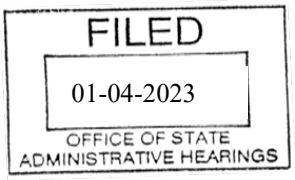
BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

J[redacted] H[redacted], **Petitioner,** **v.** **DEPT. OF BEHAVIORAL HEALTH & DEVELOPMENT DISABILITIES,** **Respondent.**	**Docket No.: [redacted]-OSAH-DBHDD-NOWCOMP-36-Schroer**



FINAL DECISION

I. INTRODUCTION

Petitioner J[redacted] H[redacted], by and through his guardians, S[redacted] and M[redacted] M[redacted], requested a hearing in response to the determination by the Department of Behavioral Health & Developmental Disabilities ("DBHDD" or "Respondent") that he is not eligible to receive services under the New Options Waiver/Comprehensive Supports Waiver Program (hereinafter "NOW/COMP Waiver Program"). The hearing commenced by video on September 30, 2022, before the undersigned administrative law judge, and concluded in person in the Grovetown Municipal Court on November 2, 2022. Petitioner was represented by Anne Kuhns, Esq., and Respondent was represented by Ashlee Thompson, Esq. and Wesley Billiot, Esq. The record remained open to allow the parties to submit closing briefs to the Court.

The basic underlying facts are, for the most part, undisputed. However, the parties disagree on the proper interpretation of such facts. After careful consideration of the evidence presented, including the testimony of the witnesses, the admitted exhibits, and the parties' legal arguments, the Court concludes that Petitioner made a prima facie case for NOW/COMP eligibility, and that Respondent failed to present sufficient probative evidence in rebuttal. Accordingly, for the reasons set forth below, Respondent's decision is hereby **REVERSED**.

II. FINDINGS OF FACT

1.

J[redacted] is twenty-five years old. He lives with his mother and stepfather, who are his legal guardians. J[redacted] was found eligible for special education services as a student with an intellectual disability at a young age and has also been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"). In multiple evaluations over the years, J[redacted] has been described as a polite, cheerful, and cooperative young man with no significant medical or behavioral issues. He attended public schools and received special education and related services until he turned 22. J[redacted] reads at a second grade level and has significant impairments in adaptive functioning in areas such as communication, daily living skills, and socialization.[1] (Testimony of Dr. Mike Daniels, Annie Hinds, Dr. Kelli Bishop; Exs. P-2, P-7, P-15, P-22, R-20.)

2.

J[redacted]'s intellectual functioning has been evaluated at least seven times since he was nine years old, using different testing protocols and for a variety of purposes. As an initial matter, the reliability of intellectual testing to determine intellectual disability depends, in part, on the qualifications of the person administering the test, whether the test instrument is standardized, and whether the results are properly scored and interpreted. For example, some professionals who administer intellectual evaluations, such as some school psychologists, are not qualified to diagnose an intellectual disability. In addition, some tests are intended only to be used as screening tools or may be based on short interviews, not standardized instruments, and as such would be insufficient to support a diagnosis of intellectual disability.[2] Finally, as Dr. Kelli Bishop, a

[1] DBHDD does not dispute that J[redacted] meets the NOW/COMP eligibility criteria for "significantly impaired adaptive functioning."

[2] See NOW/COMP Manual, Part II – Chapter 700, at Section 702 ("A psychological assessment for intellectual

licensed psychologist and DBHDD's Director of Eligibility, acknowledged, an evaluator could make errors in administering or scoring the evaluation, although she opined that such errors would likely be rare. (Testimony of Dr. Steve Johnson, Dr. Susan Massey-Connolly, Dr. Bishop; Exs. P-2, P-3, P-5, P-7, P-11, P-22.)

3.

The parties tendered documentary evidence regarding the five evaluations that were conducted before J[redacted] turned 21. Two of these evaluations – one conducted in 2006 when J[redacted] was nine and one in 2011 when he was 14 – used the Wechsler Intelligence Scale for Children IV, sometimes called the "WISC." On both WISC evaluations, J[redacted]'s composite or full-scale IQ score was in the 40s, which falls in the extremely low classification or the bottom 0.1% of children his age. In 2009, when he was 12, J[redacted] was evaluated with the Woodcock-Johnson Test of Cognitive Ability, another standardized intelligence instrument, and scored a full-scale IQ score of 48.[3] (Testimony of Dr. Mike Daniels; Exs. P-5, P-7.)

4.

The other two evaluations conducted prior to when J[redacted] turned 21 were conducted in December 2017 and February 2018. The December 2017 evaluation was conducted by Dr. Gerald Augustin, a licensed psychologist in Alpharetta, Georgia, who did a clinical interview with J[redacted] and administered the Wide Range Intelligence Test ("WRIT"), which is a screening test and is not intended to produce a comprehensive measure of intelligence. J[redacted] received a general IQ score

functioning and/or adaptive behavior is required and must be based on an individually administered, comprehensive, age-appropriate, and standardized instrument(s) administered by a professional qualified to administer the particular assessment or test." (Ex. R-6.)

[3] The record does not contain information about the qualifications of the evaluators who conducted the 2006 or 2009 evaluations, but the 2011 evaluation was performed by a school psychologist at a U.S. Department of Defense school in Heidelberg, Germany. The 2006 WISC IQ score was reported as 48, the 2009 Woodcock Johnson score was 48, and the 2011 WISC score was 46. (Exs. P-5, P-7.)

of 35 on the WRIT, which is in the very low range of intellectual functioning. In his report, Dr. Augustin opined that there was a 95% chance that J[redacted]'s "true IQ" falls between 32 and 44. A few months later, in February 2018, Dr. Kenneth Crabtree, a school psychologist with the Columbia County School System, administered the Reynolds Intellectual Assessment Scales, 2nd Edition ("RIAS" or "Reynolds"). The Reynolds, although commonly used in school settings, is not as comprehensive as the Wechsler, according to Dr. Mike Daniels, a clinical psychologist who testified on J[redacted]'s behalf. J[redacted] scored considerably higher on the Reynolds test than on his previous IQ tests. According to Dr. Crabtree, J[redacted]'s composite IQ score was 74, which is in the borderline range, although Dr. Crabtree noted a statistically significant discrepancy between J[redacted]'s sub-scores.[4] (Testimony of Dr. Bishop, Dr. Daniels; Exs. P-2, P-3, R-4.)

5.

After J[redacted] turned 22 and applied for the NOW/COMP Waiver Program, his intellectual functioning was evaluated by two additional psychologists, both using the Wechsler Adult Intelligence Scale ("WAIS-IV"). First, Dr. Susan Massey-Connolly, a DBHDD psychologist, conducted a face-to-face evaluation of J[redacted] in February 2022, when he was 24. Based on her administration of the WAIS-IV, Dr. Massey-Connolly found that J[redacted] had a full-scale IQ of 70, with scores on the subtests ranging from 70 to 79. In August 2022, after J[redacted] had turned 25, Dr. Daniels administered the WAIS-IV and obtained results similar to Dr. Massey-Connolly – a full-scale IQ of 70, with subtest scores between 63 and 81. (Testimony of Dr. Susan Massey-Connolly; Dr. Daniels; Exs. P-11, P-22.)

[4] On the RIAS's verbal intelligence subtest, J[redacted]'s score was 59, which falls in the significantly below average range, but his score on the non-verbal subtest was 95, which is within the average range. (Ex. P-3, R-4.)

6.

Drs. Massey-Connolly and Daniels both testified at the hearing, but Drs. Augustin and Crabtree did not. According to Dr. Daniels, the Wechsler instruments – the WAIS-IV for adults and the WISC for children – are the "gold standard" in intelligence testing and are the most widely-used and most thorough standardized intelligence tests. He opined, based on the recent results of his evaluation and Dr. Massey-Connolly's, as well as the earlier evaluations and records, that J[redacted]'s full-scale IQ score of 70, which is two standard deviations below the mean, is consistent with a diagnosis of intellectual disability. Further, Dr. Daniels testified that the differences in J[redacted]'s subtest scores on the WAIS-IV, with some higher and some lower than 70, did not invalidate or call into question the reliability of the full-scale score as an accurate measure of J[redacted]'s general intellectual functioning. Moreover, as to the much larger differences between the sub-scores on the Reynolds test administered by Dr. Crabtree in 2018 – which ranged from 59 to 98 – Dr. Daniels agreed with the DBHDD psychologists (Drs. Johnson and Bishop) that such differences were statistically significant and that the composite score of 74 must be viewed with caution. However, unlike the DBHDD psychologists, Dr. Daniels described the scores from the Reynolds test to be "outliers" when compared to the overall body of evidence relating to J[redacted]'s intellectual functioning from age 9 to present. According to Dr. Daniels, one can get "lost in the weeds" by focusing on the sub-tests rather than the full-scale IQ. Finally, Dr. Daniels opined that if the Reynolds full-scale IQ score is not a reliable measure, the proper response is to use a different testing instrument, not focus solely on the discrepant sub-scores. (Testimony of Dr. Daniels, Dr. Massey-Connolly, Dr. Johnson, Dr. Bishop; Exs. P3, P-11, P-22.)

7.

Conversely, the DBHDD's psychologists all opined that Dr. Crabtree's evaluation was critical in deciding whether J[redacted] truly has an intellectual disability. They testified that individuals can under-perform on intelligence testing for a variety of reasons, including anxiety, attention or motivation issues, depression, speech impairments, and mental disorders. However, it is highly unlikely that an individual can over-perform on a standardized IQ test. As Dr. Johnson put it, "you can fake bad, but you can't fake good." Consequently, both Dr. Johnson and Dr. Bishop considered Dr. Crabtree's results from the administration of the Reynolds test to be inconsistent with a diagnosis of intellectual disability because J[redacted] scored in the average range in the nonverbal portion of the test (95) and his speeded processing (97) and memory skills (98) were also average, notwithstanding his low scores in the verbal intelligence subtest (59). Dr. Bishop and Dr. Johnson also testified that DBHDD looks for "global disability" and IQ scores that are consistently below average over time to prove NOW/COMP eligibility. When there are inconsistencies or an errant average sub-score, DBHDD suspects that something other than an intellectual disability is causing the applicant's impairments.[5] (Testimony of Dr. Johnson, Dr. Bishop; Ex. R-4.)

8.

Finally, although Dr. Crabtree, Dr. Daniels, and other past evaluators noted signs of autism in evaluating J[redacted], Dr. Massey-Connolly administered the Childhood Autism Rating Scales in 2022, which revealed "minimal to no symptoms" of autism.[6] (Exs. P-4, R-4.)

---

5 Dr. Johnson testified that an applicant for the NOW/COMP Waiver Program must prove that their impairments are "solely" the result of an intellectual disability and not some other condition, liked ADHD or schizophrenia. As discussed further *infra*, the Court concludes that the Waiver does not require such proof.

6 Although autism can be "closely related" to an intellectual disability and confer NOW/COMP eligibility under certain circumstances, Petitioner has not asserted a right to eligibility under the "related condition" criteria.

III. CONCLUSIONS OF LAW

1.

Because this matter involves an application for public assistance benefits, the Petitioner bears the burden of proof. Ga. Comp. R. & Regs. 616-1-2-.07(1)(d). The standard of proof is preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).

2.

The Medicaid program was created in 1965 "for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." Miller v. Wladyslaw Estate, 547 F.3d 273, 277 (5th Cir. 2008) (quoting Harris v. McRae, 448 U.S. 297, 301 (1980)); see Social Security Act, 42 U.S.C § 1396 et seq. ("the Act"). If a state elects to participate in the Medicaid program, it must obtain approval from the Secretary of the Department of Health and Human Services ("the Secretary") of a plan specifying the programs and services it will offer using Medicaid funds. See 42 U.S.C. § 1396a; see also Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 650 (2003). Certain programs are mandatory under the Act, and other services may be funded through Medicaid "at the option of the State." 42 U.S.C. §§ 1396a(a)(10)(A)(i), 1396d(a)(1), (3), (4); see Skandalis v. Rowe, 14 F.3d 173, 175 (2d Cir. 1994); Susan J. v. Riley, 254 F.R.D. 439, 446-47 (M.D. Ala. 2008).

3.

Home and community-based services (HCBS) are optional services and may be reimbursed under a state plan if the state applies for and obtains a "waiver" from the Secretary to provide such services under section 1915(c) of the Social Security Act. See 42 U.S.C. § 1396n(c); 42 U.S.C. § 1396a(a)(10)(A)(ii)(VI); 42 C.F.R. § 430.25; Susan J., 254 F.R.D. at 446-47. "The term 'waiver' comes from Section 1915(c) of the Social Security Act, enacted in 1981, which gave the

Secretary . . . the power to waive certain requirements of the Medicaid Act." 254 F.R.D. at 446; see 42 C.F.R. § 441.300 ("Section 1915(c) of the Act permits States to offer, under a waiver of statutory requirements, an array of home and community-based services that an individual needs to avoid institutionalization."). In order to provide HCBS through a waiver program, states must "submit a proposal prepared in accordance with regulations promulgated by the Secretary." Skandalis, 14 F.3d at 176. "Once approved, the Waiver application becomes the controlling document." Susan J. v. Riley., 616 F. Supp. 2d 1219, 1240 (M.D. Ala. 2009).

4.

Georgia's Department of Community Health ("DCH"), which administers the state's Medicaid program, submitted waiver proposals that were accepted and established the NOW/COMP Waiver Programs. The accepted waiver proposal documents establish an agreement between the Centers for Medicare & Medicaid Services and the State of Georgia as to the services to be provided though the NOW/COMP Waiver Programs. The NOW/COMP Waiver Programs provide HCBS to individuals with intellectual and developmental disabilities. See Application for a § 1915(c) Home and Community-Based Services Waiver (hereinafter "Waiver").[7] DCH has delegated the day-to-day operations of the NOW/COMP Waiver Programs to DBHDD.

5.

Under the terms of the Waiver, individuals are eligible if they have an intellectual disability or a "related condition." Eligibility through diagnosis of an intellectual disability is defined in the Waiver by the following three criteria:

> (1) Age of Onset before the age of 18 years;
>
> (2) Significantly Impaired Adaptive Functioning . . .

[7] DBHDD submitted the Application with their closing brief on November 29, 2022.

> (3) Significantly Sub-average General Intellectual Functioning: Significantly sub-average general intellectual functioning defined as an intelligence quotient (IQ) of about 70 or below (approximately two standard deviations below the mean). Individuals with an IQ of 70 to 75 with appropriately measured, significant impairments to adaptive behavior that directly relates to issues of an intellectual disability may be considered as having an intellectual disability.

The Waiver also provides that "[f]indings of significant limitations in adaptive functioning and general intellectual functioning must be consistent with a diagnosis of intellectual disability and not solely the result of mental/emotional disorders, neurocognitive disorders, sensory impairments, substance abuse, personality disorder, specific learning disability, or attention-deficit/hyperactivity disorder." (Waiver, at p. 30.)

6.

The Court concludes that Petitioner met his burden to produce prima facie evidence that J[redacted] meets the three criteria for NOW/COMP eligibility. See Hyer v. Holmes & Co., 12 Ga. App. 837, 846 (1913).[8] See also Heard v. Lovett, 273 Ga. 111 (2000). There is no dispute that J[redacted]'s disability began before the age of 18 and that he has significantly impaired adaptive functioning. This case turns on whether J[redacted] meets the criteria for "significantly sub-average general intellectual functioning," as defined by the Waiver.[9] J[redacted] presented prima facie evidence that both prior to age 18 and thereafter, his general intellectual functioning was "about 70 or below." Specifically, the preponderance of the evidence proved that J[redacted]'s IQ was measured as 48 in 2006, 48 in 2009, 46 in 2011, 35 in 2017, 74 in 2018, and 70 two times in 2022. Moreover,

[8] "As soon as the party having the burden of proof shows these facts the burden of evidence, so far as he is concerned, is discharged and transferred to his adversary, and remains with him so long as the actor's original case continues to retain its prima facie quality. The position of the burden of proof in the meantime stands in no way affected …. The burden of evidence may, and frequently does, vibrate between the parties, and is a necessary and usual incident of any contest to be determined by the use of the facts, as the establishment of a prima facie case presents to a party the alternative of producing evidence to meet it or of being defeated in the action."

[9] The Waiver repeatedly references an applicant's general intellectual function, and neither the Waiver nor the NOW/COMP Manual provide standards for reviewing sub-scores.

the only score over 70 in the past sixteen years was the 74 IQ on the RIAS administered by Dr. Crabtree, which was considered suspect by all the experts, including Dr. Crabtree himself because of significant discrepancies in the sub-scores.

7.

Having weighed the testimony of the witnesses, the Court concludes that Dr. Crabtree's results were outliers, demanding additional probative evidence to prove they are reliable benchmarks that should be given equal or greater weight than the IQ scores of 70 and below reported in the six other evaluations administered between 2006 and 2022, including by DBHDD's own psychologist, Dr. Massey-Connelly, in the past year. That is, although the Court credits the testimony of Dr. Bishop and Dr. Johnson that, as a general rule, an individual cannot over-perform on an IQ test, as those witnesses admitted, other factors can lead to an inflated score, including errors in administering, calculating, or interpreting the results. Dr. Crabtree did not testify at the hearing, and his testing materials and raw data were not available for review by the agency or the Court. As Dr. Massey-Connelly's Record Form for the WAIS-IV (Exhibit R-11) demonstrates, the administrator of a standardized test must record the raw scores from each subtest, scale those scores, and then add them together to get a sum of scaled scores, which are then converted to composite scores. The opportunity for good faith mistakes in recording, calculating, and converting are, at the very least, plausible explanations for discrepant sub-scores. Of course, it is also possible, though certainly less likely, that J[redacted] consistently underperformed on each of the six other occasions he participated in standardized testing over the years, without any of those evaluators detecting his lack of attention or motivation, and that for some unknown reason, he was able to demonstrate his true intellectual abilities at age 20 during a special education evaluation on April 18, 2018.

After weighing all the evidence in the record, the Court concludes that it is more likely than not that J[redacted]'s general intellectual functioning is in the significantly sub-average range and that his IQ is about 70 or below, consistent with a diagnosis of an intellectual disability. As such, he meets the three criteria for NOW/COMP eligibility. Moreover, the Court concludes that there is insufficient evidence in the record to prove that J[redacted]'s significant adaptive functioning and general intellectual limitations are solely attributable to ADHD or any of the other disqualifying conditions listed in the Waiver. Accordingly, the Court concludes that Petitioner met his burden to prove by a preponderance of the evidence that he is eligible for the NOW/COMP Waiver Program under the criteria set forth above.

IV. DECISION

In accordance with the above Findings of Fact and Conclusions of Law, Respondent's determination that Petitioner is not eligible to receive services under the NOW/COMP Waiver Program is hereby **REVERSED**. The case is therefore **REMANDED** to the agency for further action consistent with this Final Decision.

SO ORDERED, this 4th day of January, 2023.

Kimberly W. Schroer
Administrative Law Judge