



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

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Cabinet Secretary

BOARD OF REVIEW
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Jolynn Marra
Interim Inspector General

April 9, 2021

[REDACTED]

RE: [REDACTED], A MINOR v. WVDHHR
ACTION NO.:21-BOR-1196

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 MINOR,

Appellant,

v.

Action Number: 21-BOR-1196

**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 March 4, 2021, on an appeal filed February 3, 2021.

The matter before the Hearing Officer arises from the January 19, 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 his 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 19, 2021
- D-3 Independent Psychological Evaluation (IPE), dated December 30, 2020
- D-4 Children's Hospital of Pittsburg of UPMC Child Development Evaluation, dated January 11, 2013
- D-5 ██████████ Individualized Education Program (IEP), dated April 27, 2017
- D-6 ██████████ Report of Psychological Evaluation, dated April 29, 2013

- D-7 Autism Diagnostic Observation Schedule (ADOS-1) Report on [REDACTED], dated September 25, 2019
- D-8 [REDACTED] Board of Education Triennial Evaluation, dated September 8, 2015

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 determination.
- 3) On December 30, 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 Impairment, Level 2, Requiring Substantial Supports. (Exhibit D-3)
- 5) On January 19, 2021, 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 (3) or more of the six (6) 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 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 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 January 19, 2021, 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 did not support the presence of substantial adaptive deficits in three (3) or more of the six (6) major life areas identified for I/DD Waiver Program eligibility. The notice stated that specifically, the documentation failed to demonstrate substantial limitations in the following major life areas: *Self-Care*, *Self-Direction*, *Mobility*, and *Capacity for Independent Living*. The Appellant was awarded substantial deficits in the major life areas of *Receptive/Expressive Language* and *Learning*. 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 December 30, 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 Impairments, Level 2, Requiring Substantial 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 Intelligence Scale for Children – Fifth Edition (WISC-V) which is an instrument used to determine intellectual and cognitive functioning. The Respondent testified the WISC-V instrument indicated the Appellant's overall full-scale Intelligence Quotient (IQ) was 48, which is in the intellectually delayed range. An IQ of 48 is three (3) standard deviations below the mean and typically would be an eligible score of an intellectual disability for I/DD Waiver Program eligibility. However, Ms. Smith did not include a diagnosis of intellectual disability on the IPE and instead only offered that an IQ score of 48 is in the intellectually delayed range.

The Respondent testified the Appellant was being served as a student with a significant intellectual disability according to the IEP from 2017. There was no documentation provided for review for the Appellant's current functioning in the school system or his current educational setting and no diagnosis of an intellectual disability could be found on any supporting documentation. The Appellant's mother testified the Appellant is currently in private school and receiving no ancillary services. The Appellant's mother stated the reason her son was removed from public school was because his IEP was not being followed and her son was not with neurotypical students for at least 30% of the school day. The Appellant's mother did not indicate that her son has a diagnosis of an intellectual disability.

The December 30, 2020 IPE included a Childhood Autism Rating Scale (CARS-ST), which is used to identify individuals with autism and severity levels of autism. The CARS-ST raw score of 37.5, 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 Respondent testified because the Appellant has a level 2 diagnosis, he is not eligible for the I/DD Waiver Program.

The Appellant's mother testified that the Appellant's autism diagnosis is indefinite and should not need to be verified every year. The Respondent conceded that the Appellant has a diagnosis of autism. However, based on testimony and the documentation submitted, the Respondent proved by a preponderance of evidence that the Appellant's diagnosis of autism spectrum disorder did not meet the degree of severity required to establish an eligible diagnosis for the I/DD Waiver Program. Although the Appellant's mother's testimony had compelling arguments and was convincing, the Appellant does not meet the diagnostic criteria for eligibility for the I/DD Waiver Program.

Functionality

The Respondent indicated that an adaptive behavior assessment is used to identify substantial adaptive deficits for the six (6) major life areas (*Self-Care, Learning, Self-Direction, Communication, Mobility, and Capacity for Independent Living*). The Respondent testified that on

December 30, 2020, the Appellant was administered an Adaptive Behavior Assessment System (ABAS-3) to evaluate the Appellant's adaptive functioning level. 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 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 *Communication* and *Functional Academic* scores fell in the one (1) or two (2) range, which indicates that he does have substantial deficits in the major life areas of *Receptive or Expressive Language* and *Learning*.

The Appellant's mother indicated that the Appellant should have been awarded other substantial deficits, especially regarding *Self-Care*, *Self-Direction*, and *Capacity for Independent Living*.

The December 30, 2020 IPE indicated the Appellant scored in the "Below Average" range for *Self-Care*. The narrative on the IPE for the major area of *Self-Care* indicated the Appellant does poorly with his personal hygiene, as he has to be prompted constantly and his mother has to follow through and follow up on what the Appellant has completed with any of his tasks for personal hygiene. The narrative indicated the Appellant would not shower unless his mother made him and told him what he needed to do. The narrative indicated the Appellant can follow specific two-step instructions from his mother. The Appellant's mother testified the Appellant needs consistent physical and verbal prompting along with adult supervision. The Appellant's mother further testified that after the Appellant has a bowel movement, she has to check him to make sure he is clean. The Appellant's mother also stated that when the Appellant takes a shower, she has to stay in the bathroom with the Appellant and direct him on how to wash himself.

The December 30, 2020 IPE indicated the Appellant scored in the "Extremely Low" range for *Self-Direction*. The narrative on the IPE for the major life area of *Self-Direction* indicated the Appellant is able to make choices and conscious decisions as a result. The narrative stated that he will dress himself and tends to pick out his clothing appropriately. However, the narrative also indicated that the Appellant will not self-start tasks without direction, supervision, and assistance. The Appellant's mother testified the Appellant can make choices if given two or three choices, but he will not start tasks on his own. The Appellant's mother further testified the Appellant does not know the difference between a good and bad decision. The Respondent testified individuals eligible for ICF/IDD Level of Care cannot make choices. The Respondent further indicated in order to be awarded a deficit in the major life area of *Self-Direction*, an individual must not have the ability to start or stop activities.

The Respondent testified no 14-year-old child has the capacity for independent living noting the major life area of *Capacity for Independent Living* refers to the federal government's general definition of the six (6) subdomains: *Home Living*, *Social Skills*, *Employment*, *Health and Safety*,

Community, and *Leisure* activities. At a minimum (3) three of these subdomains must be substantially limited in order to meet the criteria for a deficit in the *Capacity for Independent Living*. The Respondent stated that only five (5) subdomains and *Employment* is excluded when assessing children.

On the IPE, the major life area of *Capacity for Independent Living* indicated the Appellant scored in the “Extremely Low” range for *Community Use*, *Social*, and *Leisure*; “Below Average” range for *Home Living*; and “Low” range for *Health and Safety*. The Appellant’s mother testified when it comes to *Home Living*, that she, her husband, and the Appellant’s sister, have to direct the Appellant every step of the way when he is at home. The Appellant’s mother also testified that the Appellant’s *Social* skills are limited. The Appellant’s mother stated the Appellant is in a basketball league but that he is unable to engage with his peers in small talk, for example asking someone their name. The Appellant’s mother testified when it comes to *Health and Safety*, her son only knows to look both ways when crossing the street because he is directed to look both ways. The Appellant’s mother stated the water tank temperature is turned down because the Appellant will only turn on the hot water. The Appellant’s mother further stated they have child lock handles on the stove so he cannot turn it on. The Appellant’s mother’s testimony was again convincing, however, 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 one (1) to seven (7), 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. The Appellant’s ABAS-3 scores do not show that the Appellant’s additional deficits were met for IDD Waiver eligibility.

CONCLUSIONS OF LAW

- 1) Policy for the I/DD Waiver Program requires an eligible diagnosis for a condition that is severe and chronic in nature. Because the Appellant does meet this severity standard, the diagnostic component was not established.
- 2) Because the Appellant only has two (2) eligible substantial functional deficits out the six (6) major life areas identified in the I/DD Waiver Program policy, the functional component could not be established.
- 3) Because the Appellant does not have an eligible diagnosis or meet the functional requirements, medical eligibility could not be established 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 April 2021.

Danielle C. Jarrett
State Hearing Officer