

Since August 1, 2015, the Social Services Appeal Board has published selected decisions on its website. To ensure the privacy of individuals is protected, personal information is redacted from the original Reasons for Decision before the document is posted on the website.

Recently, the Board has heard a number of complex appeals of significant issues. The Reasons for Decision are lengthy and detailed, and attempts to redact personal information render the decisions difficult to understand. The Board has agreed to post summaries of these complex decisions, rather than redacting the original Reasons for Decisions.

Summary - Reasons for Decision:

Order # AP1819-0623

In November, 2017, two parents filed an appeal on behalf of their child, who was denied eligibility for Community Living disABILITY Program (CLdS) services.

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.

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.

An application was made to CLdS on the child’s behalf. A clinical psychologist conducted a psychological assessment, and completed an Assessment of Intellectual Functioning.

The psychologist indicated reservations about the reliability of the assessment results, although the psychologist did not elaborate on the effect of these reservations. The Department referred the assessment results to an external psychologist for review, who confirmed the results of the assessment.

The Department sent the parents a letter advising that their child had been determined

to be ineligible for CLdS, because significantly impaired intellectual functioning was not present.

The letter referenced the Act, but did not expand on how the child failed to meet the criteria. The parents appealed the decision on three grounds:

1. That the child's Full Scale IQ (FSIQ) score did indicate significantly impaired intellectual functioning;
2. That even if the large difference in subtest results casts doubt on the reliability of the FSIQ score, that a correct reading of the DSM-V diagnostic criteria would take into account the child's impaired adaptive functioning in determining the extent of the intellectual disability; and
3. The Department's policy on determining whether significantly impaired intellectual functioning exists is inconsistent with the intent of the Act and the values embodied in Canadian Charter of Rights and Freedoms.

At the hearing, the Chair ruled that a hearing on the merits of the case would be held first, and then Charter arguments would be heard.

The child's advocate introduced extensive testimony from family members and support workers regarding challenges with daily living. The testimony primarily focused on the child's adaptive functioning, and provided the Board with significant detail on the intensive supervision the child requires at home, at school and in the community while performing the most basic of tasks.

The Board noted the presentation of the child's learning support teacher, who ranked this student in the top 5 of his caseload for needs and services, ahead of many who have qualified for CLdS.

The child's advocate challenged the Department's finding that the child did not have significantly impaired intellectual functioning. The current assessment determined that the child's FSIQ score was in the Extremely Low range, which indicates an IQ two standard deviations from the mean. A FSIQ score two standard deviations from the mean indicates significantly impaired intellectual functioning.

Two previously completed cognitive assessments also determined the Full Scale score was in the Extremely Low range.

The advocate challenged the Department's reliance on the DSM-IV diagnostic criteria, noting that DSM-V has been the standard since 2013. The advocate maintained the Department's reliance on DSM-IV ignored DSM-V's emphasis on reading the cognitive assessment in conjunction with the adaptive functioning assessment, particularly where the FSIQ score is marginally less than two standard deviations from the mean.

Furthermore, the advocate maintained that the Department's requirement that an assessment be current and conclusive is not contained in the Act. When the Act is

read as a whole, the legislative intent is clearly that supports be provided to vulnerable people in need. The Department's restrictive view of what constitutes a conclusive assessment has the effect of unduly denying supports to vulnerable people. The advocate stated the Board was not required to apply a policy in its decision, particularly if the policy is inconsistent with the underlying Act.

Finally, the advocate stated that external psychologist's report was only a file review, and relied primarily on DSM-IV. The external psychologist did not meet with the child, or perform any new tests. The advocate suggested that report should not be viewed as an independent assessment.

In its presentation to the Board, the Department contended that the appeal hinged on the narrow issue of whether or not the child has significantly impaired intellectual functioning, and is therefore a disabled person under the Act. The Department asserted that the Board must decide within the framework of the Act, and that questions about the fairness or effectiveness of the legislative framework are not relevant to the appeal.

The Department agreed the Board is not required to strictly apply the policy. While policies are useful in that they provide transparent, consistent and reasonable decision making, in cases of inconsistency the Board must apply the Act. Courts have ruled that administrative decision makers must have flexibility to vary policy to account for specific circumstances.

The Department asserted that there is no inconsistency between the policy and the Act. The Departmental policy is reasonable, appropriate and conforms to the legislative intent.

The Department maintained the Board must read the Act, think of what its intent is, and then look at the evidence to determine if the child meets the 3 criteria contained in the definition of mental disability:

The Department and the advocate agreed that the three criteria to be evaluated are:

1. significantly impaired intellectual functioning
2. impaired adaptive behaviour
3. manifested prior to the age of 18 years

The Department maintained that the definition of mental disability in the Act is reflective of the criteria contained in DSM-IV. The Department suggested that the wording of the Act is sufficiently close to DSM-IV that the legislative drafters must have had knowledge of the DSM-IV criteria and consciously incorporated it into the Act.

There was considerable discussion at the hearing regarding a reliance on DSM-IV rather than DSM-V. The child's advocate maintained the DSM-V was the current standard and that DSM-IV should not be used. The Department noted that DSM-V did

not exist at time the legislation was enacted. However, the Department asserted the diagnostic criteria in DSM-V are substantially similar to DSM-IV and the Act. The Department acknowledged that DSM-V places more emphasis on adaptive functioning, and that clinicians have a little more flexibility in interpreting IQ scores.

The DSM-V criteria for a significant intellectual disability are:

- A. Deficits in intellectual functions, such as reasoning, problem-solving, planning, abstract thinking, judgment, academic learning and learning from experience, and practical understanding confirmed by both clinical assessment and individualized, standardized intelligence testing.
- B. Deficits in adaptive functioning that result in failure to meet developmental and sociocultural 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, and across multiple environments, such as home, school, work, and recreation.
- C. Onset of intellectual and adaptive deficits during the developmental period

The Parties agreed that the child met the definition of intellectual disability for criteria B and C.

Neither Party disputed the child's scores on the cognitive assessments. However, there was a fundamental disagreement on both the significance of the child's subtest results relative to the FSIQ Score, and the role impaired adaptive behaviour plays in determining a significant intellectual disability.

Much of the argument at the hearing hinged on how the DSM-V criteria ought to be interpreted. At issue is the following paragraph in the DSM-V:

IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of tasks. For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score, thus, clinical judgment is needed in interpreting results.

At the hearing, the Department took a restrictionist approach to this passage. The Department argued that, although the child's FSIQ score was two standard deviations from the mean, the variability in the subtest results and the presence of physical issues rendered the FSIQ inconclusive. The Department repeatedly stated that the clinical psychologist was required by DSM-V to exercise her clinical judgment, and that a reasonable exercise of that judgment would be to downgrade the significance of the FSIQ Score.

The Department policy is the assessment information must be current and conclusive.

The policy defines conclusive as (1) providing a clinical conclusion or interpretation of the derived scores establishing that the individual presents with significantly impaired intellectual functioning; and (2) does not contain any reservations or conditions that would influence the validity of the results.

The Department maintained that, to be eligible, an individual must meet all three criteria fully and separately.

The child's advocate argued that the change from DSM-IV to DSM-V was intended to be expansionary. In other words, the purpose of increasing the emphasis on adaptive functioning was to capture those persons whose IQ scores were marginally above the threshold, but whose adaptive functioning reduced their actual functioning to a level comparable to that of individuals with a lower IQ score.

The advocate noted that the child's FSIQ score met the threshold level. Even if the variability in the subtest results introduced an element of uncertainty, the uncertainty put the child into the threshold range, where the level of adaptive functioning must be considered to determine if the level of actual functioning is comparable to that of individuals with a lower IQ score.

The Board is not persuaded by the Department's argument that all three DSM criteria must be met separately and fully for a determination of significantly impaired intellectual functioning to be made. The Board is of the view that a plain language reading of the DSM-V passage above indicates that the criteria of impaired intellectual functioning and impaired adaptive functioning must be evaluated together, as one may affect the other.

The Board agrees with the Department that the definitions in the Act are, at the very least, inspired by DSM-IV, and are on balance of probabilities based on DSM-IV. The Board does not accept that the Legislature intended to freeze the standard of practice for evaluating significant intellectual impairment at the DSM-IV standard. To do so would be to require clinical psychologists to use outdated standards when evaluating provincial clients.

The Board does not agree that the Department policy reflects the standards contained in DSM-V, and consequently the policy does not reflect the intent of the Act, particularly the intent of supporting vulnerable persons in developing their capacity. The Board finds that the criteria of impaired intellectual functioning and impaired adaptive functioning must be evaluated together.

Having determined that the two criteria must be evaluated together, the Board must then turn its attention to the specifics of this case.

All three cognitive assessments conducted over the course of the child's life found that the FSIQ score was in the Extremely Low range. The advocate noted this to the Board. The Department's response focused on the reliability of the individual assessments,

and did not address the consistency over time between the three assessments.

The Board noted the current assessment did not include the actual scores from the cognitive testing. The previous assessment gave the range of the Full Scale score as 60 – 69, implying mid-point of 65, which is well below the threshold of 70.

The Department's policy requires the assessment to be conclusive, but the Act does not define the term. In the absence of legislative definition, the Department requires the psychologist conducting the assessment to express no reservations about the reliability or validity of the results, which implies a requirement for 100% certainty. The Board notes that evidence can be conclusive without requiring 100% certainty.

The current assessment report stated that the child's FSIQ score could not be interpreted as a unitary measure of overall functioning because of the variability in the subtest scores. The Department relied heavily on this statement in finding that the child did not have significantly impaired intellectual functioning.

The clinical psychologist completed an Assessment of Intellectual Functioning Form. She stated that she had reservations about the reliability of the testing based on the child's physical limitations.

The Board noted that earlier evidence suggested that these physical limitations are correctable with adaptive aids. In response to a question from the Board about what was the nature of the clinical psychologist's reservations about these limitations, the Department stated that it only had the wording on the form to rely on and the psychologist was not present to speak to the issue.

The Board does not understand why the Department's response to a test that has reservations about functional testing issues attached to it is to deny eligibility, rather than to reconduct the test.

The Board is concerned that the Department's policy on conclusive results does not recognize that all people have widely varying strengths and weaknesses, and does not reflect the Act's structured approach to assessing and reflecting the varying capacities of vulnerable persons. A de facto requirement that all indices must be in the Extremely Low range to override concerns about variability would have the effect of denying eligibility to people near, but below, the threshold of 70.

The Board finds that the weight of the evidence presented to it indicates that the child's cognitive functioning is in the Extremely Low range. To the extent that the variability in the subtest scores creates uncertainty about the reliability of the FSIQ score, the Board notes the Department submitted no evidence suggesting that the uncertainty indicates that the child is materially above the threshold of 70. Applying the plain language reading of the DSM-V criteria, the Board finds that the child's significant intellectual deficits, combined with severe adaptive functioning deficits, means that the definition of significantly impaired intellectual functioning is met.

As the Department has conceded that the child has impaired adaptive behavior and that these deficits were manifested prior to the age 18, the Board finds that, within the framework of the Act, the child has a mental disability and is a vulnerable person eligible for services under the Act. The decision of the Director has therefore been rescinded. The Board orders that the child be deemed eligible for services under the Community Living disABILITY Program.

Charter arguments

The child's advocate raised two Charter of Rights and Freedoms issues prior to the hearing. The Department reserved its position on the requirement for notice under the Constitutional Questions Act.

The advocate submitted there were ambiguities in the Act, and that court decisions have held that any ambiguity in an act must be resolved in favor of Charter values.

Briefly, the advocate argued that any ambiguities in the Act must be resolved consistent with the Charter values of meaningful inclusion, equality, and non-discrimination that are embodied in Sections 7 and 15. The Department's policy on determining significantly impaired intellectual functioning violates the child's security of person under Section 7, and equality rights under Section 15.

Based on the advocate's argument, the Department understood that the advocate was not asking the Board to find that any part of the Act offends the Charter, and was not seeking a section 24 remedy. The Department's understanding is that the Constitutional Questions Act does not come into play under those circumstances.

The Department noted the advocate wanted the Board to use Charter values as an interpretive aid where the Act is ambiguous. The Department submitted that, while the Board must exercise its discretion in the context of Charter values, it is also bound by the Act.

The Department submitted that the Supreme Court has always treated Section 7 as a negative right, and has never placed an obligation on a government to provide programs and services to promote or maintain life, liberty or security of person.

The Department agreed that Section 15(1) embodies the values of equality and social inclusion. However, the framers of the Charter were aware that there may be unintended consequences, such as the Charter being used in reverse discrimination cases. The framers included Section 15(2), which states a program does not violate the 15(1) guarantee if a government can demonstrate that the program has an ameliorative purpose and it is targeted at a 15(1) group. The Department's position is that the CLdS program has an ameliorative purpose, targeted to a specific class of mental disability to the exclusion of others.

Having already determined that, based on the evidence, the child meets the criteria for eligibility for the CLdS program, the Board declines to rule on the Charter arguments made before it.

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