



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

March 19, 2021

[REDACTED]

RE: [REDACTED], A PROTECTED INDIVIDUAL v. WV DHHR
ACTION NO.: 21-BOR-1219

Dear Mr. [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-1219

**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 March 3, 2021, on an appeal filed February 10, 2021.

The matter before the Hearing Officer arises from the January 28, 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 Kerri Linton, consulting psychologist for the Bureau for Medical Services. The Appellant appeared by her brother, █. Appearing as a witness for the Appellant was █, Advocate with Disability Rights of West Virginia. All witnesses were sworn and the following documents were admitted into evidence.

Department's Exhibits:

- D-1 Bureau for Medical Services Policy Manual §513.6
- D-2 Notice of Denial dated January 28, 2021
- D-3 Independent Psychological Evaluation dated December 7, 2020
- D-4 Notice of Denial dated September 28, 2020
- D-5 Independent Psychological Evaluation dated August 27, 2020
- D-6 Adult Intake Form for Mildred Mitchell-Bateman Hospital dated August 27, 2020
- D-7 Medication List from Mildred Mitchell-Bateman Hospital dated December 4, 2020
- D-8 Correspondence from █ with FMRS dated July 14, 2005
- D-9 Individual Program Plan dated February 18, 2004
- D-10 Comprehensive Psychological Evaluation dated February 2, 2004

- D-11 [REDACTED] County ACTION Plan dated October 18, 2012
- D-12 Notice of Denial dated October 15, 2019
- D-13 Independent Psychological Evaluation dated September 25, 2019
- D-14 Comprehensive Psychological Evaluation dated February 18, 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) The Appellant applied for services under the I/DD Waiver Program.
- 2) An Independent Psychological Evaluation (IPE) was conducted with the Appellant on August 27, 2020 in conjunction with the I/DD Waiver Program application (Exhibit D-5).
- 3) The Appellant was diagnosed with Schizoaffective Disorder and mild Intellectual Disability (Exhibit D-5).
- 4) The Respondent issued a Notice of Denial on September 28, 2020, advising that the Appellant's application had been denied as the documentation did not support the presence of an eligible diagnosis of an Intellectual Disability or related condition with associated substantial adaptive deficits, which is severe, and was present during the developmental period prior to the onset of mental illness (Exhibit D-4).
- 5) The Appellant requested a second psychological evaluation to determine eligibility for the I/DD Waiver Program which was conducted on December 7, 2020 (Exhibit D-3).
- 6) The Appellant received diagnoses of Schizoaffective Disorder and mild Intellectual Disability (Exhibit D-3).
- 7) The Respondent issued a Notice of Denial on January 28, 2021, advising that the Appellant's application had been denied as the documentation did not support the presence of an eligible diagnosis of Intellectual Disability or related condition which is severe, with concurrent substantial adaptive delays which were present prior to the onset of mental illness (Exhibit D-2).
- 8) The Appellant was identified as a Medley class member in 2003 (Exhibit D-8).

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.

The Medley Decree (*Medley vs Ginsberg 492 F.Supp. 1294 (S.D. W. Va., 1980)*) certified all persons under the age of twenty-three (23) years who suffer from mental retardation (Intellectual Disability) as that term is defined by W. Va. Code § 27-1-3 (1976), who are citizens of the State of West Virginia, who are unable to live in their homes due to lack of resources in their homes or in their home communities to fulfill their special needs arising from their mental retardation, and who are now or will in the future be institutionalized as Medley class participants.

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 denied the Appellant's application for the I/DD Waiver Program as she did not meet the diagnostic criteria of an eligible diagnosis of an Intellectual Disability, or related condition, which is severe. The Appellant underwent two psychological evaluations to determine medical eligibility for I/DD Waiver services. The initial psychological evaluation conducted in

August 2020 determined the Appellant's IQ as 63 as derived from the Weschler Adult Intelligence Scale (WAIS). The Appellant's IQ from the WAIS administered during the psychological evaluation in December 2020 was a 66, falling within the mild intellectual range. Kerri Linton, consulting psychologist for the Respondent, testified that a score of 66 did not meet the threshold of a severe Intellectual Disability. Ms. Linton testified that the Appellant's primary diagnosis is that of mental illness and any substantial adaptive deficits present are attributed to that diagnosis. Ms. Linton referred to policy in the exclusion of mental illness as an eligible diagnosis for I/DD Waiver eligibility. Ms. Linton testified that the training that is provided through I/DD Waiver services is habilitative, and based upon the information provided, the Appellant would not benefit from these services as her primary disability is mental illness.

According to the records submitted with the Appellant's application, the Appellant was administered an educational assessment when she was approximately 13 years old in May 1997, by ██████ County Schools to determine placement in special education classes. The Appellant's IQ was determined as a 68. Records indicate that the Appellant functioned normally academically until middle school, when the Appellant began having difficulty with concentration and following instruction. The Appellant was admitted to Sharpe Hospital in 2002, when she was approximately 17 years old, when she began exhibiting bizarre and inappropriate behaviors. The Appellant was diagnosed with Schizoaffective Disorder in 2002 and mild Intellectual Disability. The Appellant has remained institutionalized in psychiatric facilities throughout her adult life, with brief placements in residential group settings. The Appellant has a history of self-harm and hallucinations.

The Appellant has been consistently diagnosed with mild Intellectual Disability and Schizoaffective Disorder in the multiple psychological evaluations that were submitted for review. The Appellant met the criteria for and was identified as a Medley class member in 2003. However, identification of an applicant as a Medley class member does not automatically meet the medical eligibility requirements for participation in the I/DD Waiver Program.

There is no dispute that the Appellant had a diagnosis of an Intellectual Disability during the developmental period. The issue to be decided is if the Appellant's Intellectual Disability meets the severity criteria and if the Appellant has substantial adaptive deficits attributed to Intellectual Disability and not mental illness.

The tests administered during the psychological evaluations from August and December 2020 measured the Appellant's intellectual functioning to be in the mildly impaired range. The academic achievement tests indicated that the Appellant was functioning in the borderline range academically, which is inconsistent with a severe Intellectual Disability. From the developmental period throughout the Appellant's adulthood, the Appellant has consistently tested within the mild intellectual range, with somewhat higher scores on achievement tests, which may be indicative of a learning disability. There are conflicting accounts of when special education services were started for the Appellant, however, documentation supports the Appellant's significant decline did not start until age 17, after the onset of the Appellant's mental illness.

The Appellant received low scores on the August and December 2020 adaptive behavior tests. The Appellant scored less than one percentile on the Adaptive Behavior Assessment System (ABAS)

in each of the major life areas tested. The Appellant scored less than one percentile in functional academics, self-direction and capacity for independent living as derived from the December 2020 ABAS. These scores are contradictory with the narrative descriptions of the Appellant's abilities. The Appellant is independent in areas of self-care with the need for prompting, is able to participate in a conversation and express her wants and needs and is able to make choices regarding her hobbies and interests. Regarding functional academics, or learning, the Wide Range Achievement Test (WRAT) administered in August and December 2020, the Appellant's scores in Reading, Spelling and Math Computation ranged from scores of 60 to 79. To be considered functioning in less than one percentile, eligible scores are 55 or below. Based on the scores derived from the WRAT, the Appellant is not found to be substantially delayed in the area of functional academics, which does not reflect a severe Intellectual Disability.

The Appellant's brother, [REDACTED], testified that the Appellant had an Intellectual Disability at a young age, having to repeat kindergarten and sixth grade. Mr. [REDACTED] contended that the Appellant's Intellectual Disability has been overlooked by her treating physicians, who focused on her mental illness instead. Mr. [REDACTED] testified that the Appellant has difficulties with comprehension and is easily confused and cannot live independently in the community. Mr. [REDACTED] argued that the Appellant has substantial adaptive delays in self-care, self-direction, learning, capacity for independent living and communication, all of which can be attributed to her cognitive functioning, not mental illness.

The Appellant was diagnosed with an Intellectual Disability during the developmental period, prior to age 22. However, from the earliest psychological evaluation available for review to the most recent evaluation administered in December 2020, the Appellant's cognitive abilities have been determined to fall within the mildly impaired range. The Appellant's behaviors and inability to live independently in the community without constant supervision are a result of her mental illness.

Whereas the Appellant does not have an eligible diagnosis of a severe Intellectual Disability, or related condition, the Respondent's decision to deny the Appellant's application for services under the I/DD Waiver Program is affirmed.

CONCLUSIONS OF LAW

- 1) Pursuant to policy, an individual must meet the diagnostic criteria of a diagnosis of Intellectual Disability or related condition, which constitutes a severe and chronic disability that manifested prior to age 22.
- 2) The Appellant was diagnosed with a mild Intellectual Disability and Schizoaffective Disorder prior to age 22.
- 3) Based on the documentation submitted, the Appellant's primary diagnosis is that of mental illness, which is specifically excluded by policy as an eligible diagnosis for I/DD Waiver eligibility.
- 4) The Appellant did not meet the diagnostic 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 19th day of March 2021.

Kristi Logan
Certified State Hearing Officer