

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF DEVELOPMENTAL
DISABILITIES

M.L.,

Petitioner,

v.

Division of Developmental Disabilities,

Respondent.

ADMINISTRATIVE ACTION

FINAL AGENCY DECISION

OAL DKT. NO. HDD 01916-15

As Assistant Commissioner of the Division of Developmental Disabilities, I have reviewed the record in this matter, consisting of the Initial Decision, the OAL case file and documents in evidence. Respondent filed exceptions; Petitioner responded to those exceptions.

This matter involves the determination of M.L.'s eligibility to receive Division of Developmental Disabilities (Division) services. The Division denied M.L.'s application for eligibility on the basis of its determination that his primary diagnosis was not autism spectrum disorder, but rather, obsessive compulsive disorder and bipolar disorder, mental health conditions. The Division also determined that M.L. did not have substantial functional limitations. Petitioner, through his parents and legal guardians, appealed.

Pursuant to statute, individuals who are developmentally disabled are eligible to receive Division services. N.J.S.A. 30:6D-25(e). Developmental disability is defined, in part, as a severe, chronic disability of an individual that is attributable to a mental or physical impairment or combination of mental or physical impairments, is manifest before age 22, and is likely to continue indefinitely. N.J.A.C. 10:46-1.3. The disability must result in substantial functional limitations in three or more areas of major activities of daily living, namely: self-care; receptive and expressive language; learning; mobility; self-direction; capacity for independent living; and economic self-sufficiency. *Id.* Mental impairment is also defined by regulation. It means "impairment in cognitive, neurological, sensory, or cerebral functioning resulting from other than mental illness." *Id.*

Based upon the facts and evidence presented, the Initial Decision found that Petitioner has autism, and that autism is his primary disabling condition. Additionally, the Initial Decision concluded that M.L. met his burden of proving that he has a severe, chronic disability that is attributable to a mental impairment, was manifest before age 22 and is likely to continue indefinitely. The Initial Decision also concluded that while M.L. has psychiatric disorders, his disabilities are primarily attributable to his autism. After a review of the totality of the evidence and the record in this case, I ADOPT these findings and conclusions.

The Initial Decision concluded that M.L. is eligible for Division services because his disability results in substantial functional limitations in six major activities of daily living, namely: self-care; self-direction; capacity for independent

living; economic self-sufficiency; learning; and communication. Based upon my review of the record in this case, I MODIFY this conclusion. M.L. is eligible to receive Division services because the evidence indicates that he has a developmental disability that results in substantial functional limitations in three or more major activities of daily living. The record does not, however, indicate that M.L. is limited in either learning or communication.

As stated in Respondent's exceptions, learning focuses on a person's ability to acquire and process new information and apply that information. In this case, the facts show that M.L. attended Fairleigh Dickinson University and with certain accommodations was able to earn a degree in four years. He achieved a score of 161 on the Law School Admissions Test, which the Initial Decision acknowledges as "excellent." As noted in the Initial Decision, his "assessments revealed that cognitively, M.L. was quite high functioning." (I.D., p. 3.) M.L. has an intelligence quotient of 128, which is in the superior range. While I adopt the conclusion that M.L. is eligible for Division services, these facts, in conjunction with the record as a whole, indicate that M.L. is not substantially functionally limited in learning.

Similarly, M.L. is not substantially functionally limited in receptive and expressive language. This activity of daily living concerns a person's ability to communicate, receive information and convey his or her needs. The record in this case indicates that M.L. has good communication skills. His mother described him as "very articulate." (T. 53-15.) He was able to communicate with both the Division psychologist and the Petitioner's expert. The Division

psychologist observed M.L. communicating with his father. The intake worker indicated that she was able to communicate with him. (T. 176 to 177.) While M.L. may have difficulty with nonverbal and social cues, the record as a whole demonstrates that M.L. is able to communicate with others. He is not substantially functionally limited in this area.

The Initial Decision concluded that the Division has "denied services to M.L. based upon a standard that 'is intended to be applied generally and uniformly to all similarly situated persons,'" in violation of Metromedia v. Div. of Taxation, 97 N.J. 313 (1984). For the reasons discussed below, I REJECT this conclusion.

Specifically, the Initial Decision concluded that the Division's determination that M.L. was not substantially functionally limited in certain areas because he did not obtain a particular score on the Adaptive Behavior Assessment System (ABAS) II test amounted to rulemaking. As indicated in Respondent's exceptions, this is not a correct interpretation of the law. Moreover, this conclusion, as well as the Petitioner's response to the exceptions, does not reflect the entirety of the Division's eligibility process.

Metromedia established factors for determining if an agency action constitutes an administrative rule. *Id.* However, not all agency actions are subject to the Administrative Procedure Act's (APA) rule-making requirements. N.J. Builders Assoc. v. N.J. Dep't of Env'tl. Prot., 306 N.J. Super. 93, 100-04 (App. Div. 1997). When a State agency's internal process does not constitute rule-making, the Metromedia factors do not control. Woodland Private Study Grp.

v. State, 109 N.J. 62, 66-69 (1987). In fact, administrative agencies frequently engage in processes that lie outside the requirements of the APA. Northwest Covenant Med. Ctr. v. Fishman, 167 N.J. 123, 136, 137 (N.J. 2001). An agency's process only implicates the APA when it substantially impacts an individual's rights. Woodland, 109 N.J. at 74.

The Division's determination of whether an applicant demonstrates substantial functional limitations is part of the assessment of an individual's eligibility for services. The Division's determination of eligibility is not limited to the use of the ABAS. Indeed, the Division typically determines whether an individual is eligible for services without performing ABAS testing. In those cases where ABAS testing is utilized, it provides the psychologist and the other Intake Team professionals another tool to consider in the overall assessment.

A complete functional eligibility assessment includes the initial application process and screening, completion of the New Jersey Comprehensive Assessment Tool (NJCAT)¹, and Intake Team evaluation. Pursuant to regulation, the Intake Team consists of professionals charged with determining whether eligibility criteria have been met. N.J.A.C. 10:46. The Intake team must include an intake worker and a psychologist. On an as needed basis, a Division psychologist will perform ABAS testing to help guide the team. As noted at the outset of the Division psychologist's report in this case, she completed the ABAS for M.L. "to assist in determining if M.L. is eligible for services of the Division of Developmental Disabilities pursuant to N.J.A.C. 10:46-1.1, et seq."

¹ The NJCAT is administered by the Developmental Disabilities Planning Institute at Rutgers University. This tool assesses whether individuals are substantially functionally limited in the seven major activities of daily living.

N.J.A.C. 10:46, Determination of Eligibility, promulgated pursuant to the requirements of the Administrative Procedure Act (APA), is the Division's regulation which provides the community with notice as to the criteria for eligibility. These rules are comprehensive, setting forth the definition of developmental disability, residency requirements, requirements for Medicaid eligibility, the application and reapplication process, the determination process and the appeals process. Metromedia does not require that these rules include a specified assessment tool used to evaluate functional eligibility or the way in which the scores obtained on an assessment tool are analyzed. The rules clearly and unambiguously inform the public that a developmental disability must result in substantial functional limitations in three of seven areas.

The ABAS used by the Division psychologist scores an individual in a range from "Very Superior" to "Extremely Low." The "Extremely Low" score correlates to a scaled score of 3 or below, as indicated by the Division psychologist. Thus, this is not an "arbitrarily selected score on a test," as indicated in the Initial Decision. Moreover, the ABAS score alone is not determinative of eligibility. The ABAS scores are a factor in a larger eligibility process. For most individuals seeking to become eligible to receive Division services, ABAS scores are not part of the process. Therefore, ABAS scores alone do not substantially impact an individual's rights. The Intake Team reviews numerous documents gathered during the application process, including the results of the NJCAT and the psychologist's report. Together these factors inform the Division's determination whether an individual presents the three or

more substantial functional limitations and meets the other eligibility requirements. Therefore, the Division's use of the ABAS scoring is not rule making within the meaning of Metromedia.

I hereby MODIFY the Initial Decision consistent with the above. M.L. is functionally eligible for Division services as a result of a developmental disability that results in substantial functional limitations in three or more major activities of daily living. I REJECT the legal conclusion that respondent has violated Metromedia.

This is my Final Decision.



Elizabeth M. Shea
Assistant Commissioner
Division of Developmental Disabilities

Dated: 3/23/17