

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

REGIONAL CENTER OF THE EAST BAY,

Service Agency.

OAH No. 2016120891

DECISION

This matter was heard before Karen Reichmann, Administrative Law Judge, State of California, Office of Administrative Hearings, on February 12, 2018, in San Leandro, California.

Fair Hearing Specialist Mary Dugan represented the Regional Center of the East Bay, the service agency.

Claimant was represented by his mother.

The record closed, and the matter was submitted for decision on February 12, 2018.

## ISSUE

Is claimant eligible for regional center services because he has intellectual disability, or has a condition that is closely related to intellectual disability or that requires treatment similar to that required for individuals with intellectual disability<sup>1</sup>?

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## FACTUAL FINDINGS

### INTRODUCTION

1. Claimant was born in 1980 and is currently 38 years old. He has never been a regional center client.

2. Claimant's mother submitted a request for regional center assessment to the Regional Center of the East Bay (RCEB). Following a social assessment and a review of available documents, a multidisciplinary team determined that Claimant had not established that he has a developmental disability. On November 15, 2016, RCEB issued a Notice of Proposed Action concluding that Claimant is not eligible for services. Claimant filed a Fair Hearing Request on December 20, 2016. An informal meeting was held on January 18, 2017, at which Claimant's family agreed to provide additional

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<sup>1</sup> Eligibility based on a condition that is closely related to intellectual disability or that requires treatment similar to that required for individuals with intellectual disability is commonly referred to as the "fifth category."

documentation. After reviewing additional documentation, RCEB adhered to its position that Claimant does not have a developmental disability and is not eligible for services.

#### DIAGNOSTIC CRITERIA FOR INTELLECTUAL DISABILITY

3. The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, (DSM-5), sets forth the diagnostic criteria for Intellectual Disability as follows:

Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following three criteria must be met:

- A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.
- B. Deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.
- C. Onset of intellectual and adaptive deficits during the developmental period.

#### MEDICAL AND SCHOOL RECORDS

4. In February 1995, when he was 15 years old, Claimant was admitted to CPC Walnut Creek Hospital for an involuntary psychiatric hospitalization, due to suicidal

ideation. His stay lasted 11 days. The discharge summary was written by Morton Neril, M.D., notes that Claimant reported daily marijuana use for the prior three years and that his attendance at school had been poor. Claimant was diagnosed with depression and substance abuse. Claimant is described as having been oppositional, defiant, depressed, hostile, and surly during his hospitalization. Dr. Neril noted that "Psychological testing was done by Dr. Howard Friedman who felt that his intellectual functioning was at a borderline level, a verbal I.Q. of 78, performance I.Q. of 69 and full scale I.Q. 71." Upon discharge, continued substance abuse treatment and individual and family therapy were recommended.

5. A document which appears to be a report regarding claimant's school progress in on-site education during the 1995 hospitalization includes the following teacher comments:

[Claimant] exhibited little or no motivation to participate in our school program. His educational assessment indicate[s] an approximate two year lag in skill development & this generally corresponds to [Claimant's] reported change in school involvement. Alternative educational settings might be considered, such as ROP or work experience programs. It was apparent [Claimant] could benefit from extensive one-to-one opportunities in order for him to operate independently with some degree of success.

6. Claimant's high school transcript reflects all failing grades in January 1995, the period of his hospitalization. In February 1995, Claimant transferred from Castro Valley High School to Redwood Opportunity School. In 1996, he attended school in

Minnesota. He returned to Castro Valley in 1997 and was placed in an independent study program.

7. In February 1997, psychologist Nidhi Singh performed an evaluation of Claimant on behalf of the Castro Valley Unified School District. Claimant was 17 years and one month old. Dr. Singh noted that Claimant had attended two out-of-state residential drug rehabilitation programs in 1996. At the time of testing, Claimant was "currently not in school."

Dr. Singh administered an IQ test. Claimant's Verbal IQ score was 92, his Performance IQ was 80, and his Full Scale IQ was 84. She noted that he put forth a good effort during testing. Dr. Singh described Claimant's overall intellectual functioning as "in the low average range" and commented that "it is unclear at this time of testing how [much] of an impact has been made on these scores, by [Claimant's] frequent school moves, not having and not wearing his glasses, and drug abuse. Additionally it is also not clear how long [Claimant] has been drug free." Dr. Singh concluded that Claimant "will most probably need small group instruction to help build his basic academic skills."

8. In January 1999, Claimant completed high school and earned his diploma through special education independent study, with the assistance of a one-on-one special education teacher.

9. Claimant was admitted to John George Psychiatric Hospital in 1998, at age 18. He was diagnosed with Bipolar disorder, amphetamine abuse, and history of sniffing inhalants.

10. Psychologist Richard Streifer, Ph.D., performed a neurocognitive evaluation of Claimant at Kaiser Permanente in March 2002, when Claimant was 22 years old. Dr. Streifer assessed Claimant's intellectual functioning and noted that Claimant "obtains a Verbal IQ of 86 and Performance IQ of 76. His Full Scale IQ of 79 is exceeded by 92 percent of the general population; it falls at the upper limit of the Borderline range of

intellectual functioning." Dr. Streifer concluded that Claimant demonstrated cognitive deficits, but that given the lack of information, it could not be known whether these deficits could be attributed to Claimant's history of substance abuse.

11. On a "Physician's/Medical Officer's Statement of Patient's Capability to Manage Benefits" that was submitted to the Social Services Administration in 2002, psychiatrist Robert Streett, M.D., checked the box labeled "No" to indicate that Claimant is not capable of managing or directing the management of benefits in his best interest. Dr. Streett wrote, "Borderline intellectual functioning (IQ 86) compromised by chronic psychotic illness." Claimant's mother believes that Dr. Streett wrote "IQ 86" in error because she is not aware of any IQ testing that yielded that figure. She suggested that perhaps Dr. Streett mistakenly used the Verbal IQ score from Dr. Streifer's results discussed in Finding 10.

12. Kaiser Permanente medical records established that since at least age 26, Claimant has been diagnosed and treated for schizophrenia/schizoaffective disorder and attention deficit hyperactivity disorder.

13. Psychologist Zoe Collins, Psy.D., performed an evaluation of Claimant's adaptive functioning on October 2017, when Claimant was 37 years old. Her evaluation consisted of direct behavioral observations and the administration of the Vineland Adaptive Behavior Scales – Third Edition. Dr. Collins wrote that Claimant achieved very low scores, especially in the Socialization domain. She concluded that Claimant "shows marked delays in adaptive functioning" and that he "is at a risk for exploitation and will struggle to function daily at an age-expected developmental level across the areas of daily living, vocation, socialization, and communication." Dr. Collins added that "speculation about the etiology of these adaptive deficits is outside the scope of this evaluation."

14. In a letter to RCEB dated November 29, 2013, Robert M. Wilk, Ed.D., wrote that he treated Claimant from 1992 to 1995, when Claimant was 12 to 15 years old. Dr. Wilk no longer has records from this time period. Dr. Wilk stated:

I do recall that [Claimant] had a developmental disability (intellectual). He had borderline intellectual functioning (in today's terminology, cognitive impairment). [Claimant] was easily overwhelmed by complex verbal information and this cognitive impairment (intellectual disability) created social dysfunction. [Claimant] had substantial handicaps in areas of communication and learning.

[Claimant] experienced extreme difficulties in school. Due to those difficulties he struggled tremendously, did not want to attend classes and eventually he was placed in Special Education with a Special Day Class teacher. I trust this letter will suffice for the qualification process. ...

Although [Claimant] developed a serious mental illness in his early 20's, his development[al] disability and cognitive impairment occurred prior to this mental illness as stated above.

#### ELIGIBILITY DETERMINATION

15. Staff physician Janice Garvey, M.D., a Board-certified neurologist, was on the multidisciplinary intake assessment team. She has worked for RCEB since 2001 and has been involved in thousands of intake assessments.

Dr. Garvey explained that individuals with intellectual disability will typically fail to meet developmental milestones at an early age. Concerns will usually arise by the time the individual is about eight years old. No documentation regarding Claimant's early development was provided to RCEB. She noted that the letter of Dr. Wilk makes no mention of Claimant's substance abuse and that no medical records were included. In her opinion this letter was a letter of "advocacy."

Dr. Garvey believes that the Castro Valley Unified School District's evaluation, done when Claimant was 17, is the most reliable for purposes of determining whether he satisfies the criteria for intellectual disability. She noted that his IQ score was above the eligibility level, and that Claimant's performance could have been impaired by his history of drug use.

Dr. Garvey is skeptical of the 1995 IQ test which was performed during Claimant's hospitalization in Walnut Creek. She explained that there is no report by the psychologist who administered the test and that the records from the physician and onsite teacher from that hospitalization reflect that Claimant refused to participate in school and was oppositional. This suggests that Claimant might not have given a good effort during IQ testing. The circumstances surrounding this IQ test undermines its validity. She noted that he ultimately needed special education services, but that this would not be unexpected given that he missed a lot of school while he was being treated for substance abuse.

Dr. Garvey did not find the 2002 Kaiser evaluation as probative as the 1997 school district evaluation because it took place when Claimant was age 22, after the developmental period and after many years of drug abuse and psychiatric illness, which can impair cognitive functioning.



Dr. Garvey does not dispute that Claimant is currently significantly impaired in adaptive functioning and needs support, but believes his deficits are due to severe mental illness and his history of substance abuse.

Dr. Garvey also considered whether Claimant had satisfied eligibility requirements under the fifth category. She did not think so because there was no objective evidence of delays or early educational intervention establishing a qualifying condition during the developmental period.

16. Staff psychologist Monica Li, Ph.D., was also on the intake assessment team. Dr. Li has worked at RCEB for 14 years.

Dr. Li concurred with Dr. Garvey that the IQ test from 1997 is the most reliable. Claimant obtained a Full Scale IQ of 84 at this time. Dr. Li explained that intellectual disability occurs in about one percent of the population and that these individuals generally have an IQ score below the range of 65-75. To establish intellectual disability, there must be cognitive and functional deficits onset prior to age 18, and there must be a direct connection between the low adaptive functioning and low cognitive functioning.

Dr. Li agreed that Claimant does not have a developmental disability within the definition of the Lanterman Act and related regulations. She noted that there was no diagnosis of intellectual disability in any medical records. Claimant also has been diagnosed with ADD/ADHD, which can affect one's adaptive functioning. Dr. Li noted that early substance abuse can impact school success and can cause cognitive impairments. Schizoaffective disorder can also cause cognitive impairments.

Dr. Li concluded that Claimant's adaptive difficulties are related to substance abuse and mental illness and not due to a developmental disability.

#### CLAIMANT'S EVIDENCE

17. Claimant's mother and grandmother both testified in support of Claimant's application for eligibility. Claimant's mother is a registered nurse who has

worked with regional center clients. Claimant's mother asserted that Claimant was not diagnosed with psychiatric illness until adulthood, after he had already demonstrated cognitive impairments. She pointed out that the DSM-5 notes that patients with intellectual disability have an increased likelihood of mental disorders. The fact that Claimant ultimately developed a mental illness does not prove that he does not have intellectual disability.

Claimant's mother related that Claimant was a challenging child and that difficulties emerged around the pre-school age. She recalled that he was late in toilet-training and continued to wet his bed until his 20s. Claimant was identified as having behavioral issues at school and the family did not seek IQ testing because they did not recognize that there were cognitive issues. She now believes that the diagnoses of ADD was incorrect and noted that Claimant was prescribed medications for ADD, but discontinued because there was no effect. Claimant's mother believes that Claimant suffered from intellectual disability since early childhood, and that his frustration with his cognitive limitations caused his behavioral problems.

Claimant's mother testified that Claimant's former psychiatrist, Dr. Streett, told her that the 2002 IQ score would be a reliable indicator of his intellectual functioning at age 18. Claimant's mother argued that there is a five point margin of error for IQ scores, and if five points are subtracted from Claimant's scores, he falls within the range of intellectual disability. Claimant's mother contended that even if Claimant does not satisfy the definition of intellectual disability, he has satisfied the requirements under the fifth category because of his borderline IQ and severely low adaptive functioning.

Claimant's mother described the many difficulties Claimant has endured. He has been unsuccessful in many realms. He was unable to get a driver's license and has not been able to maintain employment. He lives with his mother, who manages his food,

laundry, medications, and finances. Claimant cannot function without constant reminders and he needs things to be explained to him "one step at a time."

Claimant's mother described Claimant as inflexible, unable to think abstractly, impulsive, repetitive, defensive, and lacking the ability to see the consequences of his actions. She firmly believes him to be substantially disabled in self-care, learning, mobility, self-direction, independent living, and economic self-sufficiency. She believes Claimant could benefit greatly from regional center supports and services, including vocational training.

18. Claimant's grandmother related that Claimant always needed extra help throughout childhood. He struggled in school. She has tried unsuccessfully to teach him to cook some simple meals. Claimant needs to have information given to him in small chunks. He briefly worked in the family's construction business, but was forgetful and had difficulty staying on task. He attempted to attend a day program but this was not successful. He also attempted a vocational program without success. Unlike his peers, he is unable to use computers or other technology.

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## LEGAL CONCLUSIONS

1. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4500 et seq.) The purpose of the Act is to rectify the problem of inadequate treatment and services for the developmentally disabled, and to enable developmentally disabled individuals to lead independent and productive lives in the least restrictive setting possible. (Welf. & Inst. Code, §§ 4501, 4502; *Association for Retarded Citizens v. Department of*

*Developmental Services* (1985) 38 Cal.3d 384.) The Act is a remedial statute; as such it must be interpreted broadly. (*California State Restaurant Association v. Whitlow* (1976) 58 Cal.App.3d 340, 347.)

2. A developmental disability is a "disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual." The term "developmental disability" includes intellectual disability and also includes what is referred to as the fifth category, which consists of "disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability." (Welf. & Inst. Code, § 4512, subd. (a).) Handicapping conditions which are solely physical in nature are excluded. Conditions that are solely psychiatric in nature, or solely learning disabilities, are not considered developmental disabilities. (Cal. Code Regs., tit. 17, § 54000, subd. (c)(1)(2).) However, if a learning disability or mental illness co-exist with a developmental disability, regional center eligibility is not precluded.

Pursuant to section 4512, subdivision (l), the term "substantial disability" is defined as "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."

3. It is Claimant's burden to prove that he has a developmental disability, as that term is defined in the Act.

4. Claimant's family contends that he qualifies for services due to an intellectual disability or under the fifth category. RCEB's experts persuasively explained their conclusion that Claimant has not established that he is intellectually disabled. He

has never been diagnosed with intellectual disability. The letter of Dr. Wilk is given little weight because he did not testify at the hearing, did not include medical records, and made no mention of Claimant's history of substance abuse. IQ testing at age 15 produced the lowest score, but it occurred during an involuntary hospitalization during which Claimant was described as defiant and oppositional. The IQ test at age 17 produced a result in the low average range. The examiner noted that Claimant put forth a good effort, but also noted that Claimant's drug abuse and school moves could have had a negative effect on his score. IQ testing at age 22 produced a result in the upper limit of borderline intellectual functioning. This test, however, is less probative than the test at age 17 in light of Claimant's ongoing substance abuse and the onset of serious mental illness.

RCEB's experts were also persuasive in explaining their conclusion that Claimant is not developmentally disabled based on the fifth category criteria. The evidence did not establish that Claimant suffered from a disabling condition prior to the age of 18 that is closely related to intellectual disability or required treatment similar to that required by individuals with an intellectual disability. Childhood medical records reflect only diagnoses of substance abuse and depression. The most reliable IQ test shows him in the low average range. Claimant was provided with special education services in high school, but it was not established that these services were similar to those required by the intellectually disabled. Rather, it appeared that Claimant's struggles in school stemmed largely from his substance abuse and poor attendance.

It is undisputed that at present, Claimant is substantially disabled. Regional center services are limited to individuals who meet the eligibility requirements established by law. Claimant's severely impaired adaptive functioning is most likely caused by his serious mental illness. Because there has been insufficient evidence that Claimant has a

condition similar to intellectual disability or that he has treatment needs similar to the intellectually disabled, his appeal must be denied.

## ORDER

The appeal of Claimant is denied. Claimant is not eligible for regional center services.

DATED:

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KAREN REICHMANN

Administrative Law Judge

Office of Administrative Hearings

## NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.