

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,<sup>1</sup>

OAH No. 2018040706

vs.

VALLEY MOUNTAIN REGIONAL CENTER,

Service Agency.

DECISION

This matter was heard by John E. DeCure, Administrative Law Judge with the Office of Administrative Hearings, on May 10, 2018, in Modesto, California.

Claimant, who was not present, was represented by her mother (mother). Mother was assisted by certified Spanish-English interpreter Raquel Roacho.

Valley Mountain Regional Center Inc. (VMRC or Service Agency) was represented by Anthony Hill, Legal Advisor.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on May 10, 2018.

ISSUE

Does claimant have a developmental disability - in particular intellectual disability, or a "fifth category" disability<sup>2</sup> - entitling her to receive regional center services?

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

## FACTUAL FINDINGS

1. Claimant is an eight-and-one-half-year-old female. She seeks eligibility for regional center services based on mother's reports that claimant is a consistently slow learner in school, with poor-to-nonexistent retention and no signs of improvement.

2. On March 26, 2018, VMRC sent a Notice of Proposed Action to claimant, informing her that a VMRC evaluation and assessment team had determined she is not eligible for regional center services. On April 6, 2018, claimant requested a fair hearing. All jurisdictional requirements have been met.

## BACKGROUND INFORMATION AND INITIAL ASSESSMENT

3. In February 2018, VMRC staff performed an intake assessment of claimant at mother's request. VMRC visited the family home as part of this process. Mother was considered to be a good reporter. VMRC learned that claimant was born weighing seven pounds, two ounces, at 39 weeks gestation, via caesarean section and with no substantial complications. Mother reported no abnormal pregnancy conditions. Claimant was released to return home with mother after one day in the hospital. Claimant lives in a stable home environment in which both mother and claimant's father work outside of the home, while claimant's older siblings help provide child care to claimant.

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<sup>2</sup> Among the five categories of eligibility set forth in Welfare and Institutions Code section 4512, the fifth and last category of eligibility is listed as "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." These types of disabilities are commonly referred to as "fifth category."

4. The parents reported concerns about claimant's inability to crawl and talk at the typical milestones in time. Claimant sat up at six months, crawled at 10 months, walked at 13 months, and spoke single words at 12 months. She did not speak in phrases, and become potty-trained, until three years old.

5. Claimant is easily distracted, and may interrupt conversations with random comments. She can appear to not hear people speaking to her, becomes nervous when she believes someone may bully her about her weight, bites her nails compulsively, and eats when anxious. She becomes frustrated when denied from doing as she pleases, denigrates herself about her struggles with learning and memory, and can yell and be noncompliant when demands are made of her. She has frequent disagreements with peers, and can act challenging toward her teacher when she does not want to do an assignment. Claimant has been diagnosed with anxiety, and underwent individual and group counseling for anxiety, eating, and bullying. Mother did not see the counseling provided by their medical plan as being beneficial to claimant.

6. Claimant's health history includes a broken arm at three years old due to a fall, and a leg laceration in 2017 from riding a scooter. In December 2017 she was treated for a spot in a crease on her neck, which was due to obesity. In 2016 she tested negative for a thyroid condition and diabetes. She wears prescribed eyeglasses and dental spacers, has possible food allergies, and suffers from hives. Her diet is varied. Her family apparently does not encourage healthy food choices or portion control. Claimant follows a routine at home including doing her homework in the evening, reading, brushing her teeth, eating a bowl of cereal, and taking a bath. She wears leggings and a t-shirt to bed rather than pajamas. Bedtime is at 9:00 p.m. Claimant sometimes has trouble sleeping, and rises at 7:00 a.m.

7. Claimant has "staring spells" while watching television on her electronic tablet, lasting one to two minutes and occurring once or twice per week. A neurologist

in Mexico attempted to perform a sleep study in 2016, but the study was terminated when claimant would not fall asleep. A further pediatric neurological reevaluation was recommended. The Kaiser cardiology department assessed claimant two years ago for a heart murmur, determining her status as "stable."

8. Claimant is a third-grader at Sisk Elementary School in Salida, but reportedly is at kindergarten/first grade level academically. She attends Learning Center, a tutoring service, for reading and math. In May 2016, her school recommended she be held back a grade, but her parents refused and she was promoted to the next grade. She does not have an Individualized Education Program (IEP<sup>3</sup>).

9. Claimant was interviewed in the home. She appeared mildly overweight, and sat at the dining table while eating a fast-food meal of chicken nuggets, French fries, and a soda. When asked for her favorite chicken nuggets, she replied, "McDonalds." Asked if she could make a peanut butter and jelly sandwich, she said yes. When asked, she said her favorite jelly is strawberry. When asked, she said her favorite food is spaghetti. She did not know what the "beef" in spaghetti sauce was. When asked what time she got up in the morning, she stated, "When it is dark like night outside." When complimented on her pink glasses, she appropriately said thank you. When mother was asked about claimant's height and weight, claimant stated, "I need to stop eating." Claimant laughed when mother was asked about potty-training claimant.

When asked about her math skills, claimant said she had difficulty with multiplication and division, having trouble with the "X" and the "line with the dots." She referred to her backpack as her "pack back." Asked about any upcoming Valentine's Day

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<sup>3</sup> A child eligible for special education services due to a learning disability must have an IEP, which is a written statement of the educational program designed to meet a child's individual needs.

projects at school, claimant said, "We're having a party." She described a situation at school involving girls that wanted to play with claimant and her friends, but claimant and her friends did not play with them. Anxious about potential bullying, claimant was mean toward the girls and had "a little fight." She considers the other girls "frenemies." Claimant placed her fast-food garbage in the bag when she was finished eating, and then got an ice cream sandwich from the freezer, put it on a plate, and returned to the dining table.

10. Regarding self-care, claimant can dress and undress herself, but cannot tie her shoes and prefers slip-ons or boots. She showers and bathes only with prompting, and with mother's assistance. She uses the toilet independently, and can brush her teeth without assistance. She feeds herself using utensils, can wipe her face, and washes her hands.

11. Regarding claimant's capacity for communication, including receptive and expressive language, she can initiate a conversation, speak clearly, and engage in two-way conversation, but does not always have answers when queried. She has difficulty understanding received information, which frequently must be rephrased, and has trouble communicating information. She asks appropriate questions, but does not always appear to receive the answer. She does not always follow directions, which must be given one at a time. Claimant can discuss multiple topics, and her own interests.

12. Regarding learning, claimant was noted not to be receiving special education services at her school. She is not performing at grade level. She has retention problems, and only recently learned her birthdate. Claimant cannot tell time. She easily forgets new information, has trouble recalling important incidents or what she did the week before, and speaks of days-ago events as if they just occurred. She may take more time to complete a task or project, and tasks must be broken down into simple tests or repeated. Claimant cannot identify coins or their value. She gets confused doing simple

math and uses her fingers to count. She can read a simple paragraph and identify the subject of a story or book, but cannot describe further details.

13. No concerns were raised about claimant's mobility skills during the assessment.

14. Regarding self-direction, claimant was described as "somewhat flexible." She is not particularly routine-oriented and could adjust to change. She can be non-compliant and refuse requests. She can self-initiate a simple task, share, and take turns. She has a few friends at school, and occasional disagreements with other students. Claimant bites her nails.

15. Regarding capacity for independent living, claimant does simple chores with prompting. She can fold laundry, put items away, and place her dishes in the sink without being reminded. Some tasks are left incomplete, but sometimes claimant remembers and completes a task. Claimant can make a peanut butter and jelly sandwich, pour a bowl of cereal, and use the microwave oven. In the market she may wander, but she does not cross the street without supervision. If someone were injured, claimant could get help.

16. Claimant's economic self-sufficiency was not evaluated because her young age renders this issue irrelevant.

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17. VMRC's assessment report concluded with an overall impression of "No concerns regarding intellectual disability."<sup>4</sup>

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<sup>4</sup> The VMRC team also noted it had no concerns regarding autism spectrum disorder.

## TESTIMONY OF BARBARA JOHNSON

18. Barbara A. Johnson, Psy.D., a clinical psychologist with VMRC since 2007, testified regarding her review and analysis of the VMRC evaluation and assessment team's determination that claimant was not 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.

19. Dr. Johnson noted that VMRC eligibility reviews focus on whether the subject displays a qualifying developmental disability, as defined pursuant to Welfare and Institutions Code (Code) section 4512, subdivision (a). In order for claimant to qualify for regional center services, she must suffer from a developmental disability listed under that Code section, including intellectual disability, autism spectrum disorder, cerebral palsy or significant other motor dysfunction, epilepsy/seizure disorders, or other types of developmental disability (i.e., fifth category). Even if a claimant is diagnosed with one or more of these disabilities, a second analysis is required pursuant to Code section 4512, subdivision (l): in order for a 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.

20. In this case, the potential disabilities at issue were intellectual disability and fifth category, but the VMRC eligibility review team saw no evidence to support either diagnoses. Despite the fact that claimant did not suffer from a disability, the eligibility review team additionally performed a secondary analysis and found that while

six areas of “substantial disability” potentially apply to her,<sup>5</sup> none of those six areas of handicaps were present. Dr. Johnson was in agreement with both aspects of the team’s analyses. As Dr. Johnson testified, she drew from the records and reports regarding claimant’s case while discussing claimant’s eligibility issues as follows.

21. The Salida Unified School District (District) performed a multi-disciplinary psychoeducational assessment of claimant in May 2017, and produced a 15-page report (assessment report) detailing its findings and recommendations. The noted “reason for referral” was mother’s concerns regarding claimant’s learning issues, particularly regarding orthographic processing<sup>6</sup> deficits and memory deficits, and to determine whether claimant was initially eligible for special education services. The District reviewed records, conducted interviews, observed claimant multiple times in the classroom, and administered formal and informal testing.

22. The District’s assessment report noted that claimant’s educational history had raised concerns among prior evaluators, primarily that claimant struggled to understand and retain information. In January 2015, these concerns were related to reading decoding, reading comprehension, math reasoning, written language, and behavior. Claimant received one-on-one intervention with a classroom aide, spent extra time on a learning iPad, and received math tutoring at the Learning Center. She had difficulty sitting and listening in a group-learning setting, and was disrespectful to the

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<sup>5</sup> Code section 4512, subdivision(l)(7), sets forth a seventh functional limitation for “Economic self-sufficiency,” which is not applicable to claimant due to her relative youth.

<sup>6</sup> Orthographic processing refers to using the visual system to form, store, and recall words, such as writing a word out in the air in front of you.



classroom aide when working with her one-on-one. She also spat, and stuck out her tongue, at another student. She was not achieving academic benchmarks as of February 2015. In 2016, she continued to receive one-on-one aide assistance in the classroom, and was part of a reading and math intervention program. By May 2016, claimant was making progress in reading, and was doing basic addition and subtraction in math. In February 2016, she was assessed for special education services and did not qualify.

23. The District's school psychologist, Sammara Moyers, M.S., evaluated claimant on January 28, 2016, using the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V), a widely used and highly regarded test used to determine a child's cognitive abilities and measure learning disabilities. Dr. Johnson explained that in testing, a score of below 70 is a level which generally represents two standard deviations and indicates substantial disability. Here, claimant's score of 91 for Full Scale Intelligence Quotient (FSIQ) was in the average range and well above the low benchmark of 70. Her scores for verbal comprehension, working memory, and auditory memory were 86, 88 and 86, respectively, but fell within the low average range. Her written expression score of 83 was below average, but not indicative of a substantial disability. In 11 other areas, claimant's test scores were in the average range. Dr. Johnson opined that this testing indicated no substantial disabilities.

24. Dr. Johnson also interpreted the scores of a July 28, 2016 District evaluation of claimant via the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV). Claimant's FSIQ was 89, or below average. Claimant's verbal comprehension, perceptual reasoning, and working memory scores of 99, 96 and 94, respectively, were all in the average range. Her processing speed score was 75, or borderline. None of these scores indicated a substantial disability.

25. Dr. Johnson noted that the District's examiner considered claimant to be an appropriate test taker who was able to stay focused on the questions and responded

positively to encouragement and praise. As a result, the examiner concluded that claimant's test results were a valid estimate of her levels of functioning. This was a significant point to Dr. Johnson because she believed that she, and the VMRC review and assessment team, could therefore consider claimant's test scores to be more reliable.

26. The District administered a Bilingual Verbal Ability Tests Normative Update (BVAT NU) to evaluate claimant's verbal cognitive ability. Her English language proficiency and bilingual verbal ability scores were 95 and 97, respectively, which were both in the average range.

27. The District administered a Kaufman Assessment Battery for Children, Second Edition (KABC-II), which is designed to measure the processing and cognitive abilities of children ages three to 18. Claimant's overall Mental Processing Index (MPI), a composite score of all sub-testing administered, was 88, which is in the average range. Her planning score was 75, which is below average. Her sequential, simultaneous, and learning scores of 106, 103, and 86, respectively, all fell within the average range.

28. Dr. Johnson further noted that the District tested claimant using the Naglieri Nonverbal Ability Test (NNAT), which is designed to provide a brief nonverbal measure of general ability using figural matrix items (i.e., shapes and symbols). Claimant received a score of 99, which is within the average range.

29. The District measured claimant's academic performance using the Kaufman Test of Educational Achievement, Third Edition (KTEA-3). Claimant received below average scores in five areas: letter and word recognition, reading composite, reading understanding composite, reading vocabulary, and decoding composite. She received average scores in seven areas, including: math concepts and applications, written expressions, math computation, reading comprehension, math composite, listening comprehension, phonological processing, and oral expression.

30. Dr. Johnson noted that in the District's assessment report's conclusion, the District did not find claimant to be eligible for special education services. Instead, it recommended: a multi-sensory instructional approach that employs visual stimuli and hands-on activities to accompany oral presentation as often as possible, front-row seating, graphic organizers, simple and short oral directions, having claimant paraphrase directions to ensure they were understood, and writing directions, procedures, and assignments on the board or paper.

31. Dr. Johnson agreed with the District's assessment report's findings and conclusions. None of the testing and reportage available to her, or the VMRC review and assessment team, would support a conclusion that claimant suffers from any identifiable intellectual disability as set forth by the Code; nor does the evidence establish any substantial disabilities.

#### MOTHER'S TESTIMONY

32. Mother noted that claimant has exhibited learning problems since kindergarten. Claimant's school did not want to perform an IEP examination on her until the first grade, because they believed she did not "qualify." Mother believes the school has helped claimant all they could, but claimant has failed to show improvement and has stayed more or less "the same." Mother was perplexed with claimant's test scores and wondered whether claimant has the ability to test better than her actual skills would allow for. Adding, subtraction, and basic spelling continue to be "big hurdles" for claimant.

33. Mother wants to help claimant overcome her learning problems, but she doesn't know how best to help her. It seems to mother that "nothing is working." Her primary desire is to find the best assistance available for her daughter.

## DISCUSSION

34. Dr. Johnson engaged in a capable and thorough assessment of records and documents regarding claimant's testing, home life, and schooling. She credibly opined that such information does not support a finding of a qualifying intellectual disability; nor, in the second analysis, is there evidence of a substantial disability. While claimant's learning and memory struggles are identifiable, they are not so pronounced as to lead to a conclusion that she is intellectually disabled. The District's current plan of implementing several educational measures to bolster claimant's learning potential, while keeping her in a general education setting, appears to be the result of considerable testing and a careful assessment of her individual needs.

35. At hearing, mother presented as a dedicated, caring advocate on claimant's behalf who seeks regional center services to help claimant to overcome her educational challenges. While this is a commendable purpose, the regional center does not have the discretion, under the Lanterman Developmental Disability Services Act (Lanterman Act) and Title 17 regulations, to accept any new client that does not meet the qualifying criteria.

36. The totality of evidence did not establish that claimant suffers from an intellectual disability, or other type of developmental disability linked to intellectual disability.

## LEGAL CONCLUSIONS

1. Claimant did not establish that she suffers from a developmental disability (intellectual disability, or "fifth category" developmental disability) which would entitle her to regional center services under the Lanterman Act.

2. Throughout the applicable statutes and regulations (Welf. & Inst. Code, §§ 4700 - 4716, and Cal. Code Regs., tit. 17, §§ 50900 - 50964), the state level fair hearing is

referred to as an appeal of the Service Agency's decision. Where a claimant seeks to establish her eligibility for services, the burden is on the appealing claimant to demonstrate by a preponderance of evidence that the Service Agency's decision is incorrect. Claimant has not met her burden of proof in this case.

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

a disability 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.

4. 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.

5. 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.

6. 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.

7. In addition to proving a "substantial disability," a claimant must show that her disability fits into one of the five categories of eligibility set forth in Welfare and Institutions Code section 4512. The first four categories are specified as: intellectual disability, cerebral palsy, epilepsy, and autism. The fifth and last category of eligibility is listed as "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." (Welf. & Inst. Code, § 4512.)

8. In order to establish eligibility, a claimant's substantial disability must not be solely caused by an excluded condition. The statutory and regulatory definitions of "developmental disability" (Welf. & Inst. Code, § 4512 and Cal. Code. Regs., tit. 17, § 54000) exclude conditions that are *solely* physical in nature. California Code of Regulations, title 17, section 54000, also excludes conditions that are *solely* psychiatric disorders or *solely* learning disabilities. Therefore, a person with a "dual diagnosis," that is, a developmental disability coupled with either a psychiatric disorder, a physical

disorder, or a learning disability, could still be eligible for services. However, someone whose conditions originate from just the excluded categories (psychiatric disorder, physical disorder, or learning disability, alone or in some combination) and who does *not* have a developmental disability would not be eligible.

9. Claimant maintains she is eligible for regional center services under a diagnosis of intellectual disability, or disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability. Neither of these diagnoses was established by the totality of the evidence. Therefore, a preponderance of the evidence does not support a finding that claimant is eligible to receive regional center services.

## ORDER

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

DATED: May 23, 2018

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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).)**