



STATE OF WEST VIRGINIA  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
OFFICE OF INSPECTOR GENERAL

Bill J. Crouch  
Cabinet Secretary

Board of Review  
State Capitol Complex  
Building 6, Room 817-B  
Charleston, West Virginia 25305  
Telephone: (304) 558-0955 Fax: (304) 558-1992

M. Katherine Lawson  
Inspector General

August 14, 2018

██████████, DHHR Guardian for: ██████, A PROTECTED INDIVIDUAL  
*Delivered via e-mail*

RE: ██████, A PROTECTED INDIVIDUAL v. WV DHHR  
ACTION NO.: 18-BOR-1727

Dear Ms. ██████

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

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,

Todd Thornton  
State Hearing Officer  
Member, State Board of Review

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

cc: Bureau for Medical Services  
PC&A  
KEPRO

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

█, A PROTECTED INDIVIDUAL,

Appellant,

v.

Action No.: 18-BOR-1727

**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 █, A PROTECTED INDIVIDUAL. 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 June 27, 2018 and reconvened on July 26, 2018, on an appeal filed May 17, 2018.

The matter before the Hearing Officer arises from the Respondent's April 20, 2018 decision to deny the Appellant's application for participation in the I/DD Waiver Program due to unmet medical eligibility.

At the hearing, the Respondent appeared by █. The Department is the guardian for the Appellant, and he was represented by his DHHR guardian – █ for the first hearing date, and █ for the second hearing date. Appearing as a witness for the Appellant was █. All witnesses were sworn and the following documents were admitted into evidence.

**EXHIBITS**

**Department's Exhibits:**

- |      |  |
|------|--|
| D-1  | Bureau for Medical Services Provider Manual (excerpt)<br>Chapter 513 – Intellectual and Developmental Disabilities Waiver (IDDW)<br>§§ 513.6.2 – 513.6.4 |
| D-2* | Notice of Decision<br>Notice date: April 20, 2018  |

- D-3\* Psychological Evaluation of the Appellant  
[REDACTED]  
Evaluation date: March 15, 2018
- D-4\* Independent Psychological Evaluation  
[REDACTED], MA  
Evaluation date: January 25, 2018
- D-5\* Notice of Decision  
Notice date: February 20, 2018
- D-6\* ABES Summary of Scores for the Appellant  
Date of rating: April 20, 2008

**\* Note: Respondent submitted marked exhibits for evidence and proposed changing the exhibit labels on the date of the hearing. The exhibits will remain as initially marked; however, recorded testimony will refer to Exhibit D-6 as D-2, D-2 as D-3, D-3 as D-4, D-4 as D-5, and D-5 as D-6.**

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 was an applicant for the I/DD Waiver Program.
- 2) The Respondent, through its Bureau for Medical Services, contracts with [REDACTED] to perform functions related to the I/DD Waiver Program, including eligibility determination.
- 3) [REDACTED], a licensed psychologist employed by [REDACTED], made the eligibility determinations regarding the Appellant.
- 4) The Appellant submitted a January 25, 2018, psychological evaluation in conjunction with this application. (Exhibit D-4)
- 5) By notice dated February 20, 2018, (Exhibit D-5) the Respondent notified the Appellant that his application for the I/DD Waiver Program was denied. The notice provided the reason for denial as “Documentation submitted does not support the presence of substantial adaptive deficits in three or more of the six major life areas identified for Waiver eligibility.”
- 6) The Appellant requested a second psychological evaluation, and the Respondent reviewed the results of a March 15, 2018, psychological evaluation (Exhibit D-3) of the Appellant.

- 7) By notice dated April 20, 2018, (Exhibit D-2) the Respondent notified the Appellant that his application for the I/DD Waiver Program remained denied after consideration of the second psychological evaluation. The reason provided for the denial was unchanged from the February 20, 2018 notice of denial.
- 8) On both notices (Exhibit D-2 and D-5) the Appellant was determined to have established substantial adaptive deficits in two of the three areas required, and these two “major life areas” were *learning* and *self-direction*.
- 9) Ms. [REDACTED] testified that an issue with approving the Appellant’s application was comorbid mental illness, but that the primary issue was the unmet functionality component required to establish medical eligibility.
- 10) On the January 2018 psychological evaluation (Exhibit D-4) of the Appellant, the psychologist administered a test to assess adaptive behavior – the Adaptive Behavior Assessment System (ABAS).
- 11) The Appellant’s ABAS scaled scores demonstrated substantial adaptive deficits in the areas of *learning* and *self-direction*. (Exhibit D-4)
- 12) The Appellant obtained eligible ABAS scaled scores on only two of the six sub-domains of the area of *capacity for independent living*, which was insufficient to establish the presence of a substantial adaptive deficit in this area. (Exhibit D-4)
- 13) On the March 2018 psychological evaluation (Exhibit D-3) of the Appellant, the results of the ABAS suggested eligible scaled scores of 1 in all skill areas.
- 14) The Appellant’s ABAS test scores are based on a survey, which was completed by “[REDACTED]” for the January 2018 evaluation (Exhibit D-4) and by “his social worker” on the March 2018 evaluation. (Exhibit D-3)
- 15) The Appellant was diagnosed with *F39 – Unspecified Mood Disorder*, and *F29 – Unspecified Psychosis, by history*, on the January 2018 evaluation (Exhibit D-4, using the ICD-10-CM designations) and *298.9/F29 – Unspecified Schizophrenic Spectrum and other psychotic disorder*, on the March 2018 evaluation. (Exhibit D-3, referencing both DSM-5 and ICD-10 terminology)
- 16) Ms. [REDACTED] noted that the evaluations (Exhibits D-3 and D-4) list numerous medications for the Appellant, including 13 psychotropic medications.
- 17) The Respondent noted on the February 20, 2018 denial notice (Exhibit D-5) that it relied on what is described as a “4/28/08 School Version Rating Form.” (Exhibit D-6)
- 18) This school rating form (Exhibit D-6) shows the adaptive behavior scores the Appellant obtained at age 17, when he was in the developmental period.

- 19) The Appellant did not obtain any scores that would suggest substantial adaptive behavior deficits from this rating form. (Exhibit D-6)

### APPLICABLE POLICY

The policy regarding the I/DD Waiver Program is located in the Bureau for Medical Services Provider Manual, Chapter 513.

At §513.6.2, this policy addresses initial medical eligibility, and reads, “In order to be eligible to receive IDDW Program Services, an applicant must meet the medical eligibility criteria in each of the following categories: Diagnosis; Functionality; Need for active treatment; and Requirement of ICF/IID Level of Care.”

At §513.6.2.1, this policy addresses the diagnostic component of medical eligibility, and reads, “The applicant must have a diagnosis of intellectual disability with concurrent substantial deficits manifested prior to age 22.” The policy continues to list examples of potentially eligible diagnoses and qualifies related conditions as follows: “Any condition, **other than mental illness**, found to be closely related to intellectual disabilities because this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of intellectually disabled persons, and requires services similar to those required for persons with intellectual disabilities.” (emphasis added)

At §513.6.2.2, this policy addresses the functionality component and its required criteria. The policy requires an applicant to have substantial deficits in at least three of the six major life areas – self-care, receptive or expressive language, learning, mobility, self-direction and capacity for independent living. The capacity for independent living is further divided into six sub-domains – home living, social skills, employment, health and safety, community and leisure. Policy requires a minimum of three of these sub-domains to be substantially limited for an applicant to meet the criteria for this major life area.

Functionality policy (§513.6.2.2) also defines substantial deficits as “standardized scores of three 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<sup>th</sup> percentile when derived from [intellectually disabled] normative populations when intellectual disability has been diagnosed and the scores are derived from a standardized measure of adaptive behavior.”

### DISCUSSION

The Appellant requested a fair hearing based on the decision of the Respondent to deny his application for the I/DD Waiver Program based on their finding that he did not establish medical eligibility. The Respondent must show by a preponderance of the evidence that the Appellant did not establish medical eligibility for the program.

The Respondent denied the Appellant's application for I/DD Waiver Services. The Appellant requested a second psychological evaluation, which was reviewed as part of the Respondent's second denial. In both denials, the notices to the Appellant provide functionality as the unmet component of medical eligibility for the program. However, the representative for the Respondent testified that the Appellant failed to establish that he had an eligible diagnosis with deficits manifested in the developmental period, or prior to age 22.

The evidence regarding the Appellant from his developmental period is a school rating form. The scaled scores from this instrument, and from both recent evaluations of the Appellant considered, must be 1 or 2 to reflect the degree of limitation required by the policy definition of substantial deficits. In the developmental period, the Appellant did not establish substantial deficits in any of the six major life areas defined by policy. On the January 2018 psychological evaluation, rated by a worker in the hospital where the Appellant resides, the Appellant's ABAS scores indicated substantial deficits in two areas. This was insufficient to establish medical eligibility, and the Appellant was denied. The Appellant requested and submitted a second psychological evaluation, conducted in March 2018, for review by the Respondent. On this evaluation, the Appellant was rated by a different person and resulted in scaled scores of 1 in every skill area. This discrepancy alone makes the March 2018 psychological evaluation unreliable, and its findings were given little weight. There is no indication that the Appellant had a diagnosis of intellectual disability with concurrent substantial deficits manifested prior to age 22.

For consideration of a related condition, policy specifically excludes mental illness. The Respondent's expert witness contended that the Appellant's adaptive behavior deficits stem from his mental illness diagnoses and from the medications he takes to treat his mental illness.

Because the Appellant did not meet the diagnostic requirements for medical eligibility within the developmental period, and because the Appellant did not provide reliable evidence of substantial deficits to meet the functionality component of medical eligibility the Respondent was correct to deny the Appellant's application for participation in the I/DD Waiver Program.

### **CONCLUSIONS OF LAW**

- 1) Because the Appellant did not establish substantial deficits in at least three of the six major life areas defined by policy, the Appellant did not meet the functionality component of medical eligibility for the I/DD Waiver Program.
- 2) Because the Appellant did not have substantial adaptive deficits manifested prior to age 22, he did not meet the diagnostic criteria for medical eligibility for the I/DD Waiver Program.
- 3) Because the Appellant did not establish medical eligibility, the Respondent must deny the Appellant's application for I/DD Waiver services.

**DECISION**

It is the decision of the State Hearing Officer to **UPHOLD** the Respondent's decision to deny the Appellant's application for the I/DD Waiver Program due to unmet medical eligibility.

**ENTERED this \_\_\_\_ Day of August 2018.**

---

**Todd Thornton  
State Hearing Officer**