



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

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BOARD OF REVIEW
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Jolynn Marra
Interim Inspector General

April 11, 2019

[REDACTED]

RE: [REDACTED], A MINOR v. WVDHHR
ACTION NO.:19-BOR-1205

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,

Danielle C. Jarrett
State Hearing Officer
Member, State Board of Review

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

cc: Sarah Clendenin, Department Representative
Angela Signore, Department Representative

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

█, A MINOR,

Appellant,

v.

Action Number: 19-BOR-1205

**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 minor. 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 March 14, 2019, on an appeal filed January 31, 2019.

The matter before the Hearing Officer arises from the January 15, 2019 determination by the Respondent to deny the Appellant medical eligibility for services under the I/DD Waiver Program.

At the hearing, the Respondent appeared by Kerri Litton, consulting psychologist for the Bureau for Medical Services (BMS). The Appellant appeared by his mother, █. All witnesses were sworn and the following documents were admitted into evidence.

Department's Exhibits:

- D-1 Intellectual and Development Disabilities Waiver (IDDW) §§ 513.6 through 513.6.4
- D-2 Notice of Denial, dated January 15, 2019
- D-3 Second Medical Independent Psychological Evaluation (IPE), dated October 24, 2018
- D-4 Teacher Adaptive Behavior Assessment System, Third Edition (ABAS-3), dated January 8, 2019
- D-5 Notice of Denial, dated September 25, 2018
- D-6 Independent Psychological Evaluation (IPE), dated August 29, 2018

Appellant's Exhibits:

None

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) An application was made on behalf of the Appellant for services under the I/DD Waiver Program.
- 2) The Respondent, through its Bureau for Medical Services (BMS) contracted with Psychological Consultation & Assessment (PC&A), to perform functions related to the I/DD Waiver Program, including eligibility determination.
- 3) Kerri Litton (Ms. Litton), a licensed psychologist with PC&A, made the eligibility determination regarding the Appellant.
- 4) The Respondent denied the Appellant's application based on unmet medical eligibility and issued a notice dated January 15, 2019, advising the Appellant of the basis for denial as, "Documentation as to the severity of the potential related condition (Autistic Disorder) is inconsistent, and, therefore, does not support that the condition is severe. In addition, documentation does not support substantial adaptive deficits in at least three (3) major life areas." (Exhibit D-2)
- 5) The IPE for the Appellant includes the results of his adaptive behavior testing, utilizing the Adaptive Behavior Assessment System-3rd Edition (ABAS-3). (Exhibits D-3, D-4, and D-6)
- 6) The ABAS-3 produces scores with a mean of one-hundred (100) and a standard deviation of ten (10). Scores of one (1) or two (2) are indicative of a substantial adaptive deficit in a major life area.
- 7) On August 29, 2018, an IPE was completed with input by the Appellant's mother and indicated the Appellant was assessed with no substantial deficits in any of the six (6) major life areas. (Exhibit D-6)
- 8) The narrative contained in the August 29, 2018 IPE indicated that with respect to the major life area of *Communication* the Appellant was able to express his wants, needs, and feelings on a very limited basis.
- 9) On October 24, 2018, an IPE was completed with the Appellant's mother and indicated substantial deficits in all six (6) major life areas of *Communication, Functional Academics, Self-Direction, Social, Community Use, Home Living, Health and Safety, and Self-Care*. (Exhibit D-3)

- 10) On January 8, 2019, an IPE was administered by the Appellant's teacher and indicated the Appellant had a substantial deficit in one (1) major life area of *Communication*. (Exhibit D-4)
- 11) The Appellant was diagnosed with Autistic Disorder, Seizure Disorder, and Autism Spectrum Disorder. (Exhibits D-2 through D-4)
- 12) The Appellant's January 8, 2019 ABAS-3 scores and narratives from the August 2018 and January 2019 IPE support the Appellant has a substantial adaptive deficit in the skill area and corresponding major life area of *Receptive or Expressive Language (Communication)*. (Exhibits D-2 through D-4)

APPLICABLE POLICY

BMS Provider Manual § 513.6.2 states that to be eligible to receive I/DD Waiver 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 Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IDD) Level of Care.

BMS Provider Manual § 513.6.2.1 Diagnosis provides in part:

The application must have a diagnosis of Intellectual Disability 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, if severe and chronic in nature, may make an individual eligible for I/DD Waiver Program include, but 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 Intellectual Disability 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 disability.

Additionally, the applicant who has a diagnosis of Intellectual Disability 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 three (3) substantial deficits out of the six (6) identified major life areas listed in § 513.6.2.2.

BMS Provider Manual § 513.6.2.2 Functionality provides in part:

The applicant must have substantial deficits in at least three (3) of the six (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 six (6) sub-domains: home living, social skills, employment, health and safety, community and leisure activities. At a minimum, three (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 three (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 75th percentile when derived from Intellectual Disability (ID) normative populations when ID has been diagnosed and the scores are derived from the 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 scores 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 Individualized Education Program (IEP), Occupational Therapy evaluation, etc. if requested by the IP for review.

DISCUSSION

To meet the diagnostic criteria for Waiver eligibility, an applicant must have a diagnosis of Intellectual Disability or a related condition, which is severe and chronic, and which manifested prior to age 22. Standardized scores are used to identify substantial adaptive deficits in the major life areas to meet the functional criteria. Policy requires that the Appellant must demonstrate

substantial adaptive deficit defined as three (3) standard deviations below the mean, or average score.

Medical eligibility requirements for the I/DD Waiver Program includes both a diagnostic and functionality requirement. The Appellant did not meet either requirement.

On August 29, 2018, the Appellant was administered an ABAS-3 standardized assessment that evaluates different aspects of adaptive functioning. The Appellant must score a one (1) or a two (2) to reflect the degree of limitations required by policy definition of substantial deficits. Once adaptive behaviors are measured, they are compared to same-aged peers. On August 29, 2018, an IPE was completed by the Appellant's mother and rated by a licensed psychologist. The Appellant's ABAS-3 scores indicated no substantial deficits. The psychologist noted the Appellant's relative strengths were in *Motor* and *Leisure Skills* and relative weaknesses were noted in *Community Use*, *Self-Direction*, and *Health and Safety*. The August 2018 IPE indicated the Appellant was able to feed himself, was cooperative with bathing, and able to remove his shoes. The Appellant was reported to be able to make choices and initiate simple activities. The narrative on the IPE for major area of *Communication* indicated the Appellant was able to express his wants, needs, and feelings on a very limited basis. The Appellant's general adaptive score was 72. The Appellant's composite scores were in the borderline range. The IPE indicated the Appellant was unable to respond to a standardized test of intellectual abilities due to his limited communication skills, lack of cooperation. Adaptive living skills were determined to be in the borderline range. At that time, the Appellant was diagnosed with Autistic Disorder and Seizure Disorder.

On October 24, 2018, a second IPE was conducted with the Appellant. The Appellant scored a (1) or (2) on the ABAS-3 testing in all major life areas with the exception of *Motor Skills*. The Appellant obtained Conceptual, Social, Practical, and General Adaptive scores which fell in the "Extremely Low" range of functioning for each area. The Childhood Autism Rating Scale (CARS2-ST) was also administered on the same date and the Appellant scored 38.0, which placed him in the severity group of severe symptoms of Autism Spectrum Disorder.

The Appellant was administered a third ABAS-3 assessment on January 8, 2019, by the Appellant's teacher. The scaled scores from this instrument required scores of one (1) or two (2) to reflect the degree of limitation required by policy definition of substantial deficits. At that time, the Appellant, rated by his teacher, was assessed with an eligible score in the major life area of *Communication*. The Appellant's general adaptive score was 70.

The Appellant's IPE scores obtained on October 24, 2018, were considerably lower than the IPE scores obtained on August 29, 2018, and January 8, 2019. All scores were obtained in less than a six-month timeframe. Kerri Litton, licensed psychologist with PC&A, testified that the only area of consistency in the IPEs was in the August 2018 and January 2019 assessments in the area of *Communication*. It is also noted the general adaptive composite scores were similar (72 and 70) on the aforementioned assessments. In contrast, the October 24, 2018 assessment identified severe deficits in all major life areas with a general adaptive composite of 49 (severe).

The Respondent's testimony is reliable. Ms. Litton testified that once the scores were compared, the Appellant was denied due to the inconsistency in the measures of adaptive behaviors,

narratives, and the level of severity. Based on Ms. Litton's expert testimony and a review of the evidence, the October 24, 2018 IPE was determined to be unreliable and given no weight. As such, the Appellant did not meet the functionality criteria required for medical eligibility because he did not have substantial deficits, as defined by policy, in at least three (3) of the six (6) major life areas.

The Respondent proved by a preponderance of evidence that the Appellant's diagnosis of Autism Spectrum Disorder did not meet the degree of severity required to establish an eligible diagnosis for the I/DD Waiver Program. Furthermore, evidence established the Appellant demonstrated only one (1) substantial deficit in the major life area of *Communication* which did not meet the necessary threshold of at least three (3) substantial deficits in the six (6) major life areas. Per policy the Appellant did not meet the functional criteria required for Waiver eligibility and the Respondent was correct to deny his application for the I/DD Waiver Program.

CONCLUSIONS OF LAW

- 1) Policy for the I/DD Waiver Program requires an eligible diagnosis for a condition that is severe and chronic in nature. Because the Appellant does not meet this severity standard, the diagnostic component was not established.
- 2) Because the Appellant only has one (1) eligible standardized score from an instrument used to measure substantial deficits in the six (6) major life areas identified in the I/DD Waiver Program policy, the functional component could not be established.
- 3) Because the Appellant did not meet the functional requirements, medical eligibility could not be established and the Respondent must deny the Appellant's application for the I/DD Waiver Program.

DECISION

It is the decision of the State Hearing Officer to **UPHOLD** the Respondent's denial of Appellant's application for services under the I/DD Waiver Program.

ENTERED this _____ day of April 2019.

Danielle C. Jarrett
State Hearing Officer