



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 30, 2021



RE: [REDACTED], A PROTECTED INDIVIDUAL v. WVDHHR
ACTION NO.:21-BOR-1137

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
Janice Brown, Department Representative

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

█, A PROTECTED INDIVIDUAL,

Appellant,

v.

Action Number: 21-BOR-1137

**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' (WVDHHR) Common Chapters Manual. This fair hearing was convened on February 25, 2021, on an appeal filed January 27, 2021.

The matter before the Hearing Officer arises from the January 11, 2021 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 her mother, █. All witnesses were sworn and the following documents were admitted into evidence.

**Observing for the Respondent was 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 January 11, 2021
- D-3 Independent Psychological Evaluation (IPE), dated December 14, 2020
- D-4 IPE by █, M.A, dated December 21, 2016
- D-5 Notice of Denial, dated January 11, 2017
- D-6 Personal Data
- D-7 Confidential Service Plans by █, CSP, dated March 7, 2005

- D-8 State of [REDACTED] Notice of Hearing on Incompetence and Order Appointing Guardian Ad Litem, dated June 9, 2006
- D-9 Written Correspondence from [REDACTED], BSW, dated December 9, 2003
- D-10 Multidisciplinary Evaluation by [REDACTED], MSW, dated August 15, 2006
- D-11 Multidisciplinary Evaluation and Psychiatric Consultation by [REDACTED], MSW and [REDACTED], M.D., dated August 28, 2006
- D-12 Psychological Evaluation by [REDACTED], Ph.D.

Appellant's Exhibits:

- A-1 Written Correspondence from [REDACTED]
- A-2 [REDACTED] EEG Findings by [REDACTED], M.D., dated June 2, 1987
- A-3 [REDACTED] – Written Correspondence from [REDACTED], M.D. to [REDACTED], M.D., dated October 18, 1990; [REDACTED] EEG Report by [REDACTED], dated March 13, 1991; and [REDACTED] EEG Report by [REDACTED], M.D., dated August 9, 1993
- A-4 Speech and Language Evaluation by [REDACTED], M.A., CCC-SP, dated October 2, 1990
- A-5 Educational Evaluation by [REDACTED], MHDL, dated October 2, 1990
- A-6 Physical Therapy Evaluation by [REDACTED], MS, PT, dated October 2, 1990
- A-7 Medical Evaluation by [REDACTED], M.D., dated October 2, 1990
- A-8 Psychological Evaluation by [REDACTED], M.A., dated October 2, 1990
- A-9 Developmental Pediatrics Evaluation by [REDACTED], M.D., dated May 8, 1991; and Developmental Pediatrics Summary of Evaluation by [REDACTED], M.D., dated August 19, 1991
- A-10 [REDACTED] Patient Care Summary, [REDACTED] Health Assessment and Plan, Plan of Care, Current Medication, Medications Administered, Allergies, Procedures, Vaccine List, Tobacco Smoking Status, Past Encounter, and Care Team Members, dated January 19, 2021; and Service Plan, dated December 30, 2004

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 December 14, 2020, Elisa Hatmaker-Lutz (Ms. Hatmaker-Lutz), a Licensed Psychologist, completed an Independent Psychological Evaluation (IPE) on the Appellant. (Exhibit D-3)
- 4) At the time of the December 14, 2020 IPE, the Appellant was 35 years of age. (Exhibit D-3)
- 5) In December 2020, the Appellant's assessed overall full-scale Intelligence Quotient (IQ) was 72. (Exhibit D-3)
- 6) The Appellant has diagnoses of seizure disorder, cerebral palsy, borderline intellectual functioning, and bipolar disorder. (Exhibit D-3)
- 7) On January 11, 2021, the Respondent issued a notice of denial, advising that the Appellant's application had been denied because documentation submitted for review did not support the presence of an eligible diagnosis for the I/DD Waiver Program of Intellectual Disability or a related condition that is severe. The notice further advised that mental illness is specifically excluded per policy. (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 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

In order to be eligible to receive 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 of an ICF/IID Level of Care. Medical eligibility is considered by looking at 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 an Intellectual Disability or a related condition, which is severe and chronic, and which manifested prior to the age of 22. Furthermore, a diagnosis of mental illness is excluded for the I/DD Waiver Program.

On January 11, 2021, the Appellant's I/DD Waiver application was denied, as the Respondent found that documentation did not provide an eligible diagnosis of an intellectual disability or a related condition, which is severe. The Appellant's notice of denial also stated that mental illness is specifically excluded per policy. The Respondent testified that none of the submitted documentation suggested the Appellant's cognitive functioning was in the range of an individual with an intellectual disability. The Respondent had to prove by a preponderance of evidence that the Appellant lacked an eligible diagnosis for I/DD Waiver eligibility purposes.

The Respondent testified that I/DD Waiver Programs vary from state to state. The Respondent indicated that individuals who qualify in other states, frequently do not meet West Virginia's stringent I/DD Waiver eligibility criteria. The Respondent further testified the Appellant received I/DD Waiver services in [REDACTED] until she moved in 2007 to West Virginia. The Appellant's first application for the I/DD Waiver Program in West Virginia was denied on December 21, 2016, when the Appellant was 31 years of age.

On December 14, 2020, an IPE was completed by Ms. Hatmaker-Lutz, an independent psychologist, to determine I/DD Waiver Program eligibility. At the time of the December 14, 2020 IPE, the Appellant was 35 years of age. The Appellant's previous IPEs listed past diagnoses of Seizure Disorder, Mild Cerebral Palsy, Unspecified Affective Disorder, ADHD, Anxiety, Depression, and Bipolar Disorder. Ms. Hatmaker-Lutz issued current diagnoses for the Appellant of Borderline Intellectual Functioning and Bipolar Disorder, Unspecified, by history.

The Respondent indicated that seizure disorders and cerebral palsy are potentially eligible diagnoses, if severe and accompanied by impairment of general intellectual and cognitive functioning. The Respondent testified that a seizure disorder may be considered a severe related condition if the individual does not respond to treatment or has a Vagus nerve stimulator. The Respondent explained the Appellant was initially prescribed medication by her neurologist but due to the seizure medication not being affective, she started seeing a psychiatrist. The Respondent further explained that since no treatment records were submitted for review, it is unclear what medication the Appellant is taking for her seizure disorder. The Respondent further testified that the Appellant's cerebral palsy was referred to as mild throughout the documentation submitted for review. The Respondent indicated that a diagnosis of mild cerebral palsy does not meet the definition of a severe related condition.

The December 14, 2020 IPE included a Weschler Adult Intelligence Scale, Fourth Edition (WAIS-IV) to determine the Appellant's intellectual functioning. The Respondent revealed that individuals with an eligible diagnosis for the I/DD Waiver Program have impaired intellectual functioning and typically have IQ scores of 55 and below. The WAIS-IV instrument indicated the Appellant's overall full-scale IQ was of 72, which is in the borderline range for intellectual functioning. The Respondent testified that the Appellant's Verbal Comprehension Index score of 87, which places her in the "Low Average" range, indicates the Appellant has the ability to respond to questions and that her Perceptual Reasoning Index score of 75, places her in the "Borderline" range. The Respondent further testified the Appellant's Working Memory score of 69 and Processing Speed score of 68, place her in the "Mild Intellectual Disability" ranges. These results indicate the Appellant's verbal intelligence falls within the "Low Average" range, while both her non-verbal intelligence and overall intelligence fall within the "Borderline" range. The Respondent explained that individuals in the "Borderline" range often need assistance with their affairs, reminders, and oversight of their finances, but do not meet diagnostic eligibility for the I/DD Waiver Program. Although, the Appellant has borderline intellectual functioning, her WAIS-IV scores do not indicate that she has an intellectual disability.

The Respondent indicated that the Appellant's IQ of 72 was the lowest score of intellect that could be found in the documentation submitted for review. For example, in August 2016 a psychological evaluation was completed for the Appellant, listing a full-scale IQ of 73 and in December 2016 an IPE was completed and listed a full-scale IQ of 79.

The IPE included a Wide Range Achievement Test, Fifth Edition (WRAT-5). The WRAT-5 measures an individual's learning ability. The Appellant's WRAT-5 standard scores in Word Reading, Spelling, and Math Computation ranged from 82 to 87. These scores indicate the Appellant's academic skills were in the low range. The Respondent explained that, similar to cognitive functioning, substantial deficits with the respect to achievement, would be scores of 55 and below on the WRAT-5. The Respondent indicated that other documentation submitted for review also shows the Appellant does not have significant deficits in cognitive functioning.

The Respondent testified that during a previous IPE the Appellant's mother reported that the Appellant was diagnosed with a mild intellectual disability as a young child, but an evaluation listing a mild intellectual disability was never provided to the Respondent for review. The Respondent stated that there was no provided documentation which showed a diagnosis of a mild intellectual disability during the developmental period. The Respondent also reviewed documentation submitted as evidence by the Appellant's mother from [REDACTED]. The documentation from [REDACTED] indicated the Appellant has a history of Mental Retardation (MR). Little weight was given to [REDACTED] documentation, as there was no test data or other documentation that supported the MR diagnosis.

The Respondent testified that the Appellant currently receives medication management through [REDACTED], for diagnoses of anxiety, depression, and bipolar disorder. The Respondent testified that the Appellant is prescribed psychotropic medications for mood stability. The Respondent added that because the Appellant has a major mental illness, such as bipolar disorder, and is taking psychotropic medication, without a diagnosis of a severe Intellectual Disability; per policy she is not eligible for the I/DD Waiver Program.

The Appellant's mother argued that her daughter's diagnoses of seizure disorder and mild cerebral palsy have been present since infancy and that she continues to receive treatment. The Appellant's mother testified the Appellant has three (3) different kinds of seizures and that she has been diagnosed with dystonia. There was no documentation submitted for review that lists dystonia disease as a diagnosis for the Appellant and no testimony given to determine if dystonia is considered a severe related condition for the IDD Waiver Program.

The Appellant's mother indicated that because her daughter has been diagnosed with borderline intellectual functioning and has seizures, that she is more at risk of getting hurt than other individuals. The Appellant's mother explained the Appellant is unable to be placed in supportive employment due to safety concern for herself and others. The Appellant's mother further explained the Appellant is unable to live independently, as she does not drive, cook, or clean. The Appellant's mother stated the Appellant is not showing improvements, and that the older she gets the more problems she is facing. The testimony given by the Appellant's mother established that the Appellant may benefit from additional support services implemented in the home. The Respondent agreed that the Appellant may need additional supports as her mother was awarded guardianship in the state of [REDACTED]. Although support services may be needed, evidence does not reflect that the Appellant has an eligible diagnosis for the I/DD Waiver Program.

Based on testimony and documentation submitted, the Appellant does not have an intellectual disability or a severe related condition and does not meet the diagnostic criteria for eligibility for the I/DD Waiver Program. While policy lists seizure disorders and cerebral palsy as possible related conditions, the documentation does not support that the Appellant has an impairment of general intellectual functioning or that the seizure disorder or cerebral palsy are the Appellant's primary presenting conditions. Evidence established the Appellant has diagnoses of borderline intellectual functioning and bipolar disorder, neither of which are considered eligible diagnoses for the IDD Waiver Program.

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) Because the Appellant does not have an eligible diagnosis, the Appellant does not meet medical eligibility criteria 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 March 2021.

**Danielle C. Jarrett
State Hearing Officer**