



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

February 25, 2021

[REDACTED]

RE: [REDACTED] A PROTECTED INDIVIDUAL v. WV DHHR
ACTION NO.: 21-BOR-1136

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,

Kristi Logan
Certified State Hearing Officer
Member, State Board of Review

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

cc: Bureau for Medical Services
Psychological Consultation and Assessment

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

■ A PROTECTED INDIVIDUAL,

Appellant,

v.

Action Number: 21-BOR-1136

**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 February 18, 2021, on an appeal filed January 27, 2021.

The matter before the Hearing Officer arises from the January 15, 2021, 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 mother, ■. Appearing as a witness for the Appellant was ■, M.D. All witnesses were sworn and the following documents were admitted into evidence.

Department's Exhibits:

- D-1 Bureau for Medical Services Provider Manual §513.6
- D-2 Notice of Denial dated January 15, 2021
- D-3 Independent Psychological Evaluation dated December 30, 2020
- D-4 Correspondence from ■, M.D., dated December 16, 2020
- D-5 Report from ■, M.D., dated December 8, 2020
- D-6 Correspondence from ■, D.O., dated August 25, 2020
- D-7 Birth to Three Evaluation/Assessment Summary Report dated March 2, 2020
- D-8 Birth to Three Evaluation/Assessment Summary Report dated April 29, 2019
- D-9 Birth to Three Evaluation/Assessment Summary Report dated April 18, 2019
- D-10 Birth to Three Nursing Assessment dated April 17, 2019

- D-11 Birth to Three Evaluation/Assessment Summary Report dated June 19, 2019
D-12 Individualized Education Plans from ██████ County Schools dated October 8, 2020 and October 16, 2020

Appellant's Exhibits:

- A-1 Correspondence from ████████████████████, M.D., (undated) received February 9, 2021
A-2 Correspondence from ████████████████████, M.D., dated January 27, 2021

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 Appellant underwent an Independent Psychological Evaluation in conjunction with the I/DD Waiver application on December 30, 2020 (Exhibit D-3).
- 3) The Appellant received medical diagnoses related to papillomatosis, global developmental delay and minor neurocognitive delays due to multiple hypoxic events due to papillomatosis (Exhibit D-3).
- 4) The Appellant was administered the Developmental Profile, Third Edition (DP-3), a test that measures cognitive functioning. The Appellant received standard scores of 88 in physical development, 86 in adaptive behavior, 89 in social-emotional development, 83 in cognitive development, 82 in communication and 78 in general development (Exhibit D-3).
- 5) The Adaptive Behavior Assessment System, Third Edition (ABAS-III) was administered to the Appellant during the psychological evaluation, a test that measures an individual's adaptive behaviors relating the to six (6) major life areas. The Appellant received scaled scores ranging from three (3) to seven (7) in the areas tested (Exhibit D-3).
- 6) The Childhood Autism Rating Scale, Second Edition (CARS-2) administered to the Appellant resulted in a rating of 34, yielding results of mild to moderate symptoms associated with Autism Spectrum Disorder (Exhibit D-3).
- 7) The Respondent issued a Notice of Denial on January 15, 2021 advising that the Appellant's application had been denied as the documentation submitted did not indicate an eligible diagnosis of Intellectual Disability, or related condition, which is severe. Additionally, the documentation failed to support the presence of at least three (3) substantial adaptive deficits of the six (6) major life areas (Exhibit D-2).

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, which constitutes a severe and chronic disability that manifested prior to age 22, the functionality criteria of at least three (3) substantial adaptive deficits out of the six (6) major life areas that manifested prior to age 22, the need for active treatment and a requirement of ICF/IID level of care to receive services under the I/DD Waiver Program.

The Respondent's witness, Keri Linton, testified that the Appellant did not have an eligible diagnosis of an Intellectual Disability or a related condition, which is severe, to meet the diagnostic criteria for services under the I/DD Waiver Program. The information submitted with the Appellant's application documented significant medical issues for the Appellant, including a permanent tracheostomy due to recurring growths in his throat resulting from the human papilloma virus that has caused multiple hypoxic events.

Policy determines substantial deficits from standardized scores of three (3) standard deviations below the mean or less than one percentile when derived from a normative sample. Ms. Linton referred to the standardized scores the Appellant received from the DP-3 and the ABAS-III that were administered during the psychological evaluation. Ms. Linton testified that the DP-3 has a mean, or average, of 100, with scores of 3 standard deviations below the mean as 55 or below. The

Appellant did not receive any eligible scores in the areas tested on the DP-3. The ABAS-III has a mean of ten (10), with eligible scores of 3 standard deviations below the mean as scores of one (1) or two (2). The Appellant did not receive any eligible scores as derived from the ABAS-III. Although the Appellant is delayed in many of the areas tested on the DP-3 and the ABAS-III, Ms. Linton contended that Appellant was not functioning at less than one percentile when compared to peers of his age as required by policy.

The Appellant's mother, [REDACTED], testified there were inconsistencies contained in the report of the psychological evaluation regarding the Appellant's medical history. Ms. [REDACTED] contended that she was unsure how to respond to the questions asked during the evaluation and felt that the Appellant's test scores were inaccurate. Ms. [REDACTED] stated the Appellant has learning disabilities due to a global developmental delay and receives speech therapy through the school system. Ms. [REDACTED] asserted that the Appellant's condition requires ongoing treatment and surgeries and is expected to continue throughout his life.

The Appellant's pediatrician, Dr. [REDACTED] testified that the Appellant has a rare medical condition that constitutes a lifelong disability. Dr. [REDACTED] stated the Appellant has recurring growths in his throat that has caused hypoxic episodes. Dr. [REDACTED] testified that the Appellant has Autism Spectrum Disorder, and in his letter submitted for evidence, surmised that many of the Appellant's delays can be attributed to this diagnosis (Exhibit A-2).

Policy requires a diagnosis of an Intellectual Disability, or a related condition, that is severe to meet the diagnostic criteria for services under the I/DD Waiver Program. While Autism can be an eligible diagnosis for eligibility, there was no documentation or testimony provided that the Appellant's Autism was severe or resulted in cognitive impairment similar to individuals with an Intellectual Disability. Furthermore, the Appellant did not meet the functionality criteria of demonstrating at least 3 substantial adaptive deficits of the 6 major life areas as evidenced by standardized test scores.

Whereas the evidence failed to demonstrate that the Appellant met the diagnostic or functionality criteria as defined by policy, the Respondent's decision to deny the Appellant's application for I/DD Waiver services is affirmed.

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) To meet the diagnostic criteria, the applicant must have been diagnosed with an Intellectual Disability, or a related condition, which is severe, during the developmental period, prior to age 22.
- 3) The Appellant does not have a diagnosis of Intellectual Disability or a related condition which is severe.

- 4) To meet the functionality criteria, an individual must demonstrate the presence of at least 3 substantial adaptive deficits of the 6 major life areas.
- 5) The documentation submitted failed to confirm the presence of any substantial adaptive deficits in the major life areas.
- 6) The Appellant does not meet the medical criteria for services under the I/DD Waiver Program.

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 25th day of February 2021.

Kristi Logan
Certified State Hearing Officer