



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

August 28, 2019

[REDACTED]

RE: [REDACTED], A MINOR v. WVDHHR
ACTION NO.:19-BOR-1962

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
Nora Dillard, Department Representative

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

█, A MINOR,

Appellant,

v.

Action Number: 19-BOR-1962

**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 July 31, 2019, on an appeal filed June 26, 2019.

The matter before the Hearing Officer arises from the May 9, 2019 determination by the Respondent to deny the Appellant medical eligibility for services under the Intellectual and Development Disabilities (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 her mother, █. All witnesses were sworn and the following documents were admitted into evidence.

Department's Exhibits:

- D-1 Intellectual and Development Disabilities Waiver (I/DD Waiver Program) §§ 513.6 through 513.6.4
- D-2 Notice of Denial, dated May 9, 2019
- D-3 Independent Psychological Evaluation (IPE), dated April 1, 2019
- D-4 Independent Psychological Evaluation (IPE), dated May 2, 2018
- D-5 Written Correspondence from Dr. █, dated March 3, 2019
- D-6 Written Correspondence from █, O.D., dated January 30, 2019
- D-7 Written Correspondence from █ at █, dated February 22, 2019
- D-8 Patient Health Summary, dated March 26, 2019
- D-9 Daily Treatment Notes, dated April 2, 2019
- D-10 Notice of Denial, dated January 4, 2019
- D-11 Notice of Denial, dated February 13, 2017

- D-12 Notice of Denial, dated May 10, 2017
D-13 Notice of Denial, dated April 24, 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) On May 9, 2019, the Respondent issued a notice denying the Appellant's application for I/DD Waiver Program. (Exhibit D-2)
- 5) The Appellant meets diagnostic criteria for the I/DD Waiver Program with an eligible diagnosis of Intellectual Disability. (Exhibit D-3)
- 6) The Appellant was denied eligibility for the I/DD Waiver Program on the basis that documentation failed to demonstrate at least three (3) substantial adaptive deficits in the six (6) major life areas identified for program eligibility. (Exhibit D-2)
- 7) The Appellant was awarded a deficit in the area of *Self-Care*. (Exhibit D-2)
- 8) On April 1, 2019, [REDACTED], a Licensed Psychologist, completed a psychological evaluation on the Appellant. (Exhibit D-3)
- 9) [REDACTED] administered the Wechsler Intelligence Scale for Children (WISC-V) instrument which indicated the overall full scale intelligence quotient (IQ) of 65, which is in the mild range for intellectual developmental delays, and is consistent with the Appellant's history. (Exhibit D-3)
- 10) [REDACTED] administered the Adaptive Behavior Assessment System (ABAS-3) instrument. (Exhibit D-3)

- 11) ABAS-3 results are derived from a parent questionnaire with items concerning daily living skills and adaptive behaviors. (Exhibit D-3)
- 12) PC&A relies on psychological evaluation ABAS-3 scores to determine the level of functionality. Scaled scores of one (1) and two (2) are considered eligible scores on the ABAS-3, which are less than one (1) percentile in an adaptive skill area are defined as eligible scores for the I/DD Waiver Program. (Exhibit D-3)
- 13) The Appellant scored a two (2) in *Home Living*, a subdomain of the major life area of *Capacity for Independent Living*. (Exhibit D-3)
- 14) The Appellant scored a one (1) in *Health and Safety*, a subdomain of the major life area of *Capacity for Independent Living*. (Exhibit D-3)
- 15) The Appellant scored a one (1) in the major life area of *Self-Care*. (Exhibit D-3)
- 16) Scores in the remaining major life areas of *Receptive or Expressive Language, Learning, Mobility, Self-Direction*, and the remaining subdomains of *Capacity for Independent Living (Social Skills and Community & Leisure Activities)* ranged from 4 to 9. (Exhibit D-3)
- 17) Both the IPE and narratives supported a substantial delay in the major life area of *Self-Care* in that the Appellant is unable to dress herself, needs assistance with basic personal hygiene, and requires assistance with bathing. (Exhibit D-3)
- 18) The narrative in the Independent Psychological Evaluation (IPE) was consistent with the ABAS-3 results. (Exhibits D-3 and D-4)
- 19) The Wide Range Achievement Test (WRAT-4) was also administered and the Appellant's overall reading composite scores were found to be within the average range. The Appellant had above-average range ability for spelling and math computation. (Exhibit D-3)

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

The Appellant met the diagnostic criteria with an eligible diagnosis of Intellectual Disability. Once an eligible diagnosis was established, the Appellant was evaluated to see if she met the functional criteria for the I/DD Waiver Program.

On May 9, 2019, PC&A issued a notice denying the Appellant's application for I/DD Waiver Program services on the basis that the Appellant failed to demonstrate substantial adaptive deficits in three (3) or more of the six (6) major life areas identified for I/DD Waiver Program services eligibility. The Appellant was awarded a substantial adaptive deficit in the area of *Self-Care* and in two (2) of the required three (3) subdomains of *Capacity for Independent Living (Home Living and Health and Safety)*.

On April 1, 2019, 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. The Appellant's IPE was completed by the Appellant's mother and rated by a licensed psychologist. The Appellant's ABAS-3 scores indicated one (1) substantial deficit. The narrative descriptions were consistent with the ABAS-3 resulting regarding the Appellant's deficit in *Self-Care* and adaptive functioning.

The narrative on the IPE for major area of *Communication* indicated the Appellant understands things asked of her, but can be hard to understand. The Respondent testified the Appellant attends

speech therapy, but speech therapy does not constitute a deficit. The narrative for the major area of *Mobility* demonstrated the Appellant currently ambulates without aid. The Respondent testified the Appellant must utilize a wheelchair in order to have a substantial delay for a deficit. The Appellant scored in the “Extremely Low” range for *Home Living* and *Health and Safety*. The Respondent testified that *Home Living* and *Health and Safety* are sub-domains of the major life area of *Capacity of Independent Living*. Policy states in order to receive a substantial deficit for *Capacity for Independent Living*, a minimum of three (3) sub-domains must be substantially limited to meet the criteria for a deficit in *Capacity of Independent Living*. While scores reflected the Appellant scored extremely low to average in other adaptive skills, policy defines a substantial deficit as three (3) standard deviations below the mean, less than one percentile.

The Appellant’s mother was unable to demonstrate that the Appellant should be awarded additional substantial adaptive deficits at this time. The Appellant’s mother testified she is concerned that additional deficits will develop and she is worried about her daughter’s future. The Respondent agreed that developmental delays could worsen, but that eligibility is based on current delays, not those that may occur in the future. The Respondent indicated that the Appellant’s mother should reapply for services if the Appellant demonstrates additional substantial delays.

CONCLUSIONS OF LAW

- 1) The Appellant meets the diagnostic component of an eligible diagnosis of Intellectual Disability.
- 2) Pursuant to policy, the Appellant must demonstrate substantial adaptive deficits in at least three (3) of the six (6) major life areas.
- 3) The Appellant demonstrated a substantial deficit in the major life area of *Self-Care*.
- 4) Because the Appellant only has one (1) substantial deficits in the six (6) major life areas identified in the I/DD Waiver Program policy, the functional component could not be established.
- 5) 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 August 2019.

Danielle C. Jarrett
State Hearing Officer