

STATE OF COLORADO
DEPARTMENT OF HUMAN SERVICES

CASE NO. DD 08-002

DECLARATORY ORDER

IN RE PETITION FOR DECLARATORY ORDER

This matter concerns the Petition for Declaratory Order submitted by The Resource Exchange (TRE) regarding the definition of the term, “developmental disability” as set forth at C.R.S. section 27-10.5-103 (2007) and 2 CCR 503-1, Rule 16.120. The Division for Developmental Disability (DDD) submitted a response to the Petition. Pursuant to the authority set forth in 2 CCR 503-1, Rule 16.321, and, in consideration of the documents submitted, the Executive Director’s designee declares the following.

This Declaratory Order concerns the interpretation of a portion of the rule which sets forth the criteria for community centered boards such as TRE to use to determine whether an individual has a “developmental disability”, e.g., whether the person’s disabilities are attributable to a neurological condition related to mental retardation as set forth in C.R.S. 27-10.5-102 (11)(a) (2007). As reflected in the Petition for Declaratory Order (Petition), the DDD notified TRE that the manner in which TRE interpreted the eligibility criteria is contrary to the rules. The DDD found that TRE did not “consider either adaptive behavior or adaptive behavior similar to a person with mental retardation” in determining a person’s eligibility for services. TRE’s response is that the rule definition itself obviates the necessity to consider adaptive functioning limitations unless the limitations are the direct result of [or substantially influenced by] a substantial cognitive deficit. Furthermore, TRE equates “substantial cognitive deficit” with an IQ of 70 or below (“mental retardation”) (parenthesis supplied). Thus, TRE argues that unless a person has mental retardation, consideration of a person’s adaptive functioning limitations is moot.¹ This interpretation is incorrect.

In its response, the DDD indicates that “substantial cognitive deficit” should be defined as an IQ score “up to 75 points, given the standard error of measurement [of 4-5 points], standard deviation of 15 and mean of 100”. Thus, under subsection “C”, if the person’s IQ score is within the margin of error of measurement of the IQ test score of 70 points, adaptive functioning limitations must be considered. This interpretation is incorrect also.

The State Board adopted the definition of “developmental disability” as set forth at 2CCR 503-1, Rule 120. Rule 120 states in pertinent part:

"Developmental disability" means a disability that is manifested before the person reaches twenty-two years of age, which constitutes a substantial disability to the affected individual, and is attributable to mental retardation or related conditions which include cerebral palsy, epilepsy, autism, or other neurological conditions when such conditions result in impairment of general intellectual functioning or adaptive behavior similar to that of a person with mental retardation.

¹ TRE’s references to “mental retardation” are interpreted herein to refer to the intelligence component of “mental retardation”. To interpret the argument otherwise would not be reasonable. This Order should not be taken as adopting a definition of mental retardation lacking an adaptive functioning component.

Unless otherwise specifically stated, the federal definition of "developmental disability" found in 42 U.S.C. sec. 15001 et seq. shall not apply.

- A. Impairment of general intellectual functioning means that the person has been determined to have an intellectual quotient equivalent which is two or more standard deviations below the mean (70 or less assuming a scale with a mean of 100 and a standard deviation of 15), as measured by an instrument which is standardized, appropriate to the nature of the person's disability, and administered by a qualified professional. The standard error of measurement of the instrument should be considered when determining the intellectual quotient equivalent. When an individual's general intellectual functioning cannot be measured by a standardized instrument, then the assessment of a qualified professional shall be used.
- B. Adaptive behavior means that the person has overall adaptive behavior which is significantly limited in two or more skill areas (communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work), as measured by an instrument which is standardized, appropriate to the person's living environment, and administered and clinically determined by a qualified professional.
- C. Similar to that of a person with mental retardation, in regard to adaptive behavior, means that a person's adaptive behavior limitations are a direct result of, or are significantly influenced by, the person's substantial cognitive deficits and may not be attributable to only a physical or sensory impairment or mental illness.

Thus, taken as a whole, the definition of "developmental disability", as pertains here, provides 3 criteria that a person could meet to be determined eligible for services:

1. the person has mental retardation; or,
2. the person has a neurological condition that results in an IQ two or more standard deviations below the mean (70 or less assuming a scale with a mean of 100 and a standard deviation of 15), taking into consideration the standard of error of measurement of the instrument; or,
3. the person has a neurological condition with substantial cognitive deficits wherein the substantial cognitive deficits result in or significantly influence 2 or more adaptive behavioral skill areas that are significantly limited.

TRE is correct that the rule definition itself requires the adaptive functioning limitations be the direct result of [or substantially influenced by] substantial cognitive deficits. The key question is what is meant by "substantial cognitive deficits"? In order to answer this question, the definition as a whole must be considered since principles of construction require giving meaning to all parts of the definition to reach a reasonable result, if possible.

TRE's approach of equating "substantial cognitive deficits" with an IQ of 70 would eliminate the need to consider subsection "C" of the definition since subsection "A" already references that criteria, i.e. it is within the definition of "impairment of general intellectual functioning." Thus, TRE's approach must be rejected because it fails to give meaning to each of the criteria set forth in the rule. Additionally, when the State Board wanted to refer to an IQ of 70, it had no difficulty doing so in subsection "A".

Similarly, the DDD posits that “substantial cognitive deficits” means an IQ score of 75 or below, a score of 75 being the high end of the margin of error of measurement for someone who tests as having mental retardation. This interpretation also eliminates the need to consider subsection “C” since it is included in subsection “A” or could qualify as mental retardation if the requisite adaptive functioning limitations were present. Again, the presumption must be that the State Board intended “substantial cognitive deficits” to have meaning different than the definition of “impairment of general intellectual functioning”. Thus, the DDD’s position must also be rejected.

The question remains, “what does substantial cognitive deficits mean in the context of adaptive behavior similar to that of a person with mental retardation” so that all the subsections of the definition have meaning?

In this context, the phrase “substantial cognitive deficits” does not mean an IQ of 70 or below since the person with an IQ of 70 presumably would qualify under subsection “A” or have mental retardation. On the other hand, an IQ of 100 is generally characterized as “average”. Thus, to have a deficit, the individual would need to have an IQ less than average. Therefore, it is reasonable to interpret a deficit in this context as an IQ score less than 100 and more than 70. The use of the term, “substantial” as modifying “deficits” indicates the intent that the cognitive deficits are “fairly large”. See: Webster’s Online Dictionary, <http://www.websters-online-dictionary.org>.

Thus, without further direction from DDD, it is reasonable to operationalize the term, “substantial cognitive deficits” by concentrating on the lower range of IQ scores between 70 and 100, e.g. by referring to one standard deviation or more below the mean as an upper limit of IQ scores that would reflect a substantial deficit.

The DDD indicated in its response to the Petition that further rulemaking is necessary to clarify the meaning of the definition of “developmental disability” in this regard to ensure greater statewide consistency in its application. The Office of Appeals agrees since neither position presented in this matter was reasonable. There may be other approaches that would also be reasonable, however, until the State Board has adopted new rules following the procedures of the Administrative Procedures Act, a reasonable approach would be that an IQ between one and two standard deviations below the mean would come within the meaning of “substantial cognitive deficits” as that term is used in 2CCR503-1 Rule 16.120.

Order

It is Hereby Declared and Ordered that The Resource Exchange’s approach to determining eligibility for developmental disabilities services must consider a person’s adaptive behavioral limitations under the circumstances set forth above. The conclusion that a person must have mental retardation in order to meet the definition of having a “developmental disability” is not consistent with C.R.S. 27-10.5-102 (11)(a) (2007) or 2 CCR 503-1, Rule 16.120. The Division for Developmental Disability is strongly urged to follow through on its stated intent to initiate the rule making process to provide further clarification to the definition of “developmental disability”.

This decision constitutes final agency action of the Executive Director of the Colorado Department of Human Services. The effective date of this decision is three days after the date of mailing set forth in the Certificate of Mailing. Pursuant to C.R.S. section 24-4-106 (2007) and 2 CCR 503-1, Appellant has the right to apply for judicial review of this decision by filing an action for review in the appropriate State District Court. Any such action must be filed in accordance with the Rules of Civil Procedure within 30 days after this final agency decision becomes effective.

Done this 14th day of March 2008.

Margery T. Bornstein
Office of Appeals

CERTIFICATE OF MAILING

I hereby certify that on March 14, 2008, I placed a true and correct copy of the Declaratory Order in case number DD 08-002 in the U.S. Mail, postage prepaid, addressed to the following:

Mr. David A. Ervin
Executive Director
The Resource Exchange
418 S. Weber Street
Colorado Springs, Co. 80903-2150

And, through Interoffice Mail addressed to the following:

Mr. John Daurio
Colorado Department of Human Services
Office of Adult, Disabilities and Rehabilitation Services
1575 Sherman St.
Denver, Co. 80203

Office of Appeals