



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

March 26, 2021

[REDACTED]

RE: [REDACTED], A MINOR v. WVDHHR  
ACTION NO.:21-BOR-1070

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: Stacy Broce, Department Representative  
Kerri Linton, Department Representative

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

█, A MINOR,

**Appellant,**

v.

**Action Number: 21-BOR-1070**

**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' (WVDHHR) Common Chapters Manual. This fair hearing was convened on February 17, 2021, on an appeal filed January 15, 2021.

The matter before the Hearing Officer arises from the December 17, 2020 determination by the Respondent to deny the Appellant medical eligibility for services under the Intellectual and Developmental Disabilities (I/DD) Waiver Program.

At the hearing, the Respondent appeared by Kerri Linton, 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.

\*\* Observing for the Respondent were Charley Bowen and Jordan Mitchell, Psychological Consultation & Assessment (PC&A).

**Department's Exhibits:**

- D-1 Intellectual and Development Disabilities Waiver (IDDW) §§ 513.6 through 513.6.4
- D-2 Notice of Denial, dated December 17, 2020
- D-3 Independent Psychological Evaluation (IPE), dated November 17, 2020

**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), contracts with Psychological Consultation & Assessment (PC&A) to perform functions related to the I/DD Waiver Program, including eligibility determinations.
- 3) On November 17, 2020, Tracy Smith (Ms. Smith), a Licensed Psychologist, completed an Independent Psychological Evaluation (IPE) on the Appellant. (Exhibit D-3)
- 4) The Appellant is diagnosed with Autism Spectrum Disorder, With Accompanying Intellectual and Language Impairments, Level 2, Requiring Supports. (Exhibit D-3)
- 5) On December 17, 2020, the Respondent issued a notice denying the Appellant's application for the I/DD Waiver Program because documentation submitted for review did not support an eligible diagnosis or the presence of substantial adaptive deficits in three or more of the six major life areas identified for Waiver eligibility. (Exhibit D-2)

### **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 75<sup>th</sup> 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 be eligible for I/DD Waiver Program services, an applicant must be considered medically eligible in the following four categories: diagnosis, functionality, the need for active treatment, and the requirement for an ICF/IDD Level of Care. Medical eligibility is considered by looking at each of these categories in order, beginning with diagnosis. If any of these eligibility categories are not met, medical eligibility for the I/DD Waiver Program is denied. To meet the diagnostic criteria for I/DD 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. To meet the functionality criteria for the I/DD Waiver eligibility, an applicant must have substantial deficits in at least three (3) of the six (6) major life areas.

On December 17, 2020, the Appellant's I/DD Waiver Program application was denied, as the Respondent found that documentation provided for review did not support an eligible diagnosis of either an Intellectual Disability or a related condition which is severe. The notice further advised that documentation submitted does not support the presence of substantial adaptive deficits in three (3) or more of the six (6) major life areas identified for Waiver eligibility. The Respondent had to demonstrate by a preponderance of evidence that the Appellant lacked an eligible diagnosis and did not have substantial deficits in three (3) or more of the six (6) major life areas for I/DD Waiver Program eligibility purposes.

### *Diagnosis*

On November 17, 2020, an IPE was conducted for the Appellant by Ms. Smith, an independent psychologist, to help determine I/DD Waiver Program eligibility. The Respondent testified that the Appellant's IPE included a diagnosis of Autism Spectrum Disorder, With Accompanying Intellectual and Language Impairments, Level 2, Requiring Supports. The Respondent further testified that a diagnosis of Autism Spectrum Disorder is a potentially eligible diagnosis, if severe and accompanied by impairment of general intellectual or cognitive functioning.

To determine the Appellant's intellectual functioning, Ms. Smith administered the Wechsler Preschool and Primary Scale of Intelligence – Fourth Edition (WPPSI-IV) which is an instrument used to determine intellectual and cognitive functioning. The Respondent indicated the Appellant had an average level working memory score, in which she did very well on the picture memory test, but all other areas of assessment were very difficult for her and were found to be significantly delayed. The Respondent testified the WPPSI-IV instrument indicated the Appellant's overall full-scale Intelligence Quotient (IQ) was 68, which is in the mildly developmentally delayed range.

The November 17, 2020 IPE included a Childhood Autism Rating Scale, Second Edition (CARS2-ST), which is used to identify individuals with Autism and severity levels of Autism. The CARS2-

ST raw score of 42, found in the IPE, placed the Appellant in the severity group of severe symptoms for Autism Spectrum Disorder according to Ms. Smith. Ms. Smith diagnosed the Appellant with Autism Spectrum Disorder, Level 2. The Respondent indicated that a diagnosis of Autism Spectrum Disorder, Level 3, would be the severity level considered for I/DD Waiver eligibility.

The Appellant's mother testified that the Appellant has been diagnosed with Autism on two separate occasions. The Appellant's mother further testified that the Appellant was even referred to an Autism feeding center in [REDACTED], West Virginia, but was unable to attend due to financial reasons. The Appellant's mother stated that the Appellant needs extra support from a gastrologist, as the Appellant needs laxatives in order to use the restroom. Although evidence demonstrates that the Appellant has Autism and is in need of certain supports, the Appellant's mother was unable to show that the Appellant's Autism diagnosis is a severe related condition for I/DD Waiver Program eligibility.

### *Functionality*

The Respondent indicated that an adaptive behavior assessment is used to identify substantial adaptive deficits in the six (6) major life areas (*Self-Care, Learning, Self-Direction, Communication, Mobility, and Capacity for Independent Living*). Policy defines substantial deficits as standardized scores of three (3) standard deviations below the mean when derived from a standardized measure of adaptive behavior. These standardized scores must be obtained from an appropriate standardized test for measuring adaptive behavior and scored by a properly trained individual.

The Respondent testified that on November 17, 2020, the Appellant was administered an Adaptive Behavior Assessment System (ABAS-3) to evaluate the Appellant's adaptive functioning level. 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. In addition to the standardized scores, the narrative descriptions in the IPE must also support the existence of substantial deficits. The Appellant's ABAS-3 was completed by the Appellant's mother and rated by a licensed psychologist. The Respondent testified that none of the Appellant's ABAS-3 scores fell in the one (1) or two (2) range, which indicates that she does not have any substantial deficits required for I/DD Waiver Program eligibility.

The Respondent indicated that the Appellant was also administered a Peabody Picture Vocabulary Test (PPVT-5) and an Expressive Vocabulary Test (EVT-3). The PPVT-5 is an instrument that assesses receptive vocabulary, and the EVT-3 is an instrument that assesses expressive vocabulary of children. The Respondent testified that the Appellant's PPVT-5 and EVT-3 standard scores of 75 and 83 respectively, show a delay in communication as compared to her same-aged peers, but not the substantial communication delays needed to qualify for the IDD Waiver Program. The Respondent indicated that in order to be eligible for the Waiver Program, the Appellant would likely have standard scores of 55 and below.

The Appellant's mother indicated that the Appellant has substantial deficits, especially regarding *Receptive or Expressive Language (Communication)*, *Self-Direction*, and *Capacity for Independent Living*.

The November 17, 2020 IPE indicated the Appellant scored in the "Low" range for *Communication*. The narrative on the IPE for the major area of *Communication* indicated the Appellant understands and follows directions most of the time but can be hard to understand. The Appellant's mother stated the Appellant struggles with asking for things and does not understand what most children her age would be able to understand. The Appellant's mother testified the Appellant is supposed to have speech therapy at school, but due to the pandemic she has not started.

The November 17, 2020 IPE indicated the Appellant scored in the "Low" range for *Self-Direction*. The narrative on the IPE for the major life area of *Self-Direction* indicated the Appellant is unable to make clear conscious choices and typically her mother makes choices for her. The Appellant's mother testified the Appellant does not eat nutritional foods and that sometimes she will go all day without eating.

On the IPE, the major life area of *Capacity for Independent Living* indicated the Appellant scored in the "Below Average" range for *Home Living* and scored in the "Extremely Low" range for *Health and Safety*. The Appellant's mother testified the Appellant needs Occupational therapy because she is unable to use a spoon or fork. The Respondent indicated 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 below average in all of the adaptive domains with scores ranging from three (3) to six (6), policy defines a substantial deficit as three (3) standard deviations below the mean, or scores of one (1) or two (2) or less than one percentile when derived from a normative sample.

Based on testimony and the documentation submitted, the Respondent proved by a preponderance of evidence that the Appellant's diagnosis of Autism Spectrum Disorder, Level 2, did not meet the degree of severity required to establish an eligible diagnosis for the I/DD Waiver Program. Furthermore, assessment scores did not establish that the Appellant had functional deficits required for the IDD Waiver Program and the Appellant's mother was unable to demonstrate that the Appellant should be awarded any substantial deficits.

### **CONCLUSIONS OF LAW**

- 1) Policy for the I/DD Waiver Program requires the applicant to have been diagnosed with an Intellectual Disability or related condition, which is severe and results in impairment of intellectual functioning, to meet diagnostic eligibility criteria.

- 2) Evidence submitted did not establish that the Appellant has an eligible diagnosis that is both chronic and severe.
- 3) Evidence did not support that the Appellant had substantial adaptive deficits in any of the six (6) major life areas.
- 4) Because the Appellant does not have an eligible diagnosis or meet the functional requirements, medical eligibility could not be established.

### **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 March 2021.**

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**Danielle C. Jarrett  
State Hearing Officer**