

Reasons for Decision:

Order #AP1920-0025

On <date removed>, the appellant filed an appeal of the decision of the Director, River East Transcona to deny them eligibility for the Community Living disABILITY Services (CldS) program. The letter from the Director communicating the denial was dated <date removed>.

The appellant was represented at the hearing by an advocate, parents, and a representative from Continuity Care.

In order to be eligible for services under CLdS, an individual must be deemed to be a vulnerable person under *The Vulnerable Persons Living with a Mental Disability Act* ("the Act").

Under the *Act*, a vulnerable person is defined as:

*"an adult living with a mental disability who is in need of assistance to meet his other basic needs with regard to personal care or management of his or her property."*¹¹

The *Act* defines "mental disability" as:

*"Significantly impaired intellectual functioning existing concurrently with impaired adaptive behavior and manifested prior to the age of 18 years, but excludes a mental disability due exclusively to a mental disorder as defined in Section 1 of The Mental Health Act."*¹¹

On <date removed>, an application was made to CldS on the appellant's behalf by a staff member from <school name removed>. The application included a modified psychological assessment completed by <psychologist name removed> on <date removed>.

After the application was submitted, the appellant was assessed by <psychologist name removed>. In their psychological assessment, <psychologist name removed> did not conclude that the appellant presented with significant impairments in intellectual functioning. <psychologist name removed> did state that the appellant adaptive functioning was in the Extremely Low range, although they suggested the results should be viewed with caution.

On <date removed>, the Department sent the appellant a letter advising them that they had been determined to be ineligible for the program because they did not have significantly impaired intellectual functioning. This decision by the Department led to the appeal filed by the appellant.

At the outset of the hearing, the Department conceded that the appellant had significantly impaired adaptive functioning, and that their impairments were manifested before the age of 18.

The appellant's advocate asserted that they were an adult living with a mental disability, who required support to meet their daily needs. The advocate requested that the Board find the appellant eligible for the CLdS program, consistent with the intent of the *Act*

The advocate stated the appellant was a <age removed> <gender removed> living half-time with each parent. They have been diagnosed with <diagnosis removed>. The appellant has self-reported <condition removed>.

The advocate stated the appellant graduated from <school name removed> in <date removed>. While they did not have direct funding for an educational assistant, the school provided shared educational assistant support from another student's funding. The appellant required accommodations throughout school.

After graduating from high school, the appellant attended <school name removed> for a <course name removed> course. While they passed the course, they struggled, and required help from their parents. The advocate noted the appellant's career goal is to be a <text removed>.

When the appellant turned <age removed>, their parents sought support services for them. They were denied eligibility by the Employment Assistance for Persons with Disabilities program (formerly marketAbilities) because their cognitive functioning was too low. However, the program enrolled them five months later.

The appellant began an employment placement with Connect Employment Services in <date removed>, funded by the Employment Assistance for Persons with Disabilities program. The appellant's advocate noted Connect Employment Services' eligibility criteria require participants to have mental disability according to the *Act*.

The appellant's advocate stated the appellant volunteered at <business name removed> while waiting for services from the Employment Assistance for Persons with Disabilities program. Prior to working at <business name removed>, they had little work experience.

The advocate asserted that the appellant had difficulty counting money. While they like working at food preparation, they cannot count more than \$50.

The advocate described the difficulties the appellant had establishing a programming routine with Connect Employment Services. While Connect stated the appellant frequently cancelled appointments, the appellant's parents cited a number of difficulties they had with Connect service approach. As a result of the appellant's difficulties, Connect supported moving them to the CLdS program.

The advocate noted the Department did not explain why the appellant did not meet the criteria for significantly impaired intellectual functioning. The advocate disagreed with the Department's assertion that the intellectual functioning and adaptive functioning tests must be met separately. The advocate asserted that the tests must be read together, and that the appellant qualifies for CLdS when their intellectual and adaptive functioning are evaluated jointly.

The appellant's advocate stated the appellant has acquired a well-developed vocabulary through their love of reading and writing, but their vocabulary causes people to overestimate their ability to understand and execute instructions. The appellant can learn new tasks by repetition, but cannot generalize existing skills to execute new tasks.

The advocate expressed concern about the appellant's safety, noting they are highly social, caring, obedient and compliant. These attributes place them at risk of being taken advantage of. The advocate described an incident at the appellant's volunteer placement, when the parent of another volunteer made the appellant's responsible for monitoring that volunteer. The appellant missed shifts because of the stress caused by that role, which led their job coaches to believe they were unmotivated.

The appellant cannot read tone or facial expression, so communication must be literal, clear and direct. Any information that needs to be remembered must be communicated in small segments.

The appellant experiences difficulties with emotional regulation and mental health. They are taking medication for <condition removed>, while their <condition removed> is managed using their <text removed> strategy, including lists and reminders.

The Continuity Care representative told the Board they have known the appellant since <year removed>. They stated that the appellant was enrolled with Children's Disability Services up to age 10. At that time, their file was supposed to be transferred to the Society of Manitobans with Disabilities, but was closed without explanation. The Continuity Care representative stated that, despite the appellant's realistic goals for the future, they were not ready for independent living.

The appellant's parent recounted the appellant's developmental history from an early age. They told the Board that some of the appellant's issues were recognized early in their life, particularly their motor planning deficits and their <diagnosis removed>. They did not receive funding for supports up to Grade 3, so they did not have any adaptations in school.

The appellant's parent stated the appellant did receive funding in Grade 3, but they paid for all supports after that. The appellant's parent told the Board that Children's Disability Services workers attempted to meet with them after they moved to <location removed>, but the parents were too busy.

With respect to the intellectual tests, the advocate noted <psychologist name removed> did not say why the appellant did not meet the criteria, and did not provide a Full Scale IQ (FSIQ) score. <Psychologist name removed> did state that the appellant's FSIQ was in the Borderline range, which represents a score between <text removed>.

The advocate observed that the assessment completed by <psychologist name removed> in <year removed> determined that the appellant's FSIQ was in the Low Average range. However, <psychologist name removed> suggested that the appellant guessed on many of the questions in one of the domain tests, and that the correctness of their answers was not randomly distributed. The psychologist suggested their FSIQ would fall in the Borderline range if it was corrected for the effects of guessing.

The advocate stated the DSM-V places an increased emphasis on adaptive behaviour, and contemplates a person with an FSIQ greater than 70 meeting the definition of intellectual disability if their adaptive functioning deficits are severe enough. The advocate asserted that the Department was still using DSM-IV criteria, noting the Assessment of Intellectual Functioning form completed by <psychologist name removed> was based on DSM-IV.

The advocate stated that the testing determined that the appellant's FSIQ was in the Borderline range, that they have significant deficits in two domains, and that their adaptive functioning was in the Extremely Low range. The fact that the appellant has strengths in certain areas does not indicate that they do not meet the criteria in the *Act*.

The advocate noted that the Board has ruled in previous decisions that intellectual and adaptive functioning must be considered jointly. The Board has also recognized that test scores have a confidence interval associated with them, and has recognized FSIQ scores up to 75 may be eligible for CLdS if adaptive functioning deficits are severe enough. The advocate asserted that the Board should infer an FSIQ of <text removed>, or the mid-point of the Borderline range, in the absence of a specific score from <psychologist name removed>.

The advocate submitted that, given the appellant's case history as recounted by their family, the Board should determine that their adaptive functioning deficits are so severe that their actual functioning is comparable to a person with an FSIQ of <text removed> or lower.

In its presentation to the Board, the Department stated the CLdS program does not provide services to a broad range of adults experiencing difficulties living in the

community. Services are provided only to those people who are eligible according to the criteria specified in the *Act*.

The Department stated the extent of mental disability is determined by criteria set out in the Diagnostic and Statistical Manual (DSM). The Department reviewed the wording of the DSM, noting its close correspondence with the *Act*.

The Department noted the terms used for the eligibility criteria contained in the *Act* arose from the field of psychology, and the Board should give significant weight to what psychologists think those terms mean. While the Board can exercise its discretion, its starting point should be the analysis conducted by a registered psychologist.

When evaluating an application for CLdS services, the Department relies on psychometric testing, adaptive behaviour tests, and the judgement of the registered psychologist as expressed in the psychological assessment report and the Assessment of Intellectual Functioning form.

The Department conceded that the appellant had impaired adaptive functioning, and that their impairments were manifested prior to age <age removed>. However, the Department asserted that the appellant did not have significantly impaired intellectual functioning, and was therefore not a disabled person under the *Act*.

The Department acknowledged that DSM-V is now the standard for determining intellectual disability. While it is true to an extent that there is less emphasis on IQ scores in DSM-V, DSM-V still clearly requires evidence of intellectual impairment. The Department stated intellectual impairment is generally indicated when the Full Scale IQ (FSIQ) score is two standard deviations or more from the mean. That standard translates to an FSIQ of 70.

The Department noted two psychological assessments were completed and made available to it.

The first assessment was completed by <psychologist name removed> in <year removed>, when the appellant was <age removed> years old. The psychologist concluded the appellant had an FSIQ score in the Low Average range. The psychologist asserted their expected FSIQ would be in the Borderline range if the results were corrected for guessing. The appellant's Verbal Comprehension was in the <text removed> range, their Perceptual Reasoning was in the <text removed> range, their Working Memory was in the <text removed> range, and their Processing Speed was in the <text removed> range. The psychologist qualified the results because of their concern about variability.

The second assessment was completed by <psychologist name removed> in <year removed>, when the appellant was <age removed> years old. The psychologist concluded the appellant had an FSIQ score in the Borderline range. The appellant's Verbal Comprehension was in the <text removed> range, their Perceptual Reasoning

was in the <text removed> range, and their Working Memory and their Processing Speed were in the <text removed> range. In their report, the psychologist concluded the appellant did not have significantly impaired intellectual functioning.

<psychologist name removed> completed an Assessment of Intellectual Functioning Form. The psychologist stated the appellant did not meet the DSM-IV criteria for intellectual impairment, and that their performance was not consistent with significant impairments in intellectual functioning. The psychologist expressed no reservations about the results.

The Department submitted that the appellant's impaired adaptive behaviour was not sufficient to make them eligible under the *Act*. While the DSM-V does not provide guidance on how far above 70 an individual's FSIQ can be while still meeting the criteria for an intellectual disability, the manual does state that clinical judgement is necessary. The Department asserted that the psychologist exercised their clinical judgement, and determined the appellant did not meet the criteria.

The Department noted that none of the evidence submitted by the appellant, including the two psychological assessments, a report from the Manitoba Adolescent Treatment Centre, or the eligibility criteria for Connect Employment Services, demonstrated that the appellant has been diagnosed with significant intellectual impairment. The appellant has been diagnosed with a number of conditions that affect their adaptive functioning, but none of these conditions qualifies as an intellectual disability.

The Board accepts the evidence of the appellant's family that they struggled throughout their school years, both academically and socially. The Board notes that, despite their struggles, their schools did not provide educational assistants or modified programming. The appellant graduated on time from a regular program, and subsequently took a community college course online.

While the appellant's advocate asserts that the psychologist did not provide an FSIQ score, the Board notes that the psychologist reported that the FSIQ score fell in the sixth percentile. The sixth percentile corresponds to an FSIQ of 77. The Board also notes that the appellant's core reasoning score (Verbal Comprehension and Perceptual Reasoning) falls in the <text removed>.

The Board finds, on a balance of probabilities, that the appellant's FSIQ is in the high end of the Borderline range, outside the confidence interval for an FSIQ of <text removed>.

The Board recognizes that the appellant has significant adaptive behaviour problems. On a balance of probabilities, the Board finds that the appellant's adaptive behaviour problems do not result in an actual functioning comparable to someone with a FSIQ of 70 or less. They do not meet the definition of mental disability contained in *The Vulnerable Persons Living with a Mental Disability Act*. The Board confirms the decision

of the Director, and the appeal is dismissed.

For a number of years, the Board has acted in its advisory role to the Minister by raising concerns about the gap in services to adults who do not fit the criteria for the CLdS program but have extremely diminished ability to function on their own.

Furthermore, the Department has told the Board at many hearings in the past year that it is reviewing its eligibility policy in light of changes to the *Diagnostic and Statistical Manual*, but program applicants continue to be subject to a policy the Department has described as outdated.

In recent appeals, the Department appears to have reverted to its earlier position that significant impairments in intellectual functioning must be manifested separately from significant impairments in adaptive functioning. The Board reiterates its determination that intellectual functioning and adaptive functioning must be evaluated together when intellectual functioning is marginally higher than an FSIQ of 70.

The Board is concerned that it continues to hear appeals from individuals who require intensive supports but do not qualify for the CIdS program. The Board empathizes with the families of these individuals, recognizing the physical, emotional and financial burden they bear when these individuals cannot access services. The Board will continue to raise this issue, and urges the Minister to take steps to address the gap in service.

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