

**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

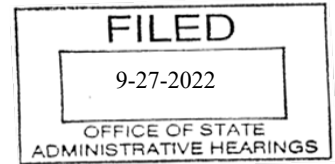
C [REDACTED] W [REDACTED],
Petitioners,

v.

**DEPT. OF BEHAVIORAL HEALTH &
DEVELOPMENT DISABILITIES,**
Respondent.

Docket No.: [REDACTED]
[REDACTED]-OSAH-DBHDD-NOWCOMP-65-
Woodard

Agency Reference No.: [REDACTED]



FINAL DECISION

I. INTRODUCTION

Petitioner C [REDACTED] W [REDACTED], by and through her mother, C [REDACTED] B [REDACTED], submitted an application for New Options Waiver/Comprehensive Supports (“NOW/COMP”) services with the Department of Behavioral Health and Developmental Disabilities (“Department” or “Respondent”). The Department denied Petitioner’s application, and she appeals. An evidentiary hearing took place before the undersigned Administrative Law Judge on August 16, 2022 at Decatur County Courthouse, Bainbridge, Georgia. Petitioner’s mother, C [REDACTED] B [REDACTED], appeared and represented her interests. Respondent was represented by Ashlee Thompson, Attorney at Law, Atlanta. For the reasons stated below, the Department’s denial of Petitioner’s application is **AFFIRMED**.

II. FINDINGS OF FACT

Personal and Medical History

1.

Petitioner is twenty years old. She was born four to six weeks prematurely, and was jaundiced and cyanotic at birth. She reportedly stayed in the NICU for nearly a month following birth because her

lungs were not fully developed. Petitioner was delayed in toilet training and speaking (her first words came at age two, and she was speaking in simple sentences at age four), but met all other developmental milestones within normal time limits. (Exhibits R-6, R-15). Petitioner qualified for special education services in 2002 in the category of Significant Developmental Delay, and the Speech/Language Impaired designation was added to her Individualized Education Plan (IEP) in 2005. As of 2019, Petitioner qualified for special education services under the designations of Emotional Behavioral Disturbance and Other Health Impairment. (Exhibits R-9, R-15). Petitioner's most recent psychological diagnoses are autism spectrum disorder, with intellectual impairment, without language impairment, level 1; Generalized Anxiety Disorder; and Schizoaffective Disorder, Bipolar Type. (Exhibit R-15). Petitioner has also previously been diagnosed with ADHD, Bipolar 1, and disruptive mood dysregulation disorder. (Exhibits R-6, R-7, and R-8).

2.

Petitioner has also suffered from various medical issues. She had a cleft nose at birth which has required at least twelve surgeries to correct. She has also dealt with acid reflux, which required two surgeries at age one. Petitioner had ear tubes placed in elementary school for chronic ear infections. She also had her throat stretched in middle school, because her throat was not expanding properly as she grew. She had several seizures one day in fifth grade, but medical testing did not reveal any problems and she has not had any known seizure activity since. (Exhibit R-15; Testimony of C [REDACTED] B [REDACTED]).

2022 Application for NOW/COMP Services

3.

In 2022,¹ Petitioner, through her mother, submitted an application to Respondent requesting intellectual/developmental disability (I/DD) services. (Exhibit R-1).

4.

Dr. Kelly Weaver is a licensed psychologist employed by Respondent. She reviewed Petitioner's application and supporting materials to determine whether Petitioner qualified for I/DD services. Dr. Weaver completed her report based on a review of the following: a psychological evaluation completed by Joe Garmon, Ph.D., on December 17, 2007; a psychological evaluation completed Dr. Garmon on May 6, 2011; a psychological evaluation completed by Dr. Garmon on February 12, 2015; an IEP prepared by ██████ County Schools on September 7, 2017; a psychological evaluation by Carrie Milhous, L.P.C., on October 2, 2018; and a psychological evaluation by Kate Harrison, Ph.D., on February 7, 2020. Dr. Weaver also administered the Childhood Autism Rating Scale-2, High Functioning Version, and conducted a virtual Clinical Interview with Petitioner. Dr. Weaver concluded that Petitioner does not have a qualifying diagnosis and thus does not meet the eligibility criteria for I/DD services. Specifically, she found that Petitioner did not meet the eligibility criteria for autism or an intellectual disability, and that Petitioner's mental health diagnoses do not qualify as eligible conditions. (Exhibit R-2).

5.

On April 11, 2022, Dr. Susan M. Massey-Connolly, a licensed psychologist, performed a Second

¹ The application does not indicate the date it was submitted. However, the application's initial review by the Department took place on March 10, 2022, and the application was denied on April 21, 2022. (Exhibits R-2, R-4). Therefore, the application was likely submitted in early 2022.

Opinion Review of Records Report on behalf of Respondent to determine whether Petitioner qualified for I/DD services. Based upon her review of the records, Dr. Massey-Connolly concluded that Petitioner does not meet the eligibility criteria for I/DD services. (Exhibit R-3).

Psychological Testing

6.

In 2007, at age five, Petitioner's mother, C [REDACTED] B [REDACTED], brought Petitioner to Dr. Joe Garmon, Ph.D., for a psychological evaluation. At that visit, Ms. B [REDACTED] reported that Petitioner was struggling with inattention, distractibility, hyperactivity, low frustration tolerance, and some aggression. Ms. B [REDACTED] was concerned that Petitioner had bipolar disorder. She said of Petitioner: "[s]he's very caring and loving. In the same instance she can be mean and hateful." While Petitioner had kept to herself earlier in preschool, at this point she had started to become interested in other children. Her ability to dress, feed, and bathe herself were within normal limits. Problems with sleep were also mentioned. In his evaluation, Dr. Garmon described Petitioner as "friendly and outgoing" and said that she was "talking nonstop." Dr. Garmon administered the Weschler Preschool and Primary Scale of Intelligence-Third Edition. Petitioner received a Verbal IQ score of 97 and a Performance IQ of 82, for a Full Scale IQ of 91, which is in the average range. Dr. Garmon diagnosed Petitioner with bipolar I disorder, childhood onset and ADHD, combined type. (Exhibit R-6). Following this visit, Petitioner began receiving counseling services from Dr. Garmon. (Exhibit R-7).

7.

In 2011, when Petitioner was nine years old, Dr. Garmon evaluated her for a second time. She was reportedly continuing to experience difficulties with distractibility, hyperactivity, low frustration tolerance, and oppositional behavior. As part of his evaluation, Dr. Garmon reviewed a report completed by Petitioner's school earlier that year. While the name of the test was not stated, Petitioner reportedly

received a Composite Intelligence Index of 94, which Dr. Garmon said was consistent with her results from 2007. Dr. Garmon administered the Scales of Independent Behavior-Revised (Short Form). Petitioner received a score of 54, which falls within the 0.1st percentile. Dr. Garmon observed that age-level tasks would likely be “very difficult” for Petitioner and stated that her age equivalence is five years and five months. Dr. Garmon had Ms. B [REDACTED] complete the Asperger’s Syndrome Diagnostic Scale. Petitioner’s score of 60 fell in the Very Unlikely range for Asperger’s. Dr. Garmon noted this was “consistent with other markers.” Ms. B [REDACTED] also completed the Gilliam Autism Rating Scale-Second Edition (GARS-2). Petitioner received a score of 78, indicating a possible probability of autism. At the end of this visit, Petitioner received diagnoses of bipolar I disorder; ADHD, combined type; and disruptive mood regulation disorder. (Exhibit R-7).

8.

Petitioner received a third evaluation from Dr. Garmon in 2015, at age twelve. Based on the report, Petitioner’s difficulties with social issues and academic functioning had continued to deteriorate. Additionally, Petitioner reported issues with certain textures and stated that “I’m picky about where I put my things.” Her mannerisms were described as “awkward.” While Petitioner’s grandmother said that she “wants to be invisible at school,” at the evaluation Dr. Garmon described her as “very talkative.” Dr. Garmon administered the Wechsler Intelligence Scale for Children-First Edition. Petitioner received a Full Scale IQ of 62, which would fall in the Mildly Impaired Range. However, Dr. Garmon did not think that accurately reflected her abilities, noting that she did not put in an appropriate effort during testing—she gave up quickly, paid poor attention to detail, and was easily distracted. Also at the 2015 visit, Petitioner’s grandmother completed the Asperger’s Syndrome Diagnostic Scale. Petitioner’s score of 120 fell within the “Very Likely” range for Asperger’s. Dr. Garmon ultimately rendered diagnoses of Rule Out Autism; ADHD, combined type; and disruptive mood dysregulation disorder. (Exhibit R-8).

9.

Petitioner initially qualified for special education services in 2002 under the designation for Significant Developmental Delay, but the Speech/Language Impaired designation was added to her IEP in 2005. According to her IEP for the 2017-2018 school year, Petitioner was qualified under Emotional/Behavioral Disorder and Other Health Impairment. The notes in that IEP also stated that Petitioner had her “ups and downs” but that she was “open” and “makes friends easily.” (Exhibits R-9, R-15).

10.

Petitioner first applied for I/DD services in March 2018, at age sixteen. Dr. Christine M. Renaud, Ph.D. evaluated her application, and reviewed the three evaluations by Dr. Garmon, Petitioner’s 2017 Thomas County IEP, and her 2017-2018 report card from [REDACTED] School. Dr. Renaud concluded that Petitioner did not qualify for I/DD services. She noted that her test scores did not indicate an intellectual disability, and that ADHD and bipolar disorder were not closely related developmental disabilities. She found that the data regarding Autism was “inconsistent” and did not support a diagnosis of autism. She also noted that the low adaptive scores were likely caused by Petitioner’s emotional and behavioral difficulties. (Exhibit R-10).

11.

Petitioner presented for an evaluation by Carrie Milhouse, LPC, at Mosaic Psychological Services in October 2018, at age sixteen. The evaluation was requested because of increased anxiety and depression. She also reported auditory hallucinations for the first time. She began therapy with Ms. Milhous that continued at least May 2021. Progress notes indicate that therapy was helping Petitioner with her anxiety. (Exhibit R-12).

12.

Petitioner was evaluated by Dr. Kate Harrison, Ph.D., on February 7, 2020, at age seventeen. Ms. B■■■■ reported that Petitioner experienced attention problems, social communication deficits, stereotypic/repetitive behaviors, situational anxiety, and rapid mood swings. Petitioner described academic difficulties and mood issues but said that her social relationships were good. She also reported that she had been hearing voices since middle school. During her interview with Petitioner, Dr. Harrison observed that while Petitioner spontaneously offered information about her thoughts, interests, and experiences, she did not always have “reciprocal intent with her overture.” She concluded that “Petitioner’s conversation skills appeared mostly one-sided.” She also noted that Petitioner’s verbal fluency was “somewhat jerky.” (Exhibit R-15).

13.

Dr. Harrison administered the Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV). Petitioner received a Full-Scale IQ of 70, which is borderline. Dr. Harrison also administered the Adaptive Behavior Assessment System, Third Edition (ABAS-3), which was completed both by Ms. B■■■■ and Petitioner’s teacher, Mr. Trammell. According to Ms. B■■■■’s ratings, Petitioner’s adaptive skills were in the below average to extremely low ranges. However, Mr. Trammell’s ratings indicated that Petitioner’s skills were in the average to low ranges, indicating skills within or somewhat below what would be expected for her age. Dr. Harrison also administered the Autism Spectrum Rating Scales. Ms. B■■■■’s ratings indicated elevated to very elevated scores across all scales, suggesting that Petitioner exhibited many characteristics similar to those with Autism. Mr. Trammell’s responses indicated slightly elevated to very elevated scores on several scales. Ultimately, Dr. Harrison diagnosed Petitioner with Autism Spectrum Disorder, Generalized Anxiety Disorder, and Schizoaffective Disorder, Bipolar Type.

She stated that Petitioner’s symptoms did not indicate ADHD, as her symptoms could be accounted for by her mania. (Exhibit R-15).

NOW/COMP Application Review and Eligibility Determination

14.

As part of the process for determining Petitioner’s eligibility for NOW/COMP services, Dr. Weaver interviewed Petitioner. She reported that Petitioner communicated normally throughout the interview. While Petitioner told Dr. Weaver that she sometimes rocks repetitively back and forth, she did not demonstrate that behavior during the interview. Dr. Weaver did not administer any test of intellectual functioning but she estimated that Petitioner’s IQ was in the low average to average range based on her vocabulary and “general verbal presentation.” Additionally, Dr. Weaver administered the Childhood Autism Rating Scale, Second Edition, High Functioning Version—Petitioner received a score of 20, indicating minimal to no symptoms of Autism. (Exhibit R-2).

15.

Dr. Weaver concluded that Petitioner did not meet the eligibility criteria for I/DD services. First, she found that Petitioner did not meet the criteria for an intellectual disability. Her measured intellectual functioning at age five was at the low end of average, which was consistent with what Dr. Weaver observed. She noted that the IQ scores Petitioner received at ages twelve and seventeen were significantly lower than at age five, and such a dramatic decline is rarely seen absent some sort of “neurological insult” to the brain. Instead, Dr. Weaver suggested that those declines were more likely a reflection of Petitioner’s worsening behavioral and emotional issues. And even if Petitioner’s 2020 IQ results were accurate, borderline intellectual functioning, the diagnosis she received at that time, is not an eligible condition. (Exhibit R-2; Testimony of Dr. Weaver).

16.

Dr. Weaver also did not find that Petitioner had a qualifying closely related condition. She noted that the evaluations provided inconsistent diagnoses but nevertheless concluded that the “bulk of the information presented,” combined with her own evaluation, did not indicate the presence of autism or adaptive deficits. Petitioner did not receive a diagnosis of autism at either of her two evaluations conducted at ages five and nine, and the characteristics described in those reports were more consistent with the diagnoses she did receive (ADHD and bipolar disorder) than with autism. Dr. Weaver said that none of these evaluations indicated that the “core” characteristics of autism were present. And while Petitioner was given a rule-out of autism at age twelve, the described autism characteristics—sensory sensitivity, awkward mannerisms, and mild motor-skill difficulties—do not alone indicate autism and are consistent with Petitioner’s other diagnoses (awkward mannerisms and motor skills are common among children with ADHD). Dr. Weaver also noted that Petitioner did not exhibit any characteristics of autism during her interview. The only noted autistic traits—rocking to self-soothe, sensitivity to taste and touch—were based on self-report. Given that Petitioner did not display autistic traits at her evaluations before age seventeen or at the evaluation by Dr. Weaver, Dr. Weaver found that the evidence did not present a “consistent picture” of a person with autism. (Exhibit R-2; Testimony of Dr. Weaver).

17.

Dr. Weaver also noted that an adaptive measure was not performed at any of Petitioner’s first three evaluations, as would be expected when “significant adaptive deficits associated with a developmental disability are suspected.” The first evaluation that included a measure of adaptive functioning occurred when Petitioner was seventeen, and the results were inconsistent: the parent report indicated significant adaptive deficits in four skill areas, while the teacher report did not indicate significant adaptive deficits in any area. Dr. Weaver explained that adaptive deficits associated with a

developmental disability are present across contexts, whereas children with mental health conditions often “act out” or otherwise behave differently at home. (Exhibit R-2; Testimony of Dr. Weaver).

18.

Ms. B [REDACTED] testified on behalf of her daughter. She said that the only reason that Petitioner was able to converse normally was that she had received five years of social skills classes at school. Before that, Petitioner would not talk or answer questions without prompting, and would “hold her head down.” Ms. B [REDACTED] said she had to coach her daughter to act appropriately in social situations. She also explained that Petitioner had to use charts at home that reminded her to take her medicine, bathe, and complete other basic living tasks. She emphasized that Petitioner, at twenty, still needed to be reminded to shower, put on deodorant, and brush her teeth. (Testimony of C [REDACTED] B [REDACTED]).²

III. CONCLUSIONS OF LAW

1.

This matter concerns the denial of an application for NOW/COMP Waiver Programs participation and services. Therefore, Petitioner bears the burden of proof. (Ga. Comp. R. & Regs. 616-1-2-.07). The standard of proof is a preponderance of the evidence. (Ga. Comp. R & Regs. 616-1-2-.21).

2.

Title XIX of the Social Security Act allows states to create medical assistance plans partially funded by the federal government. (42 U.S.C. § 1396-1396v). The Department is the state agency responsible for adopting and administering Georgia’s medical assistance plans. (O.C.G.A. § 49-4-142).

² The judge observed Petitioner during the course of the hearing. She appeared to be well spoken, in control of her emotions, and appropriately responsive to questions and comments. It is likely, if not probable, that Petitioner’s performed so well at the hearing because she had her mother sitting at counsel table beside her, which provided a high level of physical and emotional support.

The NOW/COMP Waiver Programs are some of several waiver programs offered under Georgia's State Plan pursuant to 42 U.S.C. § 1396n(d) and are included in Georgia's Home and Community-Based Waiver Programs for Elderly and Disabled Individuals.

3.

A State Plan may provide for individuals who, but for the provision of home or community-based services, require the level of care provided in a hospital, nursing facility, or intermediate care facility for individuals with intellectual disabilities ("ICF/ID"). (42 U.S.C. § 1396a(a)(10)(A)(ii)(VI); 42 C.F.R. § 430.25(c)(2)).

4.

The NOW/COMP Waiver Programs are available only to those individuals who:

- A. Are categorically eligible Medicaid recipients; and
- B. Have a diagnosis of an intellectual disability and/or closely related developmental disability; and
- C. Are currently receiving the level of care provided in an ICF/ID which is reimbursable under the State Plan, and for whom home and community-based services are determined to be an appropriate alternative; or,
- D. Are likely to require the level of care provided in an ICF/ID that would be reimbursable under the State Plan in the absence of home and community-based services that are determined to be an appropriate alternative.

(Policies and Procedures for Comprehensive Supports Waiver Program (COMP) and New Options Waiver Program (NOW) General Manual § 701 or "Manual").

5.

An evaluation of an individual's eligibility for NOW/COMP services must include a psychological assessment for intellectual functioning and adaptive behavior based on individually administered, comprehensive, and standardized instruments. The psychological assessment must

document that the applicant had an intellectual disability since birth or before age 18, or another closely related condition since birth or before age 22, which requires similar services to those needed by people with an intellectual disability. (Manual § 702).

6.

A diagnosis of intellectual disability is defined by the following criteria: (1) onset before the age of 18 years; (2) significant limitations in at least one area of adaptive functioning; and (3) significantly sub-average general intellectual functioning as evidenced by an IQ score of about 70 or below. *Id.* The individual's intellectual and adaptive functioning deficits "must be consistent with a diagnosis of mental disability and not solely the result of mental/emotional disorders, neurocognitive disorders, sensory impairments, substance abuse, personality disorder[s], specific learning disabilit[ies], or attention deficit/hyperactivity disorder." *Id.*

7.

Petitioner presented insufficient evidence that her intellectual functioning was significantly sub-average. Her IQ at age five was in the average range, and although her score at age twelve indicated an intellectual disability, Dr. Garmon did not believe that result was accurate based on Petitioner's behavior during the testing. (Exhibit R-7, R-8). Moreover, Dr. Weaver indicated that such a dramatic drop in IQ score was unlikely absent some sort of neurological injury. (Testimony of Dr. Weaver). And regardless, the diagnosis Petitioner received at age seventeen, borderline intellectual functioning, does not qualify her for NOW/COMP services.

8.

Individuals who have not been diagnosed with an intellectual disability may still be eligible for the NOW/COMP Waiver Programs if they have a condition that closely relates to an intellectual

disability. Eligibility through a “Related Condition” is defined as having a diagnosis of a condition found to be closely related to an intellectual disability and attributable to: (a) severe forms of cerebral palsy or epilepsy; or (b) any other condition, other than mental illness, found to be closely related to an intellectual disability because this condition results in substantial impairment of general intellectual functioning or adaptive behavior similar to that of persons with an intellectual disability. Additionally, individuals seeking eligibility under the closely related criteria must exhibit limitations in adaptive functioning in three or more areas, and those adaptive impairments must be directly related to the developmental disability and cannot be primarily attributed to: mental/emotional disorders, sensory impairments, substance abuse, personality disorder, specific learning disability, or ADHD. (Manual § 705).

9.

In this case, the evidence on record merits the conclusion that Petitioner has previously been diagnosed with autism spectrum disorder, generalized anxiety disorder, schizoaffective disorder, ADHD, Bipolar 1, and disruptive mood dysregulation disorder. Of the above-listed diagnoses, only autism spectrum disorder is not categorized as a mental illness, and therefore potentially eligible to be considered a condition closely related to an intellectual disability.

10.

However, Petitioner’s diagnosis of autism spectrum disorder is questionable, and, even if present, would be mild and would not reach the severity requirement to result in a substantial impairment of general intellectual functioning. Further, there is insufficient evidence to conclude that Petitioner exhibited limitations in three or more areas of adaptive functioning related to her diagnosis of autism spectrum disorder. A measure of adaptive functioning administered when Petitioner was seventeen gave inconsistent results—while Ms. B ■■■ indicated that Petitioner exhibited significant adaptive deficits in

all areas, Petitioner's teacher did not identify significant adaptive deficits in any area. Adaptive deficits related to a developmental disability, according to Dr. Weaver, would be present across contexts. (Exhibits R-2, R-15; Testimony of Dr. Weaver).


11.

Based upon the evidence presented, Petitioner is not eligible to receive services under the NOW/COMP Waiver Programs because she has not been appropriately diagnosed with an intellectual disability or a condition that is closely related to an intellectual disability and does not display significantly impaired adaptive functioning.

IV. DECISION

In accordance with the foregoing Findings of Fact and Conclusions of Law, the Department's decision to deny Petitioner's application for NOW/COMP services is **AFFIRMED**.

SO ORDERED, this 27TH day of September, 2022.



M. Patrick Woodard
Administrative Law Judge

