



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

Bill J. Crouch
Cabinet Secretary

BOARD OF REVIEW
Raleigh County District
407 Neville Street
Beckley, WV 25801

Jolynn Marra
Interim Inspector General

July 3, 2019

[REDACTED]

RE: [REDACTED], A PROTECTED INDIVIDUAL v. WV DHHR
ACTION NO.:19-BOR-1770

Dear Mr. [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: Bureau for Medical Services

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

█, A PROTECTED INDIVIDUAL,

Appellant,

v.

Action Number: 19-BOR-1770

**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, 2019, on an appeal filed May 23, 2019.

The matter before the Hearing Officer arises from the March 28, 2019, decision by the Respondent to deny the Appellant's application for services under the I/DD Waiver Program.

At the hearing, the Respondent appeared by Keri Linton, consulting psychologist for the Bureau for Medical Services. The Appellant appeared by his father, █. Both witnesses were sworn and the following documents were admitted into evidence.

Department's Exhibits:

- D-1 Bureau for Medical Services Policy Manual §513.6
- D-2 Notice of Denial dated March 28, 2019
- D-3 Independent Psychological Evaluation dated February 25, 2019
- D-4 Independent Psychological Evaluation – Addendum dated March 25, 2019
- D-5 Individualized Education Plan dated February 27, 2019
- D-6 Intensive Supportive Services Report received January 30, 2019
- D-7 Summary of Observation dated January 11, 2019
- D-8 Notice of Denial dated January 22, 2019
- D-9 Independent Psychological Evaluation dated December 18, 2019

Appellant's Exhibits:

A-1 *Assessment of Children* by Jerome M. Satler (excerpts)

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.
- 2) The Respondent issued a Notice of Denial on January 22, 2019, advising that the Appellant's application was denied as three (3) or more substantial adaptive deficits in the major life areas were not identified by the documentation submitted (Exhibit D-8).
- 3) A second psychological evaluation for the Appellant was conducted in March 2019.
- 4) The Respondent issued a Notice of Denial on March 28, 2019, advising only two (2) substantial adaptive deficits in the major life areas were identified (Exhibit D-2).
- 5) The Appellant met the diagnostic criteria for I/DD Waiver eligibility with a diagnosis of moderate Intellectually Disability (Exhibits D-3 and D-9).
- 6) The Respondent conceded that the Appellant was demonstrating substantial adaptive deficits in the major life areas of self-care and learning (Exhibits D-2 and D-8).

APPLICABLE POLICY

Bureau for Medical Services 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 ICF/IID Level of Care.

Diagnosis

The applicant 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 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 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 substantial deficits out of the six identified major life areas listed in Section 513.6.2.2.

Functionality

The applicant must have substantial deficits in at least three of the six 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 sub-domains: home living, social skills, employment, health and safety, community and leisure activities. At a minimum, three 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 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 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.

Active Treatment

Documentation must support that the applicant would benefit from continuous active treatment. Active treatment includes aggressive consistent implementation of a program of specialized and generic training, treatment, health services, and related services. Active treatment does not include services to maintain generally independent individuals who are able to function with little supervision or in the absence of a continuous active treatment program.

DISCUSSION

Pursuant to policy, an individual must meet the medical eligibility criteria of a diagnosis of Intellectual Disability or related condition, the functionality criteria of at least three (3) substantial adaptive deficits out of the six (6) major life areas, the need for active treatment, and a requirement of ICF/IID level of care.

The Appellant met the diagnostic criteria with a diagnosis of moderate Intellectually Disability. However, the Respondent denied the Appellant's application for I/DD Waiver services as only two (2) substantial adaptive deficits in the major life areas were identified.

Policy defines a substantial adaptive deficit as a standardized score of three (3) deviations below the mean, or less than one (1) percentile. The presence of substantial deficits must be supported not only by the relevant test scores, but also by the narrative descriptions contained in the documentation submitted for review.

Keri Linton, the Respondent's consulting psychologist, testified that Adaptive Behavior Assessment System, Third Edition (ABAS-III) administered to the Appellant during the Independent Psychological Evaluation in March 2019 has a mean, or average score, of ten (10). An eligible score of 3 standard deviations below the mean of 10, or less than 1 percentile, is a score of a 1 or 2. Ms. Linton stated the only eligible score from the ABAS-III for the Appellant was in the area of self-care. Although the Appellant did not receive an eligible score in learning from the ABAS-III, Ms. Linton testified that the Appellant's scores from the Wide Range Achievement Test, Fourth Edition (WRAT-4) were less than one percentile, therefore a substantial adaptive deficit in learning was awarded. Ms. Linton contended that based on the test scores and narrative descriptions of the Appellant's abilities, no additional adaptive deficits were found.

The Appellant's father, [REDACTED], contended that the Appellant is exhibiting a substantial adaptive deficit in receptive/expressive language. Mr. [REDACTED] testified that according to the Developmental Profile, Third Edition (DP-3) that was administered in March 2019, the Appellant received an eligible score of three standard deviations below the mean in communication. Mr. [REDACTED] averred that the Respondent failed to give proper weight to the results of the DP-3, and relied only on the results of the ABAS.

Ms. Linton testified that because there was a potentially eligible score in communication on the DP-3, she requested that the evaluating psychologist administer an ABAS-III Teacher Edition in March 2019 (Exhibit D-4). The ABAS-III completed by the Appellant's teachers resulted in a score of 5 in communication. Ms. Linton argued that three adaptive behavior tests administered to

the Appellant yielded ineligible scores in communication, and coupled with the narrative descriptions of the Appellant's use of language, outweighed the score in communication on the DP-3.

According to the psychological evaluations administered in December 2018 and March 2019, the Appellant's speech was unintelligible, he spoke in broken or short sentences, was unable to read or write, and did not understand non-verbal cues. However, the March 2019 psychological evaluation noted that the Appellant frequently communicated his wants and needs and responded appropriately to simple questions.

The Individualized Education Plan for the Appellant noted a moderate to severe delay in expressive and receptive language by his school's speech therapist, but that his fluency skills and oral structures appeared to within normal limits. No speech or language assessment was available to quantify the level of the Appellant's delays (Exhibit D-5).

An Intensive Support Service Report that was submitted with the Appellant's application documented the Appellant's disruptive behaviors in a classroom setting. Of interest in this report was documentation of the Appellant's use of expressive and receptive language. Although the Appellant frequently made inappropriate comments disrupting class, the report documented that the Appellant understands what is being asked of him, follows directions when he chooses to, and is able to express what he does and does not wish to participate in (Exhibit D-6).

Clearly the Appellant has delays in communication. However, to be considered a substantial adaptive deficit, meeting an institutional level of care, the Appellant would be unable to communicate his wants or needs or understand what other individuals are saying to him. The documentation submitted with the Appellant's application was often contradictory regarding his abilities in communication. However, the totality of the testimony and documentation submitted does not support that the Appellant has a substantial adaptive deficit in receptive/expressive language.

Whereas only two substantial adaptive deficits were identified for the Appellant, medical eligibility for services under the I/DD Waiver program could not be established.

CONCLUSIONS OF LAW

- 1) Policy requires that the diagnostic, functionality, need for active treatment criteria and the need for ICF/IID level of care must be met to establish medical eligibility for the I/DD Waiver Program.
- 2) The Appellant met the diagnostic criteria with an eligible diagnosis of moderate Intellectual Disability.
- 3) Policy requires that for the functionality criteria to be met, the applicant must demonstrate at least three substantial adaptive deficits of the six major life areas as determined by standardized test scores of three standard deviations below the mean, which must be supported by the narrative descriptions of the applicant's abilities.

- 4) Of the four adaptive behavior tests administered to the Appellant, only one test produced a score of three standard deviations below the mean in expressive/receptive language.
- 5) The narrative descriptions of the Appellant's use of language did not support that he was exhibiting a substantial adaptive deficit in this area.
- 6) The Appellant does not meet the functionality criteria of three substantial adaptive deficits of the six major life areas.

DECISION

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

ENTERED this 3rd day of July 2019.

**Kristi Logan
State Hearing Officer**