

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████)
)
Petitioner,)
)
vs.) Case No. ██████████
)
AGENCY FOR PERSONS WITH)
DISABILITIES,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on ██████████ by video teleconference with connecting sites in ██████████ Florida, before Errol H. Powell, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: ██████████
██████████
██████████

For Respondent: Kathleen M. Savor, Esquire
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STATEMENT OF THE ISSUE

The issue for determination is whether Petitioner has a developmental disability, as defined in Section 393.063, Florida Statutes.

PRELIMINARY STATEMENT

By letter dated December 18, 2008, the Agency For Persons With Disabilities (APD), notified ██████ that ██████ application to participate in the Developmental Disabilities Home and Community-Based Services (HCBS) Waiver or the Family and Supported Living (FSL) Waiver was denied on the basis that ██████ does not have, or has not been determined to have, a developmental disability, as defined in Section 393, Florida Statutes. By letter dated December 31, 2008, the denial by APD was challenged and a hearing was requested. On January 26, 2009, this matter was referred to the Division of Administrative Hearings.

The final hearing was originally scheduled for May 5, 2009. On ██████'s request, the hearing was continued and re-scheduled. At hearing, ██████ presented the testimony of two witnesses and 13 exhibits (Petitioner's Exhibits numbered 1 through 13) entered into evidence. APD presented the testimony of two witnesses and entered 16 exhibits (Respondent's Exhibits numbered 1 through 16) into evidence.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for ten days following the filing of the transcript. The Transcript, consisting of one volume, was filed on June 24, 2009. The parties timely filed their post-hearing submissions, which were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At the time of hearing, [REDACTED] was [REDACTED] years of age.
2. On or about November 5, 2008, an application, dated September 25, 2008, on behalf of [REDACTED]. was made with APD for HCBS or FSL Waiver services on the basis of a developmental disability. [REDACTED]. was, and is, a [REDACTED] in the court system, who has been placed in the custody of the [REDACTED]

[REDACTED] At all times material hereto, [REDACTED] has been in the custody of [REDACTED]

3. An applicant must meet the criteria set forth in Section 393.063, Florida Statutes (2009), which provides in pertinent part:

(9) "Developmental disability" means a disorder or syndrome that is attributable to retardation, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely.

* * *

(31) "Retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. "Significantly subaverage general intellectual functioning," for the purpose of this definition, means performance which is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the agency. "Adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. (emphasis in original)

4. No dispute exists that [REDACTED] satisfies the requirement of being less than [REDACTED] years of age.

5. [REDACTED] application was referred to APD's Eligibility Committee (Committee). The Committee's chairperson, Alfonso Valcarcel, testified at hearing. In addition to the application, the Committee reviewed several documents, including a psychological re-evaluation of [REDACTED] performed by the Miami-Dade County Public Schools on May 6, 2008; and reports of psychological evaluations performed by [REDACTED] Ph.D., on [REDACTED] dated December 16, 2003 (conducted on December 10, 2003), dated September 17, 2004 (conducted on September 15, 2004), dated May 23, 2006 (conducted on March 31, 2006), dated May 10, 2007 (conducted on May 4, 2007), and dated

September 4, 2008 (conducted on August 21, 2008). [REDACTED]

testified at hearing.

6. Further, the Committee referred [REDACTED] to [REDACTED] Ph.D., a licensed psychologist in the State of Florida, to determine whether [REDACTED] was suffering from mental retardation.

[REDACTED] testified at hearing.

7. As to [REDACTED] psychological evaluation report dated December 16, 2003, [REDACTED] was eight years of age at the time of the evaluation. [REDACTED] administered the Wechsler Intelligence Scale for Children Third Edition (WISC-III). [REDACTED] obtained the following scores on the WISC-III: Verbal IQ score of 54; Performance (non-verbal) IQ score of 52; and a Full Scale IQ score of 49, indicating that [REDACTED]'s intellectual functioning fell in the Deficient range.

8. Further, [REDACTED] made no findings as to mental retardation, but recommended the re-testing of [REDACTED] in one year for mental retardation. [REDACTED] testified at hearing that no such findings were made because the Vineland test, which measures adaptive functioning, was also required to be administered in order to make a finding of mental retardation and because [REDACTED] was not given the authority to address the issue of mental retardation in the referral of [REDACTED] him [REDACTED] testimony is found to be credible.

9. Additionally, [REDACTED] determined that [REDACTED] was suffering from a moderate level of Attention Deficit Hyperactivity Disorder (ADHD) and suggested an examination by a psychiatrist for consideration of medication.

10. As to [REDACTED] psychological evaluation reports dated September 17, 2004, May 23, 2006, May 10, 2007, and September 4, 2008, [REDACTED] did not administer the WISC-III. [REDACTED] administered the Wechsler Abbreviated Scale of Intelligence, which is a screener test, not a test to measure the full IQ.

11. Also, in [REDACTED] report dated September 17, 2004, [REDACTED] indicated that [REDACTED] was suffering from, among other things, depression and ADHD.

12. The [REDACTED] County Public Schools had determined [REDACTED] was eligible for exceptional student education (ESE) on the basis of Educable Mentally Handicapped (EMH) disability. Regarding the psychological re-evaluation by the [REDACTED] County Public Schools, [REDACTED] School Psychologist, conducted the evaluation on May 6, 2008.

[REDACTED] administered the Reynolds Intellectual Assessment Scales (RIAS) and the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) to measure L. M.'s then current intellectual functioning. At the time of the re-evaluation, [REDACTED]. was at the age of [REDACTED] years, 3 months. On the RIAS, [REDACTED] intellectual skills fell within the Significantly Below

Average range of efficiency, receiving a Composite Index of 63; [REDACTED] verbal, crystallized cognitive skills fell within the Significantly Below Average range; and [REDACTED] fluid, nonverbal skills were of Moderately Below Average quality. On the WISC-IV, L. M. obtained the following scores: Verbal Comprehension Index score of 57; Perceptual Reasoning Index Score of 63; Working Memory Index score of 50; Processing Speed Index score of 70; and a Full Scale IQ score of 51, indicating that [REDACTED] intellectual functioning fell within the Moderate range of Mental Handicap.

13. On November 19, 2008, [REDACTED] performed a psychological evaluation of [REDACTED] to "explore [REDACTED] level of mental retardation and adaptive functioning." At the time of [REDACTED] evaluation [REDACTED] had been diagnosed, among other diagnoses, with ADHD and depression. The test instrument administered for the intellectual examination was the Stanford-Binet Intelligence Scales-Fifth Edition (SB-V). The test administered for adaptive functioning was the Vineland-II Adaptive Behavior Scales (Vineland-II), which was completed with the help of [REDACTED] foster mother.

14. [REDACTED] testified that he administered the SB-V, instead of the WISC, because the WISC had been administered several times to [REDACTED] previously and, therefore, [REDACTED]

([REDACTED] did not want [REDACTED] familiarity with the test to affect [REDACTED] scores.

15. On the SB-V, L. M. obtained the following scores: Nonverbal IQ score of 74; Verbal IQ score of 75; and a Full Scale IQ score of 75. All the scores fall within the Borderline Impaired of Delayed range of intellectual functioning. Further, [REDACTED] indicated that [REDACTED]'s fluid reasoning skills were in the Borderline Impaired of Delayed range, while [REDACTED] crystallized knowledge was in the Low Average level; and [REDACTED] visual-spatial processing skills were in the Low Average range. [REDACTED] determined that, clinically, [REDACTED]'s intelligence level was in the low average range.

16. On the Vineland-II, [REDACTED] obtained the following standard scores: Communication Domain-64; Daily Living Skills Domain-68; Socialization Domain-64; and Adaptive Behavior Composite-64.

[REDACTED]'s scores were in the mentally deficient range. Deficits in adaptive behavior were demonstrated. However, [REDACTED] determined and testified that [REDACTED]'s scores were likely impacted by emotional factors, such as abuse and being in foster care for several years.

17. In making a diagnosis as to mental retardation, in addition to conducting the tests and interviewing [REDACTED]. and his foster parent, [REDACTED] reviewed the information submitted to the Committee. [REDACTED] diagnosed [REDACTED] as Borderline and,

therefore, determined that [REDACTED] did not meet the requirements of the statutory definition of retardation.

18. Dr. Garcia's testimony and report are found to be credible.

19. The Committee determined that [REDACTED] did not suffer from a developmental disability, as statutorily defined, and denied [REDACTED]'s application. By letter dated December 18, 2008, APD notified [REDACTED] of the denial.

20. Subsequently, a psychological assessment was conducted by [REDACTED] Psy.D., a licensed psychologist in the State of Florida, on February 12, 2009. [REDACTED] was referred to [REDACTED] by the CHARLEE Program of [REDACTED] County for an assessment to determine whether [REDACTED] met the "criteria for developmental disability pursuant to mental retardation." [REDACTED] issued a report dated February 15, 2009. At the time of [REDACTED] assessment, [REDACTED] was [REDACTED] years of age. [REDACTED] also testified at hearing.

21. [REDACTED] administered the WISC-IV to measure [REDACTED]'s intelligence. On the WISC-IV, L. M. obtained the following scores: Verbal Comprehension Index score of 69; Perceptual Reasoning Index Score of 61; Working Memory Index score of 80; Processing Speed Index score of 80; and a Full Scale Composite score of 65, indicating that [REDACTED] intellectual functioning fell within the extremely low range.

22. The test administered by [REDACTED] for adaptive functioning was the Vineland Adaptive Behavior Scales-Second Edition¹ (Vineland-II), which was completed with the help of [REDACTED]'s foster mother. On the Vineland-II, L. M. obtained the following standard scores: Communication Skills-61; Daily Living Skills-69; Socialization-65; and Adaptive Behavior Composite-64. [REDACTED]'s scores were in the low adaptive level range. Deficits in adaptive behavior were demonstrated.

23. Dr. Klein determined that, based upon the tests, interviews with [REDACTED] and [REDACTED] foster parent, and review of [REDACTED] reports and the [REDACTED] County Public Schools Re-evaluation report, [REDACTED] meet the criteria for mild mental retardation.

24. At hearing, [REDACTED] testified that [REDACTED] met the statutory criteria for retardation, addressing each requirement, and that, therefore, [REDACTED] met the statutory criteria for retardation.

25. Also, at hearing, [REDACTED] testified that [REDACTED]'s emotional factors, referred to by [REDACTED] in his report, did not affect [REDACTED]'s scores during her testing of [REDACTED]. She further testified that, if she had observed that [REDACTED] was having a concentration problem, she would have terminated the testing and re-administered the test at a later date or indicated in her report that no score could be obtained due to certain conditions, indicating those conditions. [REDACTED]

testimony is found to be credible.

26. Additionally, ██████ testified that, as to ██████ scores over time being "scattered," it was not unusual for individuals with mental retardation and does occur occasionally. Her testimony is found to be credible.

27. As to ██████'s emotional factors impacting ██████'s test scores, ██████ testimony is found to be more credible than ██████ testimony. Hence, ██████ report and testimony is found to be more credible than ██████ report and testimony.

28. Evaluations or assessments of ██████'s intelligence, using the WISC, were conducted at the ages of eight, 13, and 14. Evaluations or assessments of his adaptive functioning, using the Vineland-II, were conducted at the ages of 13 and 14.

29. ██████ report was submitted to the Committee for its review as new information. The Committee reviewed her report in conjunction with the other information it (the Committee) had previously reviewed in making its (the Committee's) original decision. Again, the Committee determined that ██████ did not meet the statutory requirements for mental retardation and, therefore, did not meet the statutory requirements for a developmental disability.

30. The evidence demonstrates that, on a standardized

intelligence test, ██████'s performance is two or more standard deviations from the mean score. Further, the evidence demonstrates that ██████ concurrently has deficits in adaptive behavior. As a result, the evidence demonstrates that ██████ suffers from a disorder or syndrome that is attributable to retardation as defined in Section 393.063, Florida Statutes.

31. Furthermore, the evidence demonstrates that ██████ retardation has manifested itself in a disorder or syndrome which constitutes a substantial hardship and that the substantial hardship may be reasonably expected to continue indefinitely.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2009).

33. Section 393.065, Florida Statutes (2008), provides in pertinent part:

(3) The agency shall notify each applicant, in writing, of its eligibility decision. Any applicant determined by the agency to be ineligible for developmental services has the right to appeal this decision pursuant to ss. 120.569 and 120.57.

34. These proceedings are de novo. § 120.57(1)(k), Fla.

Stat. (2009).

35. The standard of proof is the preponderance of evidence. § 120.57(1)(j), Fla. Stat. (2009).

36. The general rule is that "the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal." Florida Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981). [REDACTED] has the ultimate burden of proof by establishing through a preponderance of evidence that [REDACTED] is eligible for services under the Developmental Disabilities Program. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Antel v. Department of Professional Regulation, Florida Real Estate Commission, 522 So. 2d 1056, 1058 (Fla. 5th DCA 1988); J. W. C. Company, Inc., supra.; § 120.57(1)(j), Fla. Stat. (2009).

37. [REDACTED] must meet the statutory criteria set forth in Section 393.063, Florida Statutes (2009). See Webb v. Florida Department of Children and Family Services, 939 So. 2d 1128 (Fla. 4th DCA 2006).

38. Webb, supra, set forth the analysis for determining whether an applicant meets the statutory criteria for a developmental disability attributable to retardation:

The criteria for determining retardation

are: 1) performance which is two or more standard deviations from the mean score on a standardized intelligence test; 2) existing concurrently with deficits in adaptive behavior; and 3) manifested before age 18.

At 1186.

The criteria for determining retardation required only that the applicant obtain a qualifying score prior to [REDACTED] eighteenth birthday and concurrently exhibit deficits in adaptive behavior. . . .

Where the applicant achieves a qualifying score more than two deviations below the mean score on a standardized intelligence test prior to [REDACTED] eighteenth birthday, which Webb did on several other tests, then the hearing officer must determine whether, concurrently, deficits in adaptive behavior were observed, and the officer must make a finding of fact on this issue. Next, the officer must determine whether the retardation manifests itself in a disorder or syndrome which constitutes a substantial handicap. Finally, the officer must determine whether the substantial handicap can reasonably be expected to continue indefinitely.

In Webb's case, the hearing officer failed to make the necessary findings, given the legal standard set forth in the statute. The evidence was undisputed that on other tests Webb had scored in a range to meet the first criteria for retardation, and the hearing officer made no findings that the prior tests were invalid. Therefore, the hearing officer should have gone to the next criteria, namely determining whether [REDACTED] also exhibited deficits in adaptive behavior. The hearing officer failed to make any finding on this factor or on the remaining factors, including whether the disorder or

syndrome may be reasonably expected to continue indefinitely.

At 1187.

39. Florida Administrative Code Rule 65G-4.012 provides in pertinent part:

(1) For the purposes of Chapters 393 and 916, F.S., the Stanford-Binet Intelligence Scale or the Wechsler Adult & Infant Intelligence Scale, administered by or under the direct supervision of a psychologist or school psychologist licensed under Chapter 490, F.S., shall be used to determine mental retardation and the level of intellectual functioning.

(2) Notwithstanding subsection (1), if, given the condition of the individual to be tested, the Stanford-Binet Intelligence Scale or the Wechsler Adult & Infant Intelligence Scale are not valid and reliable as determined by the person authorized to administer such tests as specified in subsection (1), an alternative test or evaluation procedure, administered and interpreted in conformance with instructions provided by the producer of the tests or evaluation materials, may be used. The results of the testing or evaluation must include reference to published validity and reliability data for the specified test or evaluation procedure.

40. The evidence demonstrates that [REDACTED] is currently under the age of 18.

41. The evidence demonstrates that [REDACTED] scored two or more standard deviations from the mean score on the WISC, a standardized intelligence test.

42. The evidence demonstrates that [REDACTED]. has deficits in adaptive behavior existing concurrently with his intelligence performance.

43. Therefore, the evidence demonstrates that [REDACTED] meets the requirements of retardation as defined in Section 393.063(31), Florida Statutes (2009).

44. The evidence demonstrates that [REDACTED]'s retardation has manifested itself in a disorder or syndrome which constitutes a substantial hardship.

45. The evidence demonstrates that the substantial hardship may be reasonably expected to continue indefinitely.

46. Hence, the evidence demonstrates that [REDACTED] meets the requirements of a developmental disability on the basis of retardation, as set forth in Section 393.063(9), Florida Statutes (2009).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Agency for Persons with Disabilities enter a final order granting [REDACTED] application to participate in the Developmental Disabilities Home and Community-Based Services Waiver or the Family and Supported Living Waiver program under the Developmental Disabilities Program.

DONE AND ENTERED this 21st day of July, 2009, in
Tallahassee, Leon County, Florida.

S

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of July, 2009.

ENDNOTE

^{1/} An inference is drawn that the Vineland-II Adaptive Behavior Scales and the Vineland Adaptive Behavior Scales-Second Edition are the same test instrument.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.