



STATE OF WEST VIRGINIA  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
OFFICE OF INSPECTOR GENERAL  
BOARD OF REVIEW  
1400 Virginia Street  
Oak Hill, WV 25901

Earl Ray Tomblin  
Governor

Karen L. Bowling  
Cabinet Secretary

April 28, 2016

[REDACTED]

RE: [REDACTED] v. WV DHHR  
ACTION NO.: 15-BOR-3703

Dear Ms. [REDACTED]

Enclosed is a copy of the decision resulting from the hearing held in the above-referenced matter.

In arriving at a decision, the State Hearing Officer is governed by the Public Welfare Laws of West Virginia and the rules and regulations established by the Department of Health and Human Resources. These same laws and regulations are used in all cases to assure that all persons are treated alike.

You will find attached an explanation of possible actions you may take if you disagree with the decision reached in this matter.

Sincerely,

Kristi Logan  
State Hearing Officer  
Member, State Board of Review

Encl: Appellant's Recourse to Hearing Decision  
Form IG-BR-29

cc: Kimberly Stitzinger, Assistant Attorney General  
Bureau for Medical Services

**WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
BOARD OF REVIEW**

██████████,

**Appellant,**

v.

**Action Number: 15-BOR-3703**

**WEST VIRGINIA DEPARTMENT OF  
HEALTH AND HUMAN RESOURCES,**

**Respondent.**

**DECISION OF STATE HEARING OFFICER**

**INTRODUCTION**

This is the decision of the State Hearing Officer resulting from a fair hearing for ██████████. This hearing was held in accordance with the provisions found in Chapter 700 of the West Virginia Department of Health and Human Resources' Common Chapters Manual. This fair hearing was convened on April 13, 2016, on an appeal filed December 21, 2015.

The matter before the Hearing Officer arises from the September 17, 2015 decision by the Respondent to deny medical eligibility for services under the I/DD Waiver Program.

At the hearing, the Respondent appeared by Kimberly Stitzinger, Assistant Attorney General. Appearing as a witness for the Respondent was ██████████, consulting psychologist for the Bureau for Medical Services. The Appellant appeared by counsel, ██████████. Appearing as witnesses for the Appellant were ██████████, Child Protective Services; ██████████, Guardian Ad Litem; ██████████, Ph.D.; and ██████████, M.D. All witnesses were sworn and the following documents were admitted into evidence.

**Department's Exhibits:**

- D-1 Independent Psychological Evaluation dated September 3, 2015, from ██████████
- D-2 Notice of Denial dated September 17, 2015
- D-3 Independent Psychological Evaluation dated February 10, 2015, from ██████████  
██████████
- D-4 Summary Evaluation dated April 5, 2016, from ██████████
- D-5 Annual Psychiatric Re-evaluation/Update dated August 16, 2013, from ██████████  
██████████
- D-6 Psychological Evaluation dated August 23, 2013, from ██████████, Psy.D
- D-7 Individualized Education Plan dated November 6, 2014, from ██████████, West Virginia Schools

### **Appellant's Exhibits:**

- A-1 Psychological Evaluation dated March 29, 2016, from the [REDACTED]
- A-2 Discharge Summary dated March 3, 2016, from [REDACTED] and Discharge Summary dated June 17, 2015, from [REDACTED]
- A-3 Order of Appointment and/or Conservator dated October 27, 2015, from the Circuit Court of [REDACTED], West Virginia
- A-4 Curriculum Vita for [REDACTED], Ph.D.

After a review of the record, including testimony, exhibits, and stipulations admitted into evidence at the hearing, and after assessing the credibility of all witnesses and weighing the evidence in consideration of the same, the Hearing Officer sets forth the following Findings of Fact.

### **FINDINGS OF FACT**

- 1) The Appellant applied for services under the I/DD Waiver program. The Department issued Notice (D-2) on September 15, 2015, advising that the Appellant's application was denied as the medical criteria had not been met, specifically that the documentation submitted did not support the presence of an eligible diagnosis or the presence of substantial adaptive deficits in at least three of the six major life areas identified for Waiver eligibility.
- 2) As part of the application process, the Appellant underwent an Independent Psychological Evaluation (D-1) on September 3, 2015. The Appellant was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and Mood Disorder.

The Reynolds Intellectual Assessment Scale (RIAS) administered to the Appellant resulted in a Composite Intelligence Index score of 89.

The results of the Wide Range Achievement Test, Fourth Edition (WRAT-4) for the Appellant were scores ranging from 69-85 in the academic areas tested.

The Adaptive Behavior Assessment Scale, Second Edition (ABAS-II) administered to the Appellant identified an adaptive deficit in the area of Self-Direction. The Department stipulated to a deficit for the Appellant in this area.

The Appellant had a total score of 20 on the Childhood Autism Rating Scale, Second Edition (CARS-II), which placed him in the minimal severity group with little or no symptoms of autism present.

- 3) An Independent Psychological Evaluation (D-3) conducted on February 10, 2015, was submitted with the Appellant's application. According to this evaluation, the Appellant was diagnosed with Borderline Intellectual Functioning and Asperger's Disorder.

The Appellant received a full scale Intelligence Quotient (IQ) of 75 as a result of the Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV).

The Appellant had scores ranging from 3-13 on the ABAS-II that was administered and had scores ranging from 62-104 on the Wechsler Individual Achievement Test (WIAT).

The Gilliam Asperger's Disorder Scale (GADS) identified the Appellant as having a borderline likelihood of Asperger's Syndrome, with a quotient score of 75 and the GARS-2 score of 66 represented a low probability of the presence of autism for the Appellant.

- 4) Subsequent to the Appellant's denial, the Appellant had a psychological evaluation (A-1) on February 23, 2016. The Appellant was administered the Vineland Adaptive Behavior Scale, Second Edition (Vineland-II) which resulted in the Appellant receiving a score of less than one percent in Daily living Skills and Socialization. No diagnosis was formally given during this evaluation, but the Appellant's score of 2 on the GARS-III indicated a very likely probability of Autism Spectrum Disorder.
- 5) The Appellant's Discharge Summary (A-2) from [REDACTED], the residential treatment facility where he resided from April 2014-June 2015, and the Discharge Summary from [REDACTED] where the Appellant resided from June 2015-February 2016, document diagnoses of Borderline Intellectual Functioning and Autistic Disorder.
- 6) The Department was appointed as Guardian and Conservator of the Appellant by an Order of the Circuit Court (A-3) on October 21, 2015, due to his Autism and borderline intellectual functioning.
- 7) The Appellant's representative argued that the Appellant has an eligible diagnosis of Autism and has substantial adaptive deficits in the major life areas of Capacity for Independent Living, Self-Care and Communication.

### **APPLICABLE POLICY**

WV Medicaid Provider Manual §513.3.2 states that in order to establish medical eligibility for participation in the I/DD Waiver Program, an individual must meet the diagnostic, functionality and need for active treatment criteria.

#### **Diagnosis**

The applicant must have a diagnosis of mental retardation with concurrent substantial deficits manifested prior to age 22 **or** a related condition which constitutes a severe and chronic disability with concurrent substantial deficits manifested prior to age 22.

Examples of related conditions which may, if severe and chronic in nature, may make an individual eligible for the I/DD Waiver Program include but are not limited to, the following:

- Autism;
- Traumatic brain injury;
- Cerebral Palsy;
- Spina Bifida; and
- Any condition, other than mental illness, found to be closely related to mental retardation because this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons, and requires services similar to those required for persons with mental retardation.

Additionally, the applicant who has a diagnosis of mental retardation or a severe related condition with associated concurrent adaptive deficits must meet the following requirements:

- Likely to continue indefinitely; and,
- Must have the presence of at least 3 substantial deficits out of the 6 identified major life areas listed in Section 513.3.2.2.

### **Functionality**

The applicant must have substantial deficits in at least 3 of the 6 identified major life areas listed below:

- Self-care;
- Receptive or expressive language (communication);
- Learning (functional academics);
- Mobility;
- Self-direction; and,
- Capacity for independent living which includes the following 6 sub-domains: home living, social skills, employment, health and safety, community and leisure activities. At a minimum, 3 of these sub-domains must be substantially limited to meet the criteria in this major life area.

Substantial deficits are defined as standardized scores of 3 standard deviations below the mean or less than one percentile when derived from a normative sample that represents the general population of the United States, or the average range or equal to or below the 75 percentile when derived from MR normative populations when mental retardation has been diagnosed and the scores are derived from a standardized measure of adaptive behavior. The scores submitted must be obtained from using an appropriate standardized test for measuring adaptive behavior that is administered and scored by an individual properly trained and credentialed to administer the test. The presence of substantial deficits must be supported not only by the relevant test scores, but also the narrative descriptions contained in the documentation submitted for review, i.e., psychological report, the IEP, Occupational Therapy evaluation, etc. if requested by the IP for review.

## DISCUSSION

██████████, consulting psychologist for the Department, explained that eligibility for the I/DD Waiver program begins first with an eligible diagnosis of Intellectual Disability or related condition that is severe and closely related to Intellectual Disability. Ms. ██████████ testified that the Appellant's application for Waiver services was denied, as he was not given an eligible diagnosis. Ms. ██████████ referred to the September 2015 Independent Psychological Evaluation that gave diagnoses of ADHD and Mood Disorder. Based on the Appellant's overall IQ score of 89, Ms. ██████████ testified that the Appellant did not have an Intellectual Disability, pointing out that the threshold is typically an IQ score of 69 or below. The Appellant's CARS-II results did not indicate a diagnosis of Autism.

The February 2015 Independent Psychological Evaluation documented diagnoses of Borderline Intellectual Functioning and Asperger's Disorder. Ms. ██████████ testified that while Autism is an eligible diagnosis for Waiver eligibility, Asperger's Disorder is not an eligible diagnosis as Asperger's individuals do not have an Intellectual Disability and are high functioning individuals. The Appellant was found to have full scale IQ of 75 as determined by the WAIS-IV administered during the evaluation. This IQ score does not indicate the presence of Intellectual Disability for the Appellant.

The Appellant's treating psychiatrist, ██████████, M.D., testified that the Appellant has a diagnosis of Autism Spectrum Disorder and that this has been present for years. Dr. ██████████ opined that the Appellant's ADHD symptoms have masked the Appellant's Autism symptoms, explaining why a diagnosis of Autism has been given only in recent years. Dr. ██████████ stated the Appellant has adaptive delays in Self-Care, Communication and Capacity for Independent Living, and these delays are a result of his Autism. Dr. ██████████ did not believe the Appellant could live safely in the community due to his autistic behaviors and his diminished intellectual functioning without constant supervision.

Testimony from ██████████, Clinical and Forensic Psychologist, supported Dr. ██████████ diagnosis of Autism Spectrum Disorder for the Appellant and that the Autism was not diagnosed in childhood due to his other conditions. Dr. ██████████ testified that while the Appellant may appear high functioning based on his test scores, he felt the Appellant would regurgitate information he had heard without full comprehension. Dr. ██████████ did not feel the Appellant could live without constant supervision, although he did not classify the Appellant's Autism as severe. Dr. ██████████ agreed with the diagnosis of Borderline Intellectual Functioning for the Appellant.

The Department contended that the Appellant did not have an eligible diagnosis for Waiver eligibility, arguing that Asperger's Disorder is not associated with Intellectual Disability. Witnesses for the Appellant contended that the Appellant has Autism Spectrum Disorder, a diagnosis that is accepted by policy. It should be noted here that the witnesses for the Appellant referred to Autism Spectrum Disorder, a term found in the Diagnostic and Statistical Manual for Mental Disorders, Fifth Edition (DSM-V). Autism Spectrum Disorder replaced the diagnosis of Asperger's Disorder previously found in the DSM-IV. The Department utilizes the International Classification of Diseases, Tenth Edition (ICD-10), which classifies Autistic Disorder and Asperger's Disorder as separate diagnoses. The Centers for Medicare and Medicaid (CMS), the

federal entity that governs West Virginia's Medicaid program, uses the ICD manual. However, if the Appellant's diagnosis of Autism Spectrum Disorder was accepted as an eligible diagnosis, the documentation submitted for review failed to establish that the Appellant met the severity criteria as set forth in policy based on his IQ scores placing him in the borderline intellectual functioning range.

Policy defines a substantial adaptive deficit as standardized test scores of 3 standard deviations below the mean, or less than one percentile. The presence of substantial adaptive deficits must be supported not only by relevant test scores, but also by narrative descriptions submitted for review. The Appellant was found to be functioning less than one percentile in the area of Self-Direction as determined by the ABAS-II administered in September 2015. The Vineland-II administered in March 2016 documented that the Appellant has an eligible score of less than one percentile in the area of Daily Living Skills (Self-Care). However, narrative descriptions of the Appellant's abilities in the areas of self-care indicate that he has the ability to complete these tasks with prompting and supervision, and therefore, does not support a finding of a substantial adaptive deficit in this area.

Without eligible test scores in the major life areas of Communication, Learning or eligible scores in at least three of the six sub-domains that comprise the area of Capacity for Independent Living (Home Living, Social Skills, Employment, Health and Safety, Community and Leisure Activities), the Appellant does not meet the functionality criteria found in policy.

### **CONCLUSIONS OF LAW**

- 1) An eligible diagnosis of Intellectual Disability or related condition similar to Intellectual Disability must be present for an individual to meet the diagnostic criteria for the I/DD Waiver program.
- 2) The Appellant was given conflicting diagnoses of Asperger's Disorder and Autism Spectrum Disorder. A diagnosis of Borderline Intellectual Functioning was consistent throughout the numerous evaluations submitted.
- 3) While Autism is an eligible diagnosis for Waiver eligibility, the Autism must be severe with associated substantial adaptive deficits.
- 4) The documentation submitted failed to establish the Appellant's Autism was severe based on his borderline intellectual functioning, and in some areas above average test scores.
- 5) The documentation submitted failed to establish that the Appellant was demonstrating at least three substantial adaptive deficits in the six major life areas. Standardized test scores identified a substantial adaptive deficit in the area of Self-Direction only.
- 6) The Appellant does not meet the diagnostic or functionality criteria based on the documentation submitted for I/DD Waiver program eligibility.

**DECISION**

It is the decision of the State Hearing Officer to **uphold** the decision of the Department to deny the Appellant's application for I/DD Waiver services.

**ENTERED this 28<sup>th</sup> day of April 2016**

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**Kristi Logan  
State Hearing Officer**