

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

VALLEY MOUNTAIN REGIONAL CENTER,

Service Agency.

OAH No. 2018061163

DECISION

This matter was heard before Erin R. Koch-Goodman, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, in Sacramento, California, on October 2, 4, and 26, 2018, and December 20, 2018.

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

Elizabeth Aleman, Senior Staff Attorney, and Tori Porell, Equal Justice Works Fellow, from East Bay Children's Law Offices, represented claimant. Claimant did not appear.

Oral and documentary evidence was received. The record was held open for closing briefs. VMRC's Closing Brief was received on April 5, 2019, and marked as Exhibit 47. Claimant's Closing Brief was received on April 19, 2019, and marked as Exhibit G. VMRC's Reply Brief was received on April 26, 2019, and marked as Exhibit 48. The record was closed and the matter submitted for decision on April 26, 2019.

ISSUE

Was the original determination that claimant was eligible for regional center services clearly erroneous pursuant to Welfare and Institutions Code section 4643.5, subdivision (b)?¹

FACTUAL FINDINGS

1. Today, claimant is a 20-year-old dependent in Alameda County's AB12 Extended Foster Care Program. He lives at an Elite Family Systems group home in Ceres.

INITIAL ELIGIBILITY DETERMINATION

2. At age 11, the Golden Gate Regional Center (GGRC) found claimant to be eligible for regional care services based on a "diagnosis of having a condition found to be closely related to mental retardation² or to require treatment similar to that required for individuals with mental retardation, with substantial impairments in the areas of self-care, learning, and self-direction."

3. On September 7, 2010, Michelle Dolar, Licensed Clinical Social Worker (LCSW), GGRC, completed a Social Assessment Report, recommending "further evaluation by the GGRC Interdisciplinary Assessment Team to determine Regional Center eligibility." On October 29, 2010, the GGRC Interdisciplinary Team, including Ms.

¹ Unless otherwise indicated, all statutory references are to the California Welfare and Institutions Code.

² Effective January 1, 2014, the Lanterman Act replaced the term "mental retardation" with "intellectual disability." The terms are used interchangeably throughout this Decision.

Dolar, Telford Moore, Ph.D., GGRC psychologist, and Ingrid Lin, M.D., GGRC physician, gathered to determine if claimant met psychological and medical eligibility criteria. The Team reviewed:

- A September 7, 2010 Social Assessment Report, by Ms. Dolar.
- A December 2006 Psychological Evaluation, by L. Brulee, School Psychologist, Horace Mann Elementary School (Factual Finding 6).
- A July 20, 2010 Psychological Evaluation, by Terry Meyers, Ph.D. (Factual Finding 14).

4. On October 29, 2010, under Dr. Moore's signature, the Team found claimant psychologically eligible for regional center services because "[claimant] does have a condition or needs similar to individuals with mental retardation." The Team recommended: "[claimant's] cognitive level of functioning should be reviewed by age seventeen years to determine if he continues to meet diagnostic criteria for mental retardation. This assessment must include a measure of adaptive functioning."

5. On November 5, 2010, under Dr. Lin's signature, the Team found claimant "eligible for GGRC based upon a diagnosis of having a condition found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, with substantial impairments in the areas of self-care, learning, and self-direction."

EDUCATIONAL ASSESSMENTS

6. In December 2006, Ms. Brulee, School Psychologist, Horace Mann Elementary School, Oakland Unified School District (Oakland Unified) completed a Psychoeducational Assessment. At the time, claimant was seven years, 10 months old. Ms. Brulee reported the following test results: Matrix Analogies Test (MAT)³ scores

³ The MAT is a test that measures a child's nonverbal reasoning abilities. It does not

between 37 and 75 percentiles, Standard Score 91, Ability Classification - Average, and Age Equivalent of 6 years, nine months; Differential Ability Scales (DAS)⁴ scores of Spatial 63 and Matrix 80, Deficient to Low Average; Test of Visual-Perceptual Skills-Revised (TVPS-R)⁵ scores of Visual Memory of 83, Low Average; Test of Auditory-Perceptual Skills, Third Edition (TAPS-3)⁶ scores Phonological Index 70 (Borderline), Cohesion Index 83 (Low Average); Wide Range Assessment of Memory and Learning-2 (WRAML-2)⁷ scores Verbal Memory 91 (Average), Visual Memory 70 (Borderline), Attention/Concentration 85 (Low Average), and General Memory 76 (Borderline); and a

involve the use of motor or verbal skills. In addition, the child has an unlimited amount of time to respond to each question, thus, reducing the effects of time pressure.

⁴ The DAS is an individually administered battery of cognitive and achievement tests for children and adolescents aged 2 years, 6 months through 17 years, 11 months. Designed to measure specific, definable abilities, the cognitive subtests obtain and evaluate profiles of strengths and weaknesses.

⁵ The TVPS-R is a systematic measure used to determine a child's visual-perceptual strengths and weaknesses.

⁶ The TAPS-3 is a systematic measure used to determine an individual's auditory-perceptual strengths and weaknesses.

⁷ The WRAML-2 is an instrument used to evaluate a child's ability to actively learn and memorize a variety of information. The WRAML-2 does not test intelligence. It is normed for children 5 through 17. There are three major divisions within the WRAML-2: Verbal, Visual, and Learning. Each of these divisions contains 3 subtests that provide significant information in how the child is able to use his or her memory.

Behavioral Assessment System for Children-2 (BASC-2)⁸ with many indications of Clinically Significant emotional problems.

Based on these results, Ms. Brulee found: "According to all the tasks given, [claimant] does appear to have deficits in regards to visual processing. In addition, there does seem to be evidence of a severe discrepancy between [claimant's] overall abilities and achievement skills." Ms. Brulee then assessed claimant with a Specific Learning Disability (SLD).

7. On January 24, 2007, the Oakland Unified created an Individualized Education Program (IEP) for claimant, identifying his Primary Disability as a Specific Language Impairment (SLI), and placing claimant in the regular education environment 88 percent of his time and outside the regular education environment 12 percent of his time. Claimant was eight years old.

8. On December 11, 2007, Oakland Unified created an IEP for claimant, identifying his Primary Disability as a SLI, and placing claimant in the regular education environment 70 percent of his time and outside the regular education environment 30 percent of his time. Claimant was eight years, 11 months old.

9. On February 13, 2009, Erin Altschul, School Psychologist, Fremont Unified School District (Fremont Unified), conducted a Psychoeducational Assessment. At the

⁸ The BASC-2 is an integrated system designed to facilitate the differential diagnosis and classification of a variety of emotional and behavioral disorders of children. There are three different forms: parent, teacher, and child. The scores are based on the child's rating of himself, as well as the parent and teacher's rating of the child. Any score in the Clinically Significant range suggests a high level of maladjustment. Scores in the At-Risk range identify either a significant problem that may not be severe enough to require formal treatment or a potential of developing a problem that needs careful monitoring.

time, claimant was 10 years, one month old. Ms. Altschul reported the following test results: Woodcock Johnson-Third Edition (WJ-III)⁹ scores of Oral Expression 95 (Average), Listening Comprehension 96 (Average), Basic Reading Skills 69 (Borderline), Reading Comprehension 62 (Deficient), Math Calculations 67 (Deficient), Math Reasoning 64 (Deficient), and Written Expression 65 (Deficient); TAPS-3 scores of Phonological Index 80 (Borderline), Memory Index 88 (Low Average), Cohesion Index 93 (Average), and overall score of 86 (Low Average); TVPS-R score of Perceptual Quotient of 67 (Deficient); BASC-2 with Clinically Significant findings on the Inattention/Hyperactivity Scale, and At-Risk findings for Interpersonal Problems, Locus of Control, and Depression; WRAML-5 scores of Verbal Memory 91 (Average), Visual Memory 79 (Borderline), Attention/Concentration 85 (Low Average), General Memory 80 (Low Average). The same day, Fremont Unified created an IEP for claimant, identifying his Primary Disability as an SLD, and placing claimant in a special day class (mild to moderate) 100 percent of his time.

10. On April 7, 2011, the Stockton Unified School District (Stockton Unified) created an IEP for claimant, identifying his Primary Disability as an Emotional Disturbance (ED), and placing claimant in a nonpublic day school for 100 percent of his time. At the time, claimant was 12 years, three months old.

11. On January 29, 2015, Aline Baca, School Psychologist, Ceres Unified School District (Ceres Unified), conducted a Psychoeducational Assessment. Ms. Baca reported the following test results: BASC-2 scores of At-Risk in the areas of Atypicality, Attention Problems, and Hyperactivity, and Clinically Significant in the areas for Hyperactivity, Aggression, Anxiety, Depression; WRAML-2 scores of Verbal Memory 117 (High

⁹ The WJ-III measures levels of achievement in basic reading, basic math, math reasoning, and written expression.

Average), Visual Memory 88 (Low Average), Attention/Concentration 55 (Deficient), and General Memory 79(Borderline); Kaufman Test of Educational Achievement (KTEA-NU)¹⁰ Reading Composite 71 (Low Average), Math Composite 57 (Deficient), Battery Composite 63 (Deficient); Adaptive Behavior Assessment System – Second Edition (ABAS-II)¹¹ scores of Conceptual 70 (Borderline), Social 104 (Average), Practical 99 (Average), and General Adaptive Composite 91 (Average). Ms. Baca made the following determinations regarding claimant’s eligibility for special education services:

(1) [Claimant] does NOT present with significantly below average general intellectual functioning. In addition, his overall adaptive functioning is within the Average range. Thus, he does NOT meet California state requirements as a student with Intellectual Disability.

(2) [Claimant] continues to display Clinically Significant concerns in overall Externalizing Problems and Internalizing Problems within the school setting. It is recommended that

¹⁰ The KTEA is an individually administered measure of academic achievement for ages four and one-half through 25.

¹¹ The Conceptual composite score summarizes performance across the Communication, Functional Academics, and Self-Direction skill area. The Social composite score summarizes performance across the Leisure and Social skill area. The Practical composite score summarizes performance across the Community Use, Home Living, Health and Safety, and Self-Care skill areas. The General Adaptive Composite summarizes performance across all skill areas.

the IEP team discuss assessment result and review eligibility under Emotional Disturbance.

12. On June 14, 2016, Stanislaus County Special Education Local Plan Area (SELPA), for Ceres Unified, created an IEP for claimant, identifying his Primary Disability as an Emotional Disturbance (ED), and scheduling claimant for post-secondary training in a nonpublic school. Claimant was 17 years, five months.

MEDICAL ASSESSMENTS

13. In March/April 2009, Harmony Satre, Doctorate of Psychology, Westcoast Children's Clinic, conducted a Psychological Assessment of claimant.¹² To complete her assessment, Dr. Satre interviewed/observed claimant, reviewed court documents, made collateral contacts, administered tests, and wrote a report cataloging her findings. For the DAS-II, claimant's T-scores were: Verbal 67 (Deficient), Nonverbal 59 (Deficient), Spatial 85 (Low Average), and GCA 67 (Deficient). Dr. Satre noted concerns regarding the validity of claimant's test results, indicating: "[s]cores on the cognitive functioning measures need to be interpreted with extreme caution as it was apparent that throughout most of the testing [claimant] was not giving his best efforts. Because of this, it is likely that the scores obtained and discussed below are not true representations of his actual ability. Additionally, [claimant] refused outright to complete some measures including the achievement testing measures, so it is impossible to ascertain his abilities in that area." Dr. Satre made the following diagnoses:

Axis I: 309.81 Posttraumatic Stress Disorder (PTSD), Chronic
296.23 Major Depressive Disorder, Severe

¹² Claimant was referred for the Psychological Assessment by Kim Yancy, Child Welfare Worker, Alameda County.

314.01 Attention-Deficit/Hyperactivity Disorder, Combined Type

313.89 Reactive Attachment Disorder, Disinhibited Type

Axis II: [Rule Out] R/O V62.89 Borderline Intellectual Functioning

Axis III: None noted

Axis IV: Trouble in school, social problems, misses mother, history of physical abuse and neglect, few friends, unstable living situation, frequent moves.

Axis V: GAF¹³ Current = 35. Past year = 35.

Dr. Satre made a final disclaimer:

Based upon his performance of tests of his cognitive abilities [claimant] was given a rule-out of Borderline Intellectual Functioning. These test scores must be interpreted with extreme caution due to [claimant's] obvious lack of motivation during test-taking and while scores do qualify him for this diagnosis, it was obvious that he did not do his best due to lack of effort. It is impossible to tell how much better he could have done given more motivation, however, his emotional issue and recent life stressors (including physical abuse, removal from his home, and recent changes of foster placement) are severely impacting his ability to function cognitively at a level average to that of his peers,

¹³ The Global Assessment of Functioning (GAF) is a numeric scale used by mental health clinicians and physicians to rate subjectively the social, occupational, and psychological functioning of an individual, e.g., how well one is meeting various problems-in-living. Scores range from 100 (extremely high functioning) to 1 (severely impaired).

and it is important that this be taken into consideration when [claimant] is given schoolwork or in class assignments. It is still safe to say that [claimant] struggles with tasks that require him to use his nonverbal reasoning skills, attention, processing speed and long term memory, which will make most general academic tasks which involve these things very difficult for him. It is likely that [claimant] would qualify for a specific learning disability should test scores more accurately reflect his abilities. [Claimant] will do better with tasks that allow him to take extra time, which include repetition as part of the learning process, and when information is presented within context.

14. In May 2010, Ben Campbell, Psychology Trainee, under the supervision of Terry Meyers, Ph.D., Psychologist, Alliant International University, conducted a Psychological Assessment of claimant.¹⁴ At the time, claimant was 11 years, four months old. To complete their assessment, Mr. Campbell and Dr. Meyers interviewed/observed claimant, reviewed court documents, made collateral contacts, administered tests, and wrote a report cataloging their findings. Dr. Meyers reported claimant's scores as: Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV)¹⁵ Verbal

¹⁴ Claimant was referred for the Psychological Assessment by Kim Yancy, Child Welfare Worker, Alameda County.

¹⁵ The WISC-IV is an individually administered test of a child's intellectual ability and cognitive strengths and weaknesses. It is comprised of 15 separate subtests and measures both verbal and visual skills.

Comprehension Index (VCI) 79 (Borderline), Perceptual Reasoning Index (PRI) 67 (Deficient), Working Memory Index (WMI) 71 (Borderline), Processing Speed Index (PSI) 70 (Borderline), and Full Scale IQ (FSIQ) 66 (Deficient). For the WRAML-2, claimant's scores were: Verbal 74 (Borderline), Visual 109 (Average), Attention/Comprehension 65 (Deficient), General Memory 84 (Low Average).

In a statement of validity, Mr. Campbell and Dr. Meyers wrote: "[claimant's] results are considered a valid representation of his current neuropsychological functioning despite numerous motivational factors that may have resulted in lower scores in certain assessment measures Although [claimant] was not entirely motivated to perform all tasks presented to him, he did not exhibit any behaviors that would jeopardize the validity of the results." However, Mr. Campbell and Dr. Meyers noted the following specific concerns regarding the WRAML-2 scores: (1) "due to a 35-point difference between the highest and lowest scored indices, the General Memory Index score alone is likely not a good overall estimate of [claimant's] overall memory function"; (2) for visual memory, "[claimant's] exceptional performance in the Picture Memory task in contrast to his low Picture Memory Recognition score is a rare finding that is consistent with developmental delay, neurologically-based illness or injury. However, such poor performance on the Recognition task can also be a product of fatigue and/or poor motivation/attention. [Claimant] had described being tired during several tasks. Therefore, fatigue may have affected his performance on this recognition task." Mr. Campbell and Dr. Meyers made the following diagnoses:

- Axis I: 309.81 PTSD, Chronic
- 296.23 Major Depressive Disorder, Severe
- 314.01 Attention-Deficit/Hyperactivity Disorder, Combined Type
- 313.89 Reactive Attachment Disorder, Disinhibited Type

Axis II: Mild Mental Retardation
Axis III: None noted
Axis IV: Educational problems, problems related to social environment, problems with primary support group.
Axis V: GAF = 35 (Current)

15. In April 2012, Janice Thomas, Ph.D., Clinical Psychologist, Health Care Services Agency, Alameda County, conducted a Psychological Assessment of claimant.¹⁶ To complete her assessment, Dr. Thomas interviewed/observed claimant, reviewed court documents and special education records, made collateral contacts, administered tests, and wrote a report cataloging her findings. For the Wechsler Abbreviated Scale of Intelligence – Second Edition (WASI-II)¹⁷, claimant’s scores were: VCI 66 (Deficient), PRI 67 (Deficient), FSIQ for 2 subtests 72 (Borderline), and FSIQ for 4 subtests 62 (Deficient).

Interpreting claimant’s performance, Dr. Thomas noted: “[claimant] scored in the Borderline range of intelligence on the two subtests Full Scale IQ measure (Full Scale – 4) and in the range of Mild Mental Retardation on the four subtests Full Scale IQ (Full Scale – 2) measure. The difference between the two subtest and the four subtest estimates suggest that a full scale IQ score is not the most valid means of estimating [claimant’s] intelligence.” Further, Dr. Thomas found: “it is likely that [claimant’s] intelligence is affected by his psychological functioning and his level of psychiatric

¹⁶ Claimant was referred for the Psychological Assessment by Superior Court, County of Alameda, Juvenile Court.

¹⁷ The WADI-II is a short, valid, and reliable measure of intelligence. The standardized test consists of four subtests which measure expressive vocabulary and verbal knowledge; perceptual organization and general intelligence; verbal concept formation and abstract verbal reasoning ability; and nonverbal fluid reasoning.

symptomatology. This was evident in the context of the present evaluation where he tested in the Borderline range of intelligence and where his lowest score was most affected by idiosyncratic musings that led to incorrect answers.”

16. On May 3, 2012, Patricia S. Spivey, Doctorate of Psychology, conducted a Psychological Assessment of claimant.¹⁸ At the time, claimant was 13 years, four months old. To complete her assessment, Dr. Spivey interviewed/observed claimant, reviewed the special education record, made collateral contacts, administered tests, and wrote a report cataloging her findings. For the WISC-IV, claimant’s scores were: VCI 79 (Borderline), PRI 71 (Borderline), WMI 74 (Borderline), PSI 70 (Borderline), and FSIQ 68 (Deficient). For the Wide Range Achievement Test – Fourth Edition (WRAT-IV),¹⁹ he was at the first-grade level in Word Reading 67, Spelling 68, and Math 61.

Dr. Spivey opined: “[claimant] has a history and presentation that is consistent with both emotional disturbance and developmental disability. ... He meets criteria for mental retardation because he has an IQ below 70, as well as significant adaptive functioning deficient in several areas. He does not necessarily present as mentally retarded due to adequate speech and social skills.” Ultimately, “the emotional disturbances prevent concentration and learning but it is unlikely that his emotional disturbance is the cause of his cognitive impairments.” Dr. Spivey made the following diagnoses:

- Axis I: 309.81 Mood Disorder NOS
- 312.34 Intermittent Explosive Disorder
- 307.6 Enuresis
- 995.5 Physical abuse of child - victim

¹⁸ Claimant was referred for the Psychological Assessment by VMRC.

¹⁹ The WRAT-IV is a norm-referenced test that measures the basic academic skills of word reading, sentence comprehension, spelling, and math computation.

Axis II: 317 Mental Retardation, Mild
Axis III: Deferred to medical records
Axis IV: Interaction with the legal system.
Axis V: GAF 45

17. On February 25, 2015, Rosemarie Ratto, Ph.D., conducted a Psychological Assessment of claimant.²⁰ At the time, claimant was 16 years, one month old. To complete her assessment, Dr. Ratto interviewed/observed claimant and administered tests. She also spoke with Suzie Weschler, claimant's social worker, and Vito Fontana, a counselor at claimant's group home. Dr. Ratto wrote a report cataloging her findings; she did not review prior assessments of claimant. For the Wechsler Adult Intelligence Scale-IV (WAIS-IV),²¹ claimant's scores were: VCI 89 (Low Average), PRI 71 (Borderline), WMI 69 (Deficient), PSI 68 (Deficient), and FSIQ 71 (Borderline). Dr. Ratto noted: "[claimant] obtained a Full Scale I.Q. in the bottom of the Borderline range of functioning. Significant point differences are noted between the Verbal Comprehension Index and all of the other Index scores indicating strengths in his verbal abilities which fall in the Low Average range and indicate the potential for some higher functioning in limited areas Educational, cultural, and emotional factors may be influencing current scores, and the potential for some higher functioning may exist." For the WRAT-IV, his scores displayed a first-grade level in Word Reading 62, Sentence Comprehension 58, and Math 58, and below-kindergarten level in Spelling 55. Dr. Ratto noted, "[t]hese findings are lower than his expected achievement should be and indicate the presence of a learning disorder." For the Wechsler Memory

²⁰ Claimant was referred for the Psychological Assessment by Alameda County Social Worker.

²¹ The WAIS-IV is an IQ test designed to measure intelligence and cognitive ability in adults and older adolescents.

Scale – Fourth Edition (WMS-IV),²² claimant’s scores were: Auditory 84 (Low Average), Visual 61 (Deficient), Immediate Memory 72 (Borderline), and Delayed Memory 67 (Deficient). Dr. Ratto made the following diagnoses:

- Axis I: 319 Intellectual Disability, mild
- 315 Specific Learning Disorder, Severe
- 300.4 Persistent Depressive Disorder (Dysthymia), Mild
- 309.81 PTSD (by history)
- 312.34 Intermittent Explosive Disorder (by history)
- GAF: 50

18. On September 11, 2015, Clinton Lukeroth, Doctorate of Education, Educational Psychologist, conducted a Psychological Assessment of claimant.²³ At the time, claimant was 16 years, eight months old. To complete his assessment, Dr. Lukeroth interviewed/observed claimant, reviewed records, administered tests, and wrote a report cataloging his findings. For the WAIS-IV, claimant’s scores were: VCI 87 (Low Average), PRI 79 (Borderline), WMI 74 (Borderline), PSI 79 (Borderline), and FSIQ 77 (Borderline). Dr. Lukeroth opined:

[Claimant] does not demonstrate evidence of intellectual disability. [Claimant’s] Full Scale IQ score of 76 is above the intellectually disabled cut-off score of 69. Because the standard error of measure for the Full Scale score at [claimant’s] age is 2.60, there is a 95% chance that his true

²² The WMS-IV is a neuropsychological test designed to measure different memory functions in a person.

²³ Claimant was referred for the Psychological Assessment by VMRC.

Full Scale score is between 73 and 79. Additionally, on Indexes that are more highly “g” loaded, [claimant’s] scores were 87 and 79. This adds confirmation that his reasoning ability is above the disabled range. [Claimant’s] current IQ scores are above those that he obtained when assessed between 2010 and 2012. The difference may have been due to test motivation and/or the status of his mental health at the times of the assessments. In 2007, [claimant] obtained a nonverbal reasoning IQ in the average range.

19. On June 27, 2018, Dr. Ratto conducted a Psychological Disability Evaluation of claimant.²⁴ At the time, claimant was 19 years, five months old. To complete her assessment, Dr. Ratto interviewed/observed claimant, spoke to Suzie Weschler (claimant’s social worker) and Bill Sneed (counselor at claimant’s group home), administered tests, and wrote a report cataloging her findings. Dr. Ratto did not review prior assessments of claimant. For the WAIS-IV, claimant’s scores were: VCI 93 (Average), PRI 71 (Borderline), WMI 63 (Deficient), PSI 76 (Borderline), and FSIQ 72 (Borderline). Dr. Ratto noted:

[Claimant] obtained a Full Scale I.Q. in the bottom of the Borderline range of functioning which is only two points away from the Extremely Low range (Confidence Interval 95%, Full Scale IQ 68-77). Significant point differences are noted between the Verbal Comprehension Index and all of the other Index scores indicating strengths in his verbal

²⁴ Claimant was referred for the Psychological Disability Evaluation by Alameda County.

abilities, which fall in the Average range, and indicate the potential for some higher functioning in this area.

[¶] ... [¶]

Educational, cultural, and emotional factors may be influencing current scores, and the potential for some higher functioning may exist.

For the WRAT-IV, claimant's scores displayed a second-grade-level in Word Reading 63, Spelling (65), and Math 58, and a fourth-grade level in Sentence Comprehension 71. Dr. Ratto noted: "These findings are somewhat lower than [claimant's] ability as measured by the WAIS-IV and suggest the presence of an additional learning disorder, especially in math skills." Ultimately, Dr. Ratto observed that "[s]cores found today are similar to findings on a past assessment performed in 2015. Overall, today's results are consistent with [claimant's] history of intellectual disability with the presence of some limited strengths." Dr. Ratto made the following diagnoses:

F70	Intellectual Disability, mild
F81	Unspecified Learning Disorder
F43.10	PTSD (by history)
F34.1	Persistent Depressive Disorder, with mixed features, mild, provisional

2018 REASSESSMENT OF ELIGIBILITY DETERMINATION

20. In or about March 2011, claimant was referred to VMRC for services, based on a diagnosis of other developmental disorder (fifth category). Seven years later, in June 2018, the VMRC Eligibility Team – including Barbara Johnson, Doctorate of Psychology, VMRC clinical psychologist, and Umber Malik, M.D., VMRC Physician – conducted a

reassessment of claimant's eligibility for services. The Eligibility Team reviewed all available medical, psychological, educational, and service-related reports and records regarding claimant. The Eligibility Team determined that claimant was no longer eligible for regional center services, because he had a specific learning disability and not an intellectual disability, finding:

[E]arly developmental history is negative for developmental disability, but rather indicative of environmental and psychiatric stressors. [Claimant] first came to the attention of GGRC at 11 years of age. Following review of available information, he was found eligible on the basis of 5th category with recommendation for reassessment prior to age 17. It should be noted that [claimant's] history is significant for abuse, psychiatric condition, learning disability, and out of home placement. Special Education qualification has included SLD, SLI, and ED. Subsequent reassessment over time continues to suggest variable cognitive scores, however, at times said scores are beyond the range of suspected developmental disability. Rather, variability in test findings appear to be the result of other exclusionary factors. Based on review of available records, [claimant] is not eligible for ongoing regional center services and earlier findings are "clearly erroneous."

REGIONAL CENTER SERVICES

Initial Eligibility

21. To be eligible for regional center services, a claimant must have a qualifying disability. Section 4512 of the Lanterman Act defines developmental disability as:

... a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual

... [t]his 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 [commonly known as the "fifth category"], but shall not include other handicapping conditions that are solely physical in nature.

22. California Code of Regulations, title 17, section 54000, identifies the following exclusions:

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result

of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

23. To prove the existence of a developmental disability within the meaning of section 4512, a claimant must also show that he/she has a "substantial disability."

Pursuant to California Code of Regulations, title 17, section 54001, subdivision (a)(2), "substantial disability" includes:

... . 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:

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

24. As set forth in Factual Finding 1, GGRC determined claimant was eligible for regional care services at age 11, based on a "diagnosis of having a condition found to be closely related to mental retardation [intellectual disability] or to require treatment similar to that required for individuals with mental retardation, with substantial impairments in the areas of self-care, learning, and self-direction [fifth category]."

Reassessments

25. Under the Lanterman Act, regional centers may reassess consumers at any time, but a clearly erroneous finding must be made to discontinue services. Specifically, section 4643.5, subdivision (b), states:

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.

26. On June 13, 2018, VMRC issued a Notice of Proposed Action denying claimant continued eligibility for regional center services. VMRC stated its reason for action as:

Claimant does not have a condition similar to an intellectual disability according to the Mason standard and does not require treatment similar to a person with an intellectual disability, according to the Samantha C. standard. Claimant's condition is diagnosed as emotional disturbance due to psychiatric conditions (exclusionary condition), with co-occurring learning disability negating a finding of an intellectual disability or condition similar. Claimant requires treatment for his psychiatric conditions and learning disorders. A comprehensive reassessment of claimant's condition shows clear and convincing evidence claimant does not have a developmental disability in accordance with WIC 4512(a), when examining all of claimant's records as a whole. The regional center's prior finding of a developmental disability in claimant's case is clearly erroneous.

27. On June 25, 2018, claimant filed a Fair Hearing Request. On July 19, 2018, an informal fair hearing was held. On September 5, 2018, VMRC affirmed the Eligibility Team's findings. This hearing followed.

CLAIMANT'S ELIGIBILITY – FIFTH CATEGORY

28. In addressing eligibility under the fifth category, the Court in *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1129, stated, in part:

... 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.

29. Fifth category eligibility determinations begin with a finding of global deficits in intellectual functioning. In *Samantha C. v. State Department of Developmental Services*, (2014) 185 Cal.App.4th 1462, the court confirmed that eligibility under the fifth category can be established in one of two ways: (1) a person may have a disabling condition closely related to intellectual disability; or, (2) a person may have a disabling condition requiring treatment similar to that of a person with intellectual disability. (*Id.* at p. 1492.)

CLAIMANT IS NOT INTELLECTUALLY DISABLED

30. At hearing, Drs. Lukeroth and Johnson testified persuasively that claimant is not intellectually disabled, nor did he have a condition similar to intellectual disability prior to age 18. Instead, claimant had an SLD and multiple mental health conditions. Dr. Lukeroth is a VRMC vendor with 30 years of experience assessing individuals with developmental disabilities. Dr. Johnson, a VMRC psychologist since 2007, 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 thousands of eligibility reviews.

Drs. Lukeroth and Johnson made substantially similar findings, pointing to the same assessment scores, and drawing the same conclusion: that claimant has a SLD and multiple mental health conditions. Together, Drs. Lukeroth and Johnson made the following conclusions:

- a. First, claimant is of average intelligence. According to Dr. Johnson, average intelligence stabilizes between ages six and nine. At ages seven and 10, claimant had average cognitive test results: in 2006, claimant's TAP-3 scores included a Low Average Cohesion Index of 83. In 2009, his TAPS-3 scores ranged from Low Average to Average with a Phonological Index 80, Cohesion Index 93, and Overall Index 86, and WRAML-2 scores including Verbal Memory 91 (Average), Visual Memory 79 (Borderline), Attention/Concentration 85 (Low Average), and General Memory 80 (Low Average).
- b. Second, claimant's cognitive testing repeatedly revealed an SLD, which does not qualify as a "developmental disability." (See, Cal. Code of Regs., tit. 17, § 54000, subd. (c)(2).) An SLD exists when a significant discrepancy between ability and achievement is seen on cognitive tests. Drs. Satre, Meyers, Thomas, and Ratto, all made findings noting discrepancies between claimant's overall abilities and his achievement skills. Specifically, in 2009, claimant's scores showed a 26-point discrepancy on the DAS-II (Westcoast Children's Clinic – Dr. Satre); in 2010, a 33-point discrepancy on the WRAML-2 (Alliant International University - Dr. Meyers); in 2015, a 62-point discrepancy on the WRAML-2 (Ceres Unified – Dr. Baca); and, in 2018, a 30-point discrepancy on the WAIS-IV (Dr. Ratto). In addition, at all times relevant, claimant was deemed eligible for special education because of an SLD, SLI, and/or ED.
- c. Third, claimant's decreasing and/or fluctuating cognitive test scores were a direct result of claimant's SLD and psychiatric conditions. Dr. Brulee noted

- specific deficits in visual processing causing claimant's scores to drop. Drs. Thomas, Satre, Baca, and Spivey all noted the influence of claimant's psychiatric conditions (e.g., ADHD, Depressive Disorder, PTSD, Intermittent Explosive Disorder, Reactive Attachment Disorder) on his testing performance. For example, Dr. Thomas wrote: "it is likely that [claimant's] intelligence is affected by his psychological functioning and his level of psychiatric symptomatology. This was evident in the context of the present evaluation where he tested in the Borderline range of intelligence and where his lowest score was most affected by idiosyncratic musings that led to incorrect answers." Dr. Spivey noted: "the emotional disturbances prevent concentration and learning but it is unlikely that his emotional disturbance is the cause of his cognitive impairments."
- d. Finally, claimant relies upon Dr. Ratto's diagnosis of intellectual disability to prove regional center eligibility. However, an intellectual disability is distinct from a specific learning disability; and, according to Dr. Johnson, they are mutually exclusive diagnoses. As such, a practitioner must evaluate claimant for both conditions. Dr. Ratto did not consider the diagnosis of SLD; nor did she review any prior assessments to make her findings. In addition, Dr. Ratto does not perform educational evaluations. She focuses solely on clinical evaluations, using only DSM-V diagnoses, which does not include SLD. Even still, to meet the DSM-V diagnostic criteria for intellectual disability, deficits in adaptive functioning must be directly related to intellectual impairments. In this case, claimant's adaptive functioning deficits are attributable to his mental illness and learning disabilities and not his intellectual functioning. Dr. Altschul found: "claimant has average verbal ability, comprehension, and reading. Phonological processing deficits are indicated. Academic testing scores are in the deficit range

in reading, writing, and math, however, overall expression and listening comprehension scores are average.”

Claimant Did Not Have a Disabling Condition Requiring Treatment Similar to that of a Person with Intellectual Disability

31. Under the second prong, fifth category eligibility may also be based upon a condition requiring treatment similar to that required by individuals with intellectual disability. The terms “treatment” and “services” have separate meanings under the Lanterman Act. Individuals without developmental disabilities may benefit from many of the services and supports provided to regional center consumers. Section 4512, subdivision (b) defines “services and supports” as follows:

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

32. Regional center services and supports targeted at improving or alleviating a developmental disability may be considered “treatment” of developmental disabilities. Thus, section 4512 elaborates further upon the services and supports listed in a consumer’s individual program plan as including “diagnoses, evaluation, *treatment*, personal care, day care, domiciliary care, special living arrangements, physical, occupational and speech therapy, training, education, supported and sheltered employment, mental health services

... ” (§ 4512, subd. (b) (Emphasis added).) Designating “treatment” as a separate item is a clear indication that it is not merely a synonym for services and supports.

33. Fifth category eligibility under this prong must be based upon an individual requiring “treatment” similar to individuals with intellectual disability, and not merely services. The wide range of services and supports listed under section 4512, subdivision (b), are not specific to intellectual disability. One would not need to suffer from intellectual disability, or any developmental disability, to benefit from the broad array of services and supports provided by VMRC. The plain language of the statute reveals the Legislature’s clear intent that an individual must have a condition similar to intellectual disability, or would require *treatment* that is specifically required by individuals with intellectual disability, and not any other condition, in order to be found eligible.

34. Dr. Johnson established that claimant’s treatment needs were correctly viewed within the narrower context of the services and supports needed to assist a student with an SLD (e.g., school work with less stimuli, more 1-1 adult time, repetitive tasks, tailored curriculum), or to improve psychiatric conditions (medications, counseling, hospitalizations). The fact that claimant might benefit from some of the services that could be provided by the regional center does not mean that he required treatment similar to individuals with intellectual disabilities.

35. No treatment recommendations from claimant’s medical or educational records were based on conditions closely related to intellectual disability, nor was any evidence presented that any of the recommended treatments were similar to those required for an individual with an intellectual disability (i.e., treatment recommendations included ways to address his visual processing deficits, and medication and mental health counseling was recommended to address diagnosed psychiatric conditions). Claimant’s deficits in adaptive functioning were appropriately addressed by the treatment related to mental health and learning disabilities. No persuasive evidence was presented to

demonstrate that claimant required treatment similar to that required by an individual with intellectual disability.

36. VMRC established that claimant did not have a developmental disability prior to age 18. Therefore, he was correctly deemed ineligible for regional center services on the basis of fifth category.

///

LEGAL CONCLUSIONS

1. Eligibility for regional center services is limited to those persons meeting the eligibility criteria for one of the five categories of developmental disabilities set forth in section 4512 as follows:

“Developmental disability” means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. ... [T]his 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 [commonly known as the “fifth category”], but shall not include other handicapping conditions that consist solely physical in nature.

2. To be eligible under the fifth category, an individual must: (1) have a disabling condition closely related to an intellectual disability; or, (2) have a disabling condition which requires treatment similar to that of a person with an intellectual disability.

(*Samantha C. v. State Department of Developmental Services*, (2014) 185 Cal.App.4th 1462, 1492.) Conditions which are solely learning disabilities do not constitute a developmental disability. (Cal. Code Regs., tit. 17, § 54000, subd. (c)(2).)

3. As set forth in Factual Findings 30 through 36, the evidence did not establish that claimant is intellectually disabled, has a condition closely related to an intellectual disability, or requires treatment similar to that required for an individual with an intellectual disability. Rather, cognitive testing revealed that claimant is of average intelligence. Although claimant was diagnosed with a specific learning disability and multiple mental health conditions, none of these qualify as a developmental disability under the Lanterman Act. (Cal. Code of Regs., tit. 17, § 54000, subd. (c)(2).)

4. Claimant contends that he exhibits deficits or impairments in his adaptive functioning, is impaired by these limitations, and would benefit from regional center services. However, regional center services are limited to those individuals meeting the stated eligibility criteria. The evidence did not prove that claimant has impairments that result from a qualifying condition which originated and constituted a substantial disability before the age of 18.

5. Claimant failed to prove that he has a substantially disabling developmental disability as defined by the Lanterman Act. He is therefore not eligible for regional center services and supports at this time.

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: May 1, 2019

ERIN R. KOCH-GOODMA
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).)