



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

Bill J. Crouch
Cabinet Secretary

Board of Review
416 Adams Street Suite 307
Fairmont, WV 26554
304-368-4420 ext. 79326

Jolynn Marra
Interim Inspector
General

September 11, 2019



RE: [REDACTED], A MINOR v. WVDHHR
ACTION NO.: 19-BOR-1955

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 Board of Review 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 that may be taken if you disagree with the decision reached in this matter.

Sincerely,

Tara B. Thompson
State Hearing Officer
State Board of Review

Enclosure: Appellant's Recourse
Form IG-BR-29

cc: Nora Dillard, Bureau for Medical Services
Janice Brown, KEPRO

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

█, A MINOR,

Appellant,

v.

ACTION NO.: 19-BOR-1955

**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' (DHHR) Common Chapters Manual. This fair hearing was convened on August 7, 2019, on an appeal filed July 1, 2019.

The matter before the Hearing Officer arises from the April 23, 2019 decision by the Respondent to deny the Appellant medical eligibility for the Medicaid WV I/DD Waiver Program (I/DDW).

At the hearing, the Respondent appeared by Kerri Linton, Psychological Consultation & Assessment. The Appellant was represented by her mother, █. Appearing as a witness on behalf of the Appellant was her father, █. All witnesses were sworn and the following documents were admitted into evidence.

Department's Exhibits:

- D-1 Bureau for Medical Services (BMS) Manual § 513.6
- D-2 BMS Notice, dated April 23, 2019
- D-3 Independent Psychological Evaluation (IPE), dated March 18, 2019
- D-4 BMS Notice, dated December 5, 2018
- D-5 IPE, dated October 24, 2018
- D-6 Birth to Three Evaluation/Assessment Summary Report, dated November 16, 2017
- D-7 Birth to Three Initial Evaluation Report, dated January 5, 2019
- D-8 Birth to Three Evaluation/Assessment Summary Report, dated May 21, 2018
- D-9 █ documentation, dated January 21, 2019
- D-10 █ documentation, dated December 6, 2018

- D-11 Child Development/Down Syndrome Final Report, dated May 10, 2018
- D-12 Notice of Eligibility Committee and/or Individualized Education Program Team Meeting documentation, dated August 13, 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 following Findings of Fact are set forth.

FINDINGS OF FACT

- 1) The Appellant applied for the Medicaid WV I/DD Waiver Program (I/DDW).
- 2) The Respondent issued a notice on December 5, 2018 advising the Appellant that she was denied medical eligibility for I/DDW due to lacking an eligible diagnosis (Exhibit D-4).
- 3) The Appellant requested a second psychological evaluation.
- 4) On April 23, 2019, the Respondent issued a notice advising the Appellant that she was denied medical eligibility for I/DDW due to lacking an eligible diagnosis and failure of the documentation to demonstrate the presence of substantial adaptive deficits in three or more of the six major life areas (Exhibit D-2).
- 5) The Respondent relied on Exhibits D-3 through D-12 when making the Appellant's I/DDW medical eligibility determination (Exhibit D-2).
- 6) The Appellant receives WV Birth to Three services (Exhibit D-6).
- 7) On March 18, 2019, psychologist [REDACTED] conducted an IPE of the Appellant (Exhibit D-3).
- 8) The Appellant has a diagnosis of Autism with a severity level of 2 (Exhibits D-3, D-8, D-9, and D-11).
- 9) The Appellant's mother was the reporter for the Appellant's developmental, medical, and mental health histories, adaptive behavior scales, Autism Screening for the March 18, 2019 IPE (Exhibit D-3).
- 10) The psychologist considered a report from [REDACTED], dated January 21, 2019 (Exhibit D-9) and an IEP, dated August 13, 2018 (Exhibit D-12) when conducting the March 18, 2019 IPE (Exhibit D-3).

- 11) The ABAS-3 scores provided that the Appellant scored 2 in the adaptive skill area of *functional academics*; 3 in the area of *community use*; 5 in the area of *social*; and 7 in the areas of *home living, health & safety*, and *self-direction* (Exhibit D-3).
- 12) The Appellant is physically able to use a fork, spoon, and fingers to feed herself (Exhibits D-3 and D-9).
- 13) The Appellant requires assistance from her parents to conduct activities of daily living (ADL) (Exhibit D-9).
- 14) The Appellant's 2019 ABAS-3 reflected scores of 8 in the areas of *leisure* and *self-care* (Exhibit D-3).
- 15) The Appellant is able to communicate through picture pointing (Exhibit D-3).
- 16) On July 17, 2018, a Receptive-Expressive Emergent Language Test, third edition (REEL-3) was conducted with the Appellant (Exhibit D-12).
- 17) The July 2018 REEL-3 reflected that the Appellant had a receptive language score of 80 and an expressive language score of 60 (Exhibit D-12).
- 18) On December 6, 2018, [REDACTED] staff, [REDACTED], conducted a REEL-3 with the Appellant (Exhibit D-10).
- 19) On the Reel-3, the Appellant scored a 92 for ability and a raw score of 58 (Exhibit D-10).
- 20) [REDACTED] was unable to complete an assessment of the Appellant's expressive language skills due to time constraints (Exhibit D-10).
- 21) The Appellant used non-verbal communicating during the [REDACTED] receptive and expressive language assessment by [REDACTED] and during the [REDACTED] evaluation conducted by [REDACTED] (Exhibits D-9 and D-10).
- 22) The Appellant's 2019 ABAS-3 reflected a score of 1 in the area of *receptive or expressive language* (Exhibit D-3).
- 23) The Appellant's October 24, 2018 Slosson Intelligence Test results demonstrated the Appellant had an Intelligence Quotient (IQ) of 81 – borderline to low average ranges of intellectual functioning (Exhibit D-5).
- 24) The Appellant could not count beyond 3 objects, could not identify colors, and did not know her alphabet during the 2019 IPE (Exhibit D-3).
- 25) The Appellant's 2019 ABAS-3 reflected a score of 2 in the area of *functional academics* (Exhibit D-3).

26) The psychologist considered WV Birth to Three evaluations dated November 16 and October 18, 2017, January 5 and May 21, 2018 when conducting the 2019 IPE (Exhibit D-2).

27) The Appellant is physically able to ambulate without mechanical aid (Exhibit D-3).

28) The Appellant is able to choose to initiate or participate in activities including watching videos, watching television, cutting with scissors, crafting, coloring, completing puzzles, using playdoh or kinetic sand, and using glue (Exhibits D-3 and D-10).

29) The Appellant's 2019 ABAS-3 reflected a score of 7 in the area of *self-direction* (Exhibit D-3).

APPLICABLE POLICY

Bureau for Medical Services (BMS) Manual § 513.6 provides in part:

In order for an applicant to be found eligible for the I/DD Wavier Program, they must meet medical eligibility ... Medical eligibility is determined by the Medical Eligibility Contract Agent (MECA) through a review of the IPE completed by a member of the Independent Psychologist Network.

BMS Manual § 513.6.1.1 provides in part:

The applicant chooses a psychologist in the Independent Psychologist Network (IPN) and contacts the IP to schedule the appointment The Independent Psychological Evaluation (IPE) is used to make a medical eligibility determination.

BMS Manual § 513.6.2 provides in part:

To be medically eligible, the applicant must require the level of care and services provided in an ICF ... The IPE verifies that the applicant has an intellectual disability with concurrent substantial deficits or a related condition which constitutes a severe and chronic disability with concurrent substantial deficits. An applicant must meet all the medical eligibility criteria in each of the following categories:

- Diagnosis;
- Functionality;
- Need for treatment; and
- Requirement of ICF/IID Level of Care

BMS Manual § 513.6.2.1 provides in part:

If severe, Autism is a related condition which may make an individual eligible for the I/DDW Program. Individuals with severe related conditions 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

BMS Manual § 513.6.2.1 provides in part:

If severe, [emphasis added] Autism is a related condition which may make an individual eligible for the I/DDW Program. Individuals with severe related conditions 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

BMS Manual § 513.6.2.2 provides in part:

The applicant must have substantial deficits in at least three of the six identified major life areas:

- Self-care;
- Communication;
- Learning;
- Mobility;
- Self-direction; and
- Capacity for independent living

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 ID normative populations when intellectual disability 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 [emphasis added] be supported not only by the relevant test scores, but also the narrative descriptions contained in the documentation submitted for review.

DISCUSSION

The hearing arises from the Appellant's protest to the Respondent's determination that the Appellant was medically ineligible for I/DDW. The Appellant's representatives argued that the Appellant should be medically eligible for I/DDW due to the presence of substantial adaptive deficits in the areas of *capacity for independent living*, *self-care*, and *expressive language*. The Appellant's father argued that the Appellant is seeking I/DDW eligibility to alleviate financial expenditures for supportive services to address the Appellant's needs.

Diagnosis

To be medically eligible, the Appellant was required to have a qualifying diagnosis. The evidence demonstrated that the Appellant had a diagnosis of Autism. Policy provides that Autism is an eligible related condition when severe. The IPE and supporting documentation established that the Appellant's diagnosis was not categorized as severe. As no evidence was entered to verify that the Appellant has a qualifying diagnosis, this Hearing Officer is unable to award the Appellant medical eligibility for I/DDW.

Functionality

The Respondent testified that although WV Birth to Three requires a 40% delay in a functioning area to be considered substantially delayed, I/DDW requires a substantial delay as demonstrated by less than 1% in three major life areas. There is no policy exception reflecting that eligibility for WV Birth to Three qualifies the Appellant for I/DDW medical eligibility or confirms that additional substantial deficits should be awarded.

The Appellant's representatives argued that they know the Appellant better than the individuals assessing the Appellant. Although the Appellant's representatives disagreed with the psychologist assessment on the October 24, 2018 and March 18, 2019 IPEs, policy provides that the Appellant is responsible for selecting the Independent Psychologist (IP) used to conduct the IPE. The Appellant's parents had the authority to select an IP of their choosing to conduct both the 2018 and 2019 evaluations. There are no exceptions provided in policy to allow this Hearing Officer to disregard the IPE based on the Appellant's disagreement with the IPE results; therefore, the narrative and adaptive behavior assessment results from the 2019 IPE must be considered in determining the Appellant's medical eligibility for I/DDW.

Capacity for Independent Living

The Respondent witness testified that to demonstrate a substantial delay for the area of *capacity for independent living*, the Appellant had to score a 1 or a 2 on the ABAS-3 in three of the following areas: home living, socialization, leisure skills, community use, and health and safety. The Appellant's scores ranged from 3 to 8 in these areas. As relevant test scores are required to establish a substantial delay and the Appellant's ABAS-3 scores did not establish a substantial delay, an additional deficit in the area of *capacity for independent living* could not be awarded.

Self-Care

The 2019 IPE reflected that the Appellant was physically able to use a spoon and could independently feed herself with her fingers. During the hearing, the Appellant's mother testified that the Appellant can use utensils but primarily uses her fingers or has to be fed due to the Appellant becoming frustrated with the utensil.

During the hearing, the Appellant's mother testified that the Appellant is able to wash her face and play in the bath but requires parental assistance with washing, dressing, and toileting. The Appellant's mother testified that the Appellant requires prompting to use the toilet and does not initiate toileting on her own, resulting in daily accidents. The psychologist's narrative on the 2019 IPE was vague regarding the Appellant's requirement of "major assistance" from her parents and inability "to address toileting or bathing needs" and, further, did not provide a description of the

Appellant's self-care abilities or specify what types of assistance the Appellant required from her parents. The [REDACTED] documentation provided that the Appellant required assistance completing ADLs; however, no evidence was entered to establish that the assistance the Appellant received was not age appropriate and beyond the assistance a parent should be reasonably expected to provide for a three-year-old child.

Even if the narrative had established that the Appellant had required significant assistance with self-care, a deficit was not supported by the Appellant's relevant test scores. The Appellant scored an 8 in the area of *self-care* on the ABAS-3 completed by the Appellant's mother. To demonstrate a significant deficit in a major life area as assessed on the ABAS-3, the Appellant was required to score a 1 or 2. As the relevant test scores fail to establish a substantial deficit in agreement with the supporting documentation narrative, an additional deficit in the area of *self-care* cannot be awarded.

Receptive or Expressive Language

The Appellant's ABAS-3 scores reflected that the Appellant presented with substantial adaptive deficit in the area of *communication*; however, the supporting documentation narrative failed to corroborate the substantial adaptive deficit. The IPE narrative and [REDACTED] documentation provide that the Appellant does present with communication deficits but is able to communicate with picture pointing and non-verbal communication such as grabbing the therapist's hand when needing assistance. During the hearing, the Appellant's mother testified that the Appellant uses hand tugging to indicate a need but that she has to guess at what the need may be. The Appellant's mother testified that the Appellant is capable of saying 7-12 words without prompting and 25 words with prompting to use them.

To demonstrate a substantial delay in receptive or expressive language using the REEL-3, the Appellant had to score at 55 or below. The Appellant's July 2018 REEL-3 scores were above the substantial delay threshold. No expressive language scores were indicated on the December 2018 REEL-3. The Appellant's receptive language scores as reflected in the REEL-3 indicate that she had a three-month delay at the time of the December 2018 assessment. Although the December 2018 REEL-3 results indicate the Appellant has a receptive language delay, the Respondent witness testified that the three-month delay does not constitute a substantial receptive language delay.

Policy requires that substantial adaptive deficits must be supported by agreement between relevant test scores and the narrative descriptions contained in the documentation. As the evidence failed to demonstrate corroborating narrative and relevant test scores regarding the Appellant's communication, an additional substantial deficit in the area of *receptive or expressive language* could not be awarded.

Learning:

The Appellant's ABAS-3 scores reflected that the Appellant presented with substantial adaptive deficit in the area of *functional academics*; however, the supporting documentation narrative failed to corroborate the substantial adaptive deficit. The Appellant's IQ was within the borderline to low average range of intellectual functioning and evidence demonstrated that the Appellant did not have an intellectual disability diagnosis.

The Appellant's mother testified that the Appellant is able to count to three, name her colors and numbers but does not know her alphabet like other children in her age group. Evidence demonstrated that the Appellant has the ability to comprehend instruction and anticipate outcomes. No supporting documentation narrative was entered to demonstrate that the Appellant's current functioning is substantially delayed compared to her age group. As the evidence failed to demonstrate corroborating narrative and relevant test scores regarding the Appellant's learning, an additional substantial deficit in the area of *learning* could not be awarded.

Self-Direction

The 2019 IPE reflected that the Appellant is able to initiate or participate in activities of her choosing. To obtain a substantial deficit in the area of *self-direction*, policy provides that the Appellant had to be totally unable to initiate activities or demonstrate interest in preferred activities. To demonstrate a significant deficit in the area of *self-direction*, the Appellant was required to score a 1 or 2 on the ABAS-3. Whereas the Appellant scored an 8 in the area of *self-care* on the ABAS-3 and the narrative demonstrated that she was able to choose to initiate or participate in activities including watching videos, watching television, cutting with scissors, crafting, coloring, and using glue, a substantial delay in the functional area of *self-direction* was not established by the evidence.

Mobility

The Appellant is able to ambulate without mechanical aid. The Appellant's representatives did not contest that the Appellant should not be awarded a deficit in the area of *mobility*.

CONCLUSIONS OF LAW

- 1) To meet medical eligibility for the I/DD Waiver Program, the Appellant must have an intellectual disability with concurrent substantial deficits or a related condition which constitutes a severe and chronic disability with concurrent substantial deficits.
- 2) The evidence failed to demonstrate that the Appellant has an eligible diagnosis of Intellectual Disability or a related condition which is severe.
- 3) The evidence failed to demonstrate that the Appellant has any substantial deficits in the areas of *self-care, learning, self-direction, receptive or expressive language, mobility, or capacity for independent living*.
- 4) As the evidence failed to establish that the Appellant had an eligible diagnosis or any substantial delays as required by policy, the Respondent was correct to deny the Appellant medical eligibility for I/DDW.

DECISION

It is the decision of the State Hearing Officer to **UPHOLD** the decision by the Department to deny the Appellant medical eligibility for the I/DD Waiver Program.

ENTERED this 11th day of September 2019.

Tara B. Thompson
State Hearing Officer