skills included imitating the therapist's actions, and incorporating the use of objects to do so upon request.

15. Claimant's play skills demonstrated she could play appropriately with cause-and-effect toys, cut with knives, use peg boards, place beads on a dowel, complete a three-piece puzzle, attend to six social-interaction games, and reciprocate the "fake sneezes" social-interaction game. She was learning to respond to receptive instructions such as "stand up" or "sit down." She was learning to manipulate oral motor objects. She engaged in a variety of vocalizations, including babbling, imitating vocalizations, vocalizing when prompted or in response to a question or command, and making spontaneous vocal responses to her immediate environment.

16. B.E.S.T. provided a quarterly report in May 2013 regarding claimant's progress with its autism services. Claimant had "made progress in each of the skill areas introduced." Although she still babbled, her expressive language "continue[d] to emerge." She could non-vocally reciprocate greetings and farewells, use the PECS to request items, vocally initiate greetings and farewells, imitate oral motor movements, and point to desired items when asked what she wanted. She was learning to play longer with highly desired objects and to put them away when prompted. She could complete a nine-piece puzzle without matching pictures, anticipate and reciprocate social-interaction games, and play appropriately with a shape-sorter, a ring toss, and

nesting cups. She engaged more in functional play and less in repetitive/stereotypic play. Her ability to imitate others in a variety of contexts was increasing. She was engaging in longer, spontaneous eye-contact with her therapist, with distracters present. She would still cry and scream when frustrated or denied access to a desired item, but these behaviors were on a downward trend.

17. Claimant's parents were noted to be participating appropriately and regularly with B.E.S.T.'s training and workshops, and were working with claimant on improving her communications and vocalizations in the home setting and throughout the day.

18. Claimant showed developmental progress in multiple domains, including personal/social skills, cognition, communication, fine motor skills, and gross motor skills.

19. B.E.S.T. provided a final report of claimant's treatment and progress on July 31, 2013, noting that claimant had "mastered many skill areas," and had "made progress in language, communication, eye-contact, discrimination, and play skills." When first receiving services she was unable to express her desires, but she had learned to be responsive to receptive instructions, used the PECS, pointed to desired items, and was using a few words to express her wants. She continued to cry and scream in the treatment room and when working with her mother outside treatment, but her crying and throwing objects were on a downward trend. Her receptive language improved, but she struggled with her expressive language. Her play and interaction skills had expanded, and her ability to pretend play was emerging. She could discriminate between positions of blocks and between the uses of possessive pronouns in requests, such as "touch my nose" versus "touch your nose." She consistently engaged in spontaneous eye-contact. Overall, she had met 64 percent of her original goals since the initiation of treatment.

20. When claimant was nearly three years of age, B.E.S.T. provided an Early

Start intensive behavioral treatment report, dated October 1, 2013, which reflected many of the findings noted in its final report. Claimant was "observed to be highly motivated to interact with her peers," and "was observed to greet her peers by name and wave." She had an increased ability to greet peers and return their greetings, respond to peers' statements or questions, take turns with peers, and successfully transition with a peer from one activity to the next. Her solitary play had decreased, and her parallel and reciprocal play had increased. However, she still required prompting from a tutor.

21. Claimant continued to receive services from B.E.S.T. from 2013 through 2016 (age two to five). In an April 2016 annual report on claimant's treatment, B.E.S.T. noted substantial progress, including data from claimant's school-setting that her:

... engagement in cooperative play is higher than typically developing peers her age. Additionally, her engagement in solitary and parallel play was comparable to peers. Overall, [claimant] continues to be motivated to interact with peers during free play and has demonstrated leadership skills on the playground by helping to create ideas for games among peers.

Regarding her cognitive skills, claimant "met" (80 percent achieved) 11 benchmarks/objectives, and was "emerging" (50-79 percent achieved) in three benchmarks/objectives. Regarding her language and communication skills, claimant met 13 benchmarks/objectives, and was emerging in four benchmarks/objectives. Regarding social skills and pragmatic communication, claimant met 13 benchmarks/objectives, and was emerging in four benchmarks/objectives. Regarding play and leisure skills, claimant met two benchmarks/objectives, and was emerging in two benchmarks/objectives. Regarding self-help and daily living skills, claimant met the two benchmarks/objectives

measured. Regarding motor skills, claimant met five benchmarks/objectives, and was emerging in one benchmark/objective.

#### BRIGHTER FUTURES OCCUPATIONAL THERAPY SERVICES

22. VMRC engaged Brighter Futures, an occupational therapy and sensory integration service vendor/provider, to evaluate claimant and provide necessary services beginning with an evaluation of claimant on March 22, 2013. Claimant was determined to have sensory processing difficulties of praxis (motor-task organizing, planning, and execution in an efficient manner), bilateral integration, vestibular functioning, tactile processing, modulation, and registration of sensory processing. Due to her sensory processing dysfunction, she was distractible and unable to focus on one task for a normal length of time, noticing too many things at a time. She craved sensory information including pinching and biting herself and others, tensing her arms, slapping herself, clapping her hands hard, walking on her toes, and pushing her mother's hands and face. Weekly services were recommended to assist claimant in developing more normal sensory integration.

23. Brighter Futures submitted a progress report six months later in September 2013, noting claimant's "good progress," and her mother's good results with using a sensory integration therapy program called the Wilbarger Brushing Protocol. Among the sensory integration and processing objectives identified for progress by Brighter Futures, 24 sensory goals were reported as met, and two were emerging.

#### EDUCATIONAL HISTORY AND ASSESSMENTS

24. On September 11, 2014, the Stanislaus County Department of Education conducted a "Child Success Team Meeting" with claimant's parents, a B.E.S.T. representative, a county child development specialist, and a program specialist. The purpose of the meeting was to discuss claimant's attendance in the Marilyn Frakes Child

Development Center Head Start program beginning in September 2014, for three days per week. Claimant was noted to be "very compliant" and to engage in "cooperative play with peers." Claimant was also noted to be a picky eater, to get upset with male aides, and to dislike being wrong. One goal was to have claimant become more independent and use expressive language.

25. The Stanislaus County Special Education Local Plan Area (SELPA) assigned to serve claimant developed an Individualized Education Program (IEP) for her on October 16, 2014. It was determined that due to her autism, claimant's General Education was required to be met with Special Education support. Claimant was described by her preschool teacher as enjoying being outside, and playing with a kitten. She was holding more conversations, asking people what their names were, and improving her coping with losing a game. She eagerly tried new activities, could count from one to 13, and knew eight colors. She was beginning to express feelings, and asked and responded to questions. She could identify familiar people and animals. Her social skill pragmatics was within 100 percent of appropriate benchmarks. She engaged in reciprocal play, and engaged in self-help by independently brushing her teeth and putting on shoes. She was tolerant of male assistants. Claimant could hop on one foot and kick a ball 10 feet. Continuation of services was recommended, as were multiple goals for improving cognitive, social, and language skills.

26. SELPA developed a subsequent IEP for claimant dated April 28, 2016. Claimant was reported to be ready for kindergarten. Academically, her general education teacher placed claimant "in the top group in all academic areas." Claimant was noted to learn quickly, finish her work timely and appropriately, and perform "at or above grade level in fine and gross motor skills." She loved to initiate and engage in play. Claimant was further described as being "very social and enjoys peers. She likes being the leader," and "is strong in all academic areas." In the portion of the IEP

intended to describe “how [the] student’s disability affects [her] involvement and progress in general curriculum,” the recommendation stated: “student’s disability does not affect her education.” It was further recommended that claimant exit from special education, as she no longer needed its support.

#### VMRC’S REASSESSMENT OF CLAIMANT

27. On January 6, 2017, Michele Thomason-Jimenez, Ph.D., performed a psychological evaluation of claimant based on a referral from VMRC. The purpose of the evaluation was to assess claimant for ASD and Intellectual Disability, and assess her current levels of adaptive functioning. Dr. Thomason-Jimenez made a review of relevant records, interviewed claimant’s parents, made behavioral observations of claimant, and administered multiple established psychological testing methods.

28. V.M. described claimant’s temperament as difficult and picky. The parents had no concerns about claimant’s current motor skills. V.M. was unsure whether claimant’s language skills were normal. Claimant had experienced a verbal regression before she turned three. J.M. reported that claimant became overstimulated in loud or busy places, and complained that some normal sounds are loud. She reacted excessively to smells, was picky about food, and did not like to walk on sand or grass without shoes because of the way they feel to the touch. Claimant excessively liked swinging on a swing-set, being lifted into the air, and spinning and sliding. She felt pain easily, disliked heavy blankets, and was a high-activity child. Her attention span was short, but focused excessively on objects of interest to her. She received ASD services five times per week, eight hours per session, from 27 months until the age of five.

29. Claimant reportedly had tantrums less than once per day, which occurred when she did not win or failed to accomplish a goal. She had anxiety when in large crowds, or when she failed at something. She was appropriately affectionate, sought comfort from her parents, tried to comfort others, and shared her enjoyment of a toy

with her parents. Her eye-contact was good and she looked up when her name was called. She was interested in peers, played tag, and engaged in cooperative play and spontaneous pretend play with dolls. She did not engage in repetitive language. She liked to read the same books and watch the same movies repeatedly.

30. Dr. Thomason-Jimenez administered a Wechsler Preschool and Primary Scale of Intelligence, Fourth edition (WPPSI-IV). Claimant was in the high average range for visual spatial analyses, and non-verbal problem solving. Her verbal reasoning was in the low average range. She was considered to have "high average cognitive potential overall." Her adaptive functioning and behavior were measured using the Adaptive Behavior Assessment System, 2nd Edition (ABASII), and in several categories of communication skills, self-care skills, and social and leisure skills, she scored from below average to extremely low, based entirely on her parents' input. Her level of autism-related symptoms, as measured by the Autism Diagnostic Observation Scale (ADOS-2)-Module 3, was determined to be moderate. Her insight into social and emotional issues appeared limited. She did not engage in repetitive behaviors. Claimant met the DSM-5 diagnostic criteria for ASD, requiring supports for deficits in social communication (Level 1) and for restricted, repetitive behaviors (Level 1). She was determined to be without accompanying intellectual impairment, and of high cognitive potential; and with accompanying language impairment (mild receptive and expressive delays, and pragmatic delays.)

31. In sum, Dr. Thomason-Jimenez concluded that claimant:

... continues to present with symptoms of ASD. While her symptoms are relatively mild, they do appear to have an impact on her social interactions and adaptive functioning.

32. In September 2017, when claimant was six years and 11 months of age, an “eligibility review team” for VMRC performed a second review and assessment of claimant’s eligibility. The eligibility review team consisted of Candace Adams, Ph.D., a clinical psychologist, Janice Funamura, M.D., a physician and surgeon, and Jose Sarmiento, a VMRC service coordinator assigned to claimant’s case. The team reviewed claimant’s entire history of evaluations, treatment, and service provision, and determined that claimant’s diagnosis of ASD was still accurate as a qualifying condition. However, claimant did not exhibit any of the six applicable substantial disabilities – self-care, communication, learning, mobility, self-direction, and capacity for independent living - of which at least three must be present for claimant to qualify for regional center services.

33. On September 12, 2017, VMRC sent a Notice of Proposed Action to claimant’s parents notifying them that the eligibility review team found claimant to be ineligible for VMRC services, due to the fact that she did not have a substantially handicapping disability.

34. On September 25, 2017, claimant’s parents filed a Fair Hearing Request with VMRC, stating that claimant “has been exhibiting extreme social anxiety,” and had “regressed in this social area” and may regress further.

35. On October 30, 2017, VMRC sent a letter to claimant’s parents informing them of the results of an informal fair hearing conducted at VMRC on October 5, 2017. In the letter, VMRC confirmed its decision that claimant was not eligible for services because she had no substantial handicapping disabilities.

36. All jurisdictional requirements have been met.

#### TESTIMONY OF DR. JOHNSON

37. Barbara A. Johnson, Psy.D., a clinical psychologist with VMRC since 2007, testified regarding her review and analysis of VMRC’s determination that claimant was

no longer eligible for services. Dr. Johnson oversees VMRC psychologists, performs eligibility-case reviews, sits on several review-and-evaluation committees, and oversees psychologist-vendors who provide services to VMRC clients. Over the course of her career Dr. Johnson has overseen countless eligibility matters numbering in the thousands. In this case, she made a complete review of all available medical, psychological, educational, and service-related reports and records regarding claimant.

38. Dr. Johnson began by explaining that pursuant to Welfare and Institutions Code (Code) section 4512, subdivision (a), claimant suffers from a developmental disability in that she has been diagnosed with ASD. This diagnosis is not disputed by VMRC. However, pursuant to Code section 4512, subdivision (l), in order for claimant to be eligible for services, she must have a "substantial disability," as established by the existence of significant handicaps or functional limitations in three or more of the seven areas enumerated by the statute. The VMRC eligibility review team's position, which Dr. Johnson shares, is that in claimant's case, six of those areas potentially apply to her,<sup>4</sup> yet none of those six areas of handicaps are present. Dr. Johnson opined that although claimant suffers from ASD, she is remarkably high functioning. As Dr. Johnson testified, she drew from the records and reports regarding claimant's case while discussing each of the six enumerated areas of functional limitations as follows.

39. The functional limitation of "self-care" pursuant to Code section 4512, subdivision (l)(1), refers to a child's hygiene, grooming, and feeding. Dr. Johnson noted that claimant, per her IFSP at 26 months old, was able to wipe her mouth with a napkin, ate with a combination of fingers and utensils, and drank from an open cup. She was also potty-trained. J.M. noted claimant could dress and bathe herself, brush her teeth

---

<sup>4</sup> Code section 4512, subdivision (l)(7), sets forth a functional limitation for "Economic self-sufficiency," which is not applicable to claimant due to her young age.

with prompting, and had age-appropriate grooming and hygiene skills. At 34 months, Brighter Futures reported claimant no longer resisted hair-washing and nose-wiping. At 37 months, B.E.S.T. reported claimant was able to independently remove all clothing, except her shirts, and able to brush her teeth and dress with assistance. In May 2017, claimant's general education teacher reported no concerns with claimant's hygiene and grooming, and said she would not have guessed claimant had any developmental disabilities. Claimant ate neatly and well, disposed of her garbage, and had no issues with swallowing, chewing or choking. She used the restroom independently and blew her nose appropriately. At 46 months, B.E.S.T. reported claimant had met her benchmark goals in self-care. At 60 months, VMRC reported in its IPP that claimant continued to progress with her personal care skills, could dress without assistance, and could bathe and shower with verbal prompting. In April 2016, B.E.S.T. reported claimant could expressively label 20 safe-versus-dangerous situations. In June 2017, V.M. reported claimant: dressed herself, needing help with buttons; did not always choose appropriate clothing; bathed and washed her hair well with prompting, but had difficulty brushing her hair without assistance; used utensils to eat, but preferred using her fingers and spilled a lot; was not always motivated to do tasks but did well if motivated; and was potty-trained, but wore a diaper at night.

40. Dr. Johnson opined the evidence described above raised no significant concerns regarding claimant's self-care, but that instead, claimant's progress in these areas was age appropriate.

41. The functional limitation of "communication" pursuant to Code section 4512, subdivision (l)(2), refers to a child's abilities in the areas of expressive and receptive speech. The Early Start IFSP at 26 months showed claimant to have a 13-month delay in those areas of speech. At 21 months, B.E.S.T. reported claimant to be making progress, engaging in non-vocal reciprocal greetings and farewells. At 32

months, B.E.S.T. reported improved receptive language skills and a continuing struggle with expressive skills. At 36 months, B.E.S.T. reported continuing receptive and expressive language improvement, significant increases in spontaneous vocalizations, and claimant's ability to point to, and label, items she desired. At 37 months, B.E.S.T. noted claimant's continuing emergent receptive and expressive language; and a SELPA IEP noted claimant was talking much more, and was more understandable. At 46 months, B.E.S.T. reported claimant had met 13 of 14 language and communication benchmarks. In April 2016, a SELPA IEP deemed claimant not eligible to continue receiving special education services, partly because she showed no substantial expressive or receptive language delays. Claimant's teacher described her as articulate, possessing an above-average vocabulary, and able to use gestures, facial expressions, and complex sentences to express herself. Dr. Johnson noted that Dr. Thomason-Jimenez observed claimant to have a flat affect, limited gesturing, and inability to maintain a social discussion.

42. Dr. Johnson opined the evidence described above raised no significant concerns regarding claimant's ability to communicate. Claimant's progress in these areas was steady, and age appropriate.

43. The functional limitation of "learning" pursuant to Code section 4512, subdivision (l)(3), refers to a child's general intellectual abilities, academic achievement, retention, and ability to reason. At 26 months, the Early Start IFSP noted J.M.'s report that claimant was "so smart," picked up skills without being taught, and was a good problem-solver. At 29 months, Dr. McCray's evaluation of claimant expressed no learning concerns. In October 2013, claimant's initial psycho-educational assessment and test results raised no learning concerns. In October 2014, a SELPA IEP raised no learning concerns, and in October 2015, a SELPA IEP reported claimant was in a general education classroom. In January 2016, a SELPA IEP noted claimant's general-education

classroom time was increasing, and she understood concepts quickly. In April 2016, a SELPA IEP reported claimant's disability did not affect her education, as claimant worked well independently, persisted with tasks, was timely in her work, needed little assistance, followed directions accurately, and functioned well in the classroom setting. Claimant's teacher reported claimant was "above grade level in all academic areas."

44. In Dr. Johnson's opinion, the evidence described above raised no concerns regarding claimant's learning in any respects. Claimant's progress in these areas was steady, and even exceeded performance benchmarks for a child her age.

45. The functional limitation of "mobility" pursuant to Code section 4512, subdivision (l)(4), refers to a child's ability to ambulate independently. Dr. Johnson's review of the records and claimant's history revealed no concerns regarding walking, running, jumping and climbing. The parents expressed no concerns as well. An April 2016 SELPA IEP cited no concerns while noting that claimant enjoyed running and playing during recess.

46. The functional limitation of "self-direction" pursuant to Code section 4512, subdivision (l)(5), refers to a child's emotional development, interpersonal relations, and personal judgment. At 26 months, claimant's IFSP noted an eight-month delay, and reported claimant was resistant at bedtime and had temper tantrums. At 31 months, B.E.S.T. reported claimant exhibited limited to mild deficits, noting claimant generally transitioned well without maladaptive behavior. Crying and screaming were a problem, but were on a downward trend. At 36 months, B.E.S.T. reported claimant to be "highly motivated to interact with peers," and able to greet peers by name, wave, and successfully transition with peers from one activity to the next. Claimant needed a tutor's prompt to respond to peers' questions, but her solitary play was decreasing and her parallel and reciprocal play was increasing. Also at 36 months, the Sylvan Union Elementary School initial psycho-educational report found clinically significant behaviors

in areas of social skills, activities of daily living, hyperactivity, externalizing problems, internalizing problems, withdrawal, and attention. A February 2014 SELPA IEP reported claimant to be more outgoing, interacting more with her peers, and meeting 10 of 11 self-direction benchmarks. An October 2014 SELPA IEP reported claimant being better at starting conversations and at losing games, transitioning independently, and understanding the experience of feeling sad. The parents reported no concerns regarding self-direction. An August 2015 B.E.S.T. report noted that claimant met 18 of 20 social and pragmatic skills benchmarks, and three of five play and leisure skills benchmarks. An October 2015 SELPA IEP noted claimant likes to dance and sing, is cheerful, and is a "leader" on the playground with peers and plays cooperatively. V.M. reported no concerns regarding these abilities. In April 2016, B.E.S.T. noted claimant's engagement in cooperative play was higher than typically developing peers in her age range, and her engagement in solitary play was comparable to her peers. She continued to show motivation to interact with peers at play and demonstrated leadership skills by helping to create ideas for games. Claimant engaged in functional play a majority of the time. An April 2016 SELPA IEP described essentially the same skills and strengths noted by B.E.S.T., and determined claimant to be no longer eligible for special education services. J.M. considered claimant's social skills to be average and cited few concerns.

47. Dr. Johnson testified that a substantially disabled autistic child typically displays little to no interest interacting or talking with peers or others, yet claimant is very well beyond such developmental deficits. Her original self-directions were mild, involving tantrum-like behaviors, but the records show those problems have steadily diminished. Although claimant shows some delays regarding social "cues," she is age appropriate in most respects and is even high functioning in play with others.

48. The functional limitation of "capacity for independent living" pursuant to Code section 4512, subdivision (l)(6), refers to a child's ability to exhibit age appropriate

independent living skills without assistance. Generally, the records reflect few concerns in this area. At 36 months, the Sylvan Union Elementary School initial psycho-educational report found claimant's skills encompassing personal, domestic, community, and daily living skills, to be adequate. In August 2015, B.E.S.T. reported claimant to be increasing her awareness of strangers. In January 2016, B.E.S.T. reported claimant was continuing to make progress in self-help and daily living skills, and had met her goal in expressively labeling 10 safe-versus-dangerous situations. In May 2017, claimant's general education teacher reported that claimant does not wander away and can clean up after play with minimal prompting.

49. Dr. Johnson opined that claimant's wide range of emerging independent living skills, her ability to display a variety of living skills without supervision, and her safety awareness indicate that she suffers no disability in this realm of behavior.

50. The functional limitation of "economic self-sufficiency" pursuant to Code section 4512, subdivision (l)(7), refers to a client's capacity to participate in vocational training or maintain employment without significant support. Dr. Johnson explained that due to claimant's young age, this limitation is not applicable to her case.

51. Dr. Johnson stated that claimant was initially determined eligible for services by VMRC because of her young age, so that she could be reassessed over time and with the benefit of receiving services to address her autism while she was in the formative stages of development. In such instances, VMRC will give a very young potential client the "benefit of the doubt" in order to place her on a path during which her skills may be monitored as she progresses, or regresses. Dr. Johnson stated that as claimant approached the age of three, her real and potential disabilities were notably diminishing, and as claimant grew older, her skills and level of functioning steadily improved to the point where a reassessment by VMRC was warranted. In short, the

combination of services claimant received worked very effectively, and claimant responded equally well.

52. Pursuant to Code section 4643.5, subdivision (b), a regional center client shall remain eligible unless a regional center performs a comprehensive reassessment on the client and concludes that the original determination that the client has a developmental disability is clearly erroneous. Here, the original eligibility team evaluated claimant when she was still very young, non-verbal, and not enrolled in school, and the team relied heavily on reportage from claimant's parents regarding her condition, skills, problems, and challenges. Based on the evidence, the team surmised that claimant was likely to have several substantial handicaps, but her autism was mild. VMRC's philosophy in such cases is to give a very young child latitude, so that the child may receive benefits during her critical early period of development, and then VMRC will see how the child develops. Under such circumstances, no one could have known with any substantial certainty how claimant would actually develop from that point forward. Dr. Johnson opined that after claimant began receiving steady, appropriate services, she made excellent, well-documented progress in nearly all aspects, and showed emerging abilities in others. These steady advancements and improvements, and the absence of evidence establishing that claimant currently suffers from any substantial disabilities, now render VMRC's original disability determination clearly erroneous.

#### V.M.'S TESTIMONY

53. V.M. described claimant as having more limitations than were reflected in the records and progress reports. Claimant is not potty-trained at night, and wears a diaper to bed. She eats using utensils with assistance, but otherwise she will use her fingers to eat. Claimant enjoys swimming and gymnastics classes, but recently had a "major regression" during the summer of 2017, not joining in with her classes, and having "extreme meltdowns." She has also had playdates with friends during which she

had meltdowns, and the playdates had to be cancelled. V.M. stated claimant experiences “major anxiety” when faced with a new situation, such as entering a new grade level in school and as a result, initially attending a new class. Claimant is also prone to making odd noises in public, as if she is a cat meowing, or she is grunting due to straining. V.M. believes this is atypical behavior for a child claimant’s age; in her opinion, a normally developed child would use words to express her feelings. V.M. believed claimant may suffer from anxiety, and V.M. would pursue mental health services, including an evaluation of claimant, for the treatment of anxiety.

## DISCUSSION

54. The service agency’s initial December 2012 evaluation and diagnosis of claimant as suffering from ASD is unchanged. However, upon a recent reassessment, they found that despite her ASD, claimant did not meet any of the six possible areas of “substantial disability” under the Lanterman Act and Title 17 regulations, whereas a minimum of three areas of substantial disability must be established for claimant to be eligible for regional center services.

55. An extensive review of the evidence did not establish that claimant suffers from significant functional limitations in even one area of substantial disability, though evidence of three such limitations are required by law for her to receive benefits. Although Dr. Thomason-Jimenez found that claimant’s ASD symptoms “have an impact on her social interactions and adaptive functioning,” she characterized those symptoms as “mild.” Dr. Johnson’s testimony credibly described the careful, detailed review she, and the VMRC review team, made of each potential substantial disability, based on extensive records and reports regarding ongoing treatment, evaluations, school records, observation, testing, and benchmarks. Dr. Johnson ably demonstrated that those records and reports do not establish that claimant currently suffers from any substantial disabilities.

56. The totality of the evidence established that while claimant still suffers from ASD, she does not suffer from any area of substantial disability identified in the Lanterman Act and Title 17 regulations.

///

## LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.) An administrative hearing to determine the rights and obligations of the parties is available under the Lanterman Act to appeal a contrary regional center decision. (§§ 4700-4716.) Claimant requested a hearing and therefore jurisdiction for this appeal was established.

2. The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) "Preponderance of the evidence means evidence that has more convincing force than that opposed to it.' (Citations.) ... [T]he sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is the quality of the evidence. The quantity of the evidence presented by each side is irrelevant." (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.)

3. When a party seeks government benefits or services, he bears the burden of proof. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits].) Specifically, in a case where a party is seeking funding not previously provided or approved by a regional center, that party bears the burden of proof. In this case, the service agency determined that claimant was eligible for services commencing in January 2013, and to this date, claimant's disability of ASD is not in dispute. Yet, VMRC performed a reassessment of claimant and determined that she is no longer eligible for services because she lacks any substantial disabilities, whereas three

such disabilities are required by law. The service agency therefore bears the burden of proof. VMRC has met its burden.

4. With regard to eligibility for regional center services, "the Lanterman Act and implementing regulations clearly defer to the expertise of the DDS (California Department of Developmental Services) and RC (regional center) professionals' determination as to whether an individual is developmentally disabled." (*Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1127.) In *Mason*, the court focused on whether the applicant's expert witnesses' opinions on eligibility "sufficiently refuted" those expressed by the regional center's experts that the applicant was not eligible. (*Id.*, at p. 1137.) However, this matter presents an additional issue for analysis: VMRC asserts that while claimant was previously eligible for services, she is no longer eligible now.

5. Welfare and Institutions Code section 4643.5, subdivision (b), provides guidance on this circumstance, stating:

An individual who is determined by any regional center to have a developmental disability shall remain eligible for services from regional centers unless a regional center, following a comprehensive reassessment, concludes that the original determination that the individual has a developmental disability is clearly erroneous.

6. In order to be eligible for regional center services, a claimant must have a qualifying developmental disability. As applicable to this case, Welfare and Institutions Code section 4512, subdivision (a), defines "developmental disability" as:

a disability that originates before an individual attains age 18, continues, or can be expected to continue, indefinitely,

and constitutes a substantial disability for that individual. ... This [includes] intellectual disability, cerebral palsy, epilepsy and autism. [It also includes] 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.

7. To prove the existence of a developmental disability within the meaning of Welfare and Institutions Code section 4512, a claimant must show that she has a "substantial disability." Pursuant to Welfare and Institutions Code section 4512, subdivision (l):

"Substantial disability" means the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

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

8. Additionally, California Code of Regulations, title 17, section 54001 states, in pertinent part:

(a) "Substantial disability" means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

- (A) Receptive and expressive language;
- (B) Learning;
- (C) Self-care;
- (D) Mobility;
- (E) Self-direction;
- (F) Capacity for independent living;
- (G) Economic self-sufficiency.

#### EVALUATION

9. Claimant's underlying ASD diagnosis is unchanged, yet the totality of the evidence did not establish that claimant suffers from an area of substantial disability in any specific category. No areas of significant functional limitation within the definitions set forth above were supported by the evidence. Although VMRC found claimant eligible for regional center services based on its 2012 evaluation, VMRC's determination

was provisional in that claimant was very young, and VMRC's desire was to see claimant benefit immediately from services, then carefully assess her progress as she developed. In 2017, a VMRC reevaluation team scrutinized a sizable record including testing, reports, evaluations, and observations, determining that although claimant's autism was still apparent, she did not suffer from any substantial disabilities. Dr. Johnson conducted a complete assessment of that reevaluation process and thoroughly, credibly attested to the validity of the reevaluation team's conclusions. Claimant presented no significant evidence to refute VMRC's conclusions.

10. Considering these factors, VMRC's 2012 decision to qualify claimant for regional center services under the ASD category was clearly erroneous.

## ORDER

Claimant's appeal is denied. The service agency's determination that claimant is not eligible for regional center services is upheld. Claimant is no longer eligible for regional center services.

DATED: February 8, 2018

---

JOHN E. DeCURE

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).)**