



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

Bill J. Crouch  
Cabinet Secretary

BOARD OF REVIEW  
State Capitol Complex  
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Charleston, West Virginia 25305  
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Jolynn Marra  
Interim Inspector General

September 21, 2021



RE: [REDACTED], A PROTECTED INDIVIDUAL v. WVDHHR  
ACTION NO.: 21-BOR-1812

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 Board of Review 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 that may be taken if you disagree with the decision reached in this matter.

Sincerely,

Angela D. Signore  
State Hearing Officer  
State Board of Review

Enclosure: Appellant's Recourse  
Form IG-BR-29  
cc: Stacy Broce, Bureau for Medical Services  
Kerri Linton, PC&A

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

█, A PROTECTED INDIVIDUAL,

**Appellant,**

v.

**ACTION NO.: 21-BOR-1812**

**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' (DHHR) Common Chapters Manual. This fair hearing was convened on August 26, 2021, on an appeal filed July 22, 2021.

The matter before the Hearing Officer arises from the July 14, 2021 determination 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 █, Guardian. Appearing as witnesses for the Appellant were █, Director, █, and █, █. All witnesses were sworn and the following documents were admitted into evidence.

**Department's Exhibits:**

- D-1 Bureau for Medical Services Provider Manual §513.16
- D-2 DHHR BMS Notice of Denial, dated July 14, 2021
- D-3 Independent Psychological Evaluation (IPE), dated June 23, 2021
- D-4 Health Summary for █, date unknown
- D-5 Care Plan: Applied Behavior Analysis, dated December 09, 2020 and April 13, 2021
- D-6 Behavior Intervention Plan, dated May 06, 2021
- D-7 Individualized Education Program Assessment completed by █, dated April 09, 2021
- D-8 Independent Psychological Evaluation, dated February 06, 2020
- D-9 DHHR BMS Notice of Denial, dated May 07, 2020

- D-10 Independent Psychological Evaluation, dated October 30 and 31, 2018  
D-11 DHHR BMS Notice of Denial, dated November 16, 2018

**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 following Findings of Fact are set forth.

**FINDINGS OF FACT**

- 1) The Respondent, through the Bureau for Medical Services, contracts with Psychological Consultation & Assessment (PC&A) to perform functions related to the I/DD Waiver Program, including eligibility determination. (Exhibit D-1)
- 2) On October 30 and October 31, 2018, [REDACTED], a Licensed Psychologist, completed an Independent Psychological Evaluation (IPE) on the Appellant. (Exhibit D-10)
- 3) The October 30-31, 2018, IPE lists diagnoses of Childhood Autism and Attention Deficit Hyperactivity Disorder (ADHD), predominantly hyperactive impulsive presentation. (Exhibit D-10)
- 4) On November 16, 2018, the Respondent issued a notice advising the Appellant that his application for I/DD Waiver Program eligibility was denied due to the submitted documentation did not support the presence of substantial adaptive deficits in three (3) or more of the six (6) major life areas. (Exhibit D-11)
- 5) The November 16, 2018, notice reflected that the Appellant was found to lack substantial adaptive deficits in the areas of *self-care, learning, self-direction, receptive or expressive language, mobility, and capacity for independent living*. (Exhibit D-11)
- 6) The Respondent's November 16, 2018, denial was based on "10/30/2018 and 10/31/2018 IPE, 10/26/2018 IEP". (Exhibit D-11)
- 7) On February 06, 2020, [REDACTED], a Licensed Psychologist, completed an Independent Psychological Evaluation (IPE) on the Appellant. (Exhibit D-8)
- 8) The February 06, 2020, IPE lists diagnoses of Conduct Disorder, Childhood-Onset Type, and Mild Intellectual Disability. (Exhibit D-8)
- 9) On May 07, 2020, the Respondent issued a notice advising the Appellant that his application for I/DD Waiver Program eligibility was denied due to the submitted

documentation did not support the presence of substantial adaptive deficits in three (3) or more of the six (6) major life areas. (Exhibit D-9)

- 10) The May 07, 2020, notice reflected that the Appellant was found to lack substantial adaptive deficits in the areas of *self-care, learning, self-direction, receptive or expressive language, mobility, and capacity for independent living*. (Exhibit D-9)
- 11) The Respondent's May 07, 2020, denial was based on "02/06/2020 IPE, 11/16/2018 Notice of Denial, 04/12/2019 IEP. (Exhibit D-9)
- 12) On December 09, 2020, an Applied Behavior Analysis was completed on the Appellant by [REDACTED], Behavior Analyst, [REDACTED]. (Exhibit D-5)
- 13) The December 09, 2020, analysis lists previous diagnoses of Conduct Disorder, Childhood-Onset Type, Disruptive Mood Dysregulation Disorder, Mild Intellectual Disability, and Enuresis, primarily nocturnal. (Exhibit D-5)
- 14) On April 13, 2021, an Applied Behavior Analysis was completed by [REDACTED], Behavior Analyst, [REDACTED] (Exhibit D-5)
- 15) During the April 13, 2021, Behavior Analysis, an ABAS-3 was given that measured the Appellant's three major adaptive domains (Conceptual, Social, and Practical) as: Conceptual – 59, Social – 63, Practical – 51, and General Adaptive Composite (GAC) 53, measuring the Appellant in the "extremely low range." (Exhibit D-5)
- 16) On June 23, 2021, [REDACTED], a Licensed Psychologist, completed an Independent Psychological Evaluation (IPE) on the Appellant. (Exhibit D-3)
- 17) The June 23, 2021, IPE lists diagnoses of Autism Spectrum Disorder with Intellectual Impairment, Accompanying Language Impairment, Severity Level for Social Communication/Social Interaction and for Restricted, Repetitive Behaviors, Low end of Level 2, "Requiring substantial support to very substantial support", and Mild Intellectual Disability; By history: ADHD Disruptive Mood Dysregulation Disorder, Intermittent Explosive Disorder, Mixed Receptive-Expressive Disorder, Conduct Disorder, and Enuresis. (Exhibit D-3)
- 18) On July 14, 2021, the Respondent issued a notice advising the Appellant that his application for I/DD Waiver Program eligibility was denied due to the submitted documentation did not support the presence of substantial adaptive deficits in three (3) or more of the six (6) major life areas. (Exhibit D-2)
- 19) The July 14, 2021, notice reflected that the Appellant was found to lack substantial adaptive deficits in the areas of *learning, self-direction, receptive or expressive language, mobility, and capacity for independent living*. (Exhibit D-2)

- 20) The Respondent's July 14, 2021, denial was based on "06/23/21 IPE; [REDACTED], M.D. Health Summary; 02/08/21, 4/16/21 Care Plan: Applied Behavior Analysis; 05/06/21 Behavior Intervention Plan; 04/09/21 [REDACTED] IEP; 02/06/2020 IPE; 05/07/2020 Notice of Denial; 10/30, 10/31/2018 IPE; 11/16/2018 Notice of Denial. (Exhibit D-2)
- 21) The Appellant is currently receiving benefits provided by the Children with Serious Emotional Disabilities Waiver Program. (Exhibit D-5)
- 22) The Appellant meets the diagnostic criteria for the I/DD Waiver Program with an eligible diagnosis of Autism Disorder. (Exhibit D-3)
- 23) PC&A relies on ABAS-3 scores, along with narrative descriptions in the IPE, to determine the level of adaptive functioning. Scaled scores of one (1) and two (2) are considered eligible scores on the ABAS-3 for the I/DD Waiver Program. (Exhibit D-1)
- 24) Both the ABAS-3 scores and the supporting narrative descriptions established a substantial delay in the major life area of *Self-Care*. (Exhibit D-3)
- 25) Scores in the remaining major life areas of *Receptive or Expressive Language, Learning, Mobility, Self-Direction*, and the subdomains of *Capacity for Independent Living* failed to meet the strict criterion as established by policy. (Exhibit D-3)

### **APPLICABLE POLICY**

#### **Bureau for Medical Services (BMS) Manual § 513.6 provides, in part:**

In order for an applicant to be found eligible for the I/DD Waiver Program, they must meet medical eligibility criteria. Initial medical eligibility is determined by the Medical Eligibility Contracted Agent (MECA) through review of an Independent Psychological Evaluation (IPE) report completed by a member of the Independent Psychologist Network (IPN); which may include background information, mental status examination, a measure of intelligence, adaptive behavior, achievement, and any other documentation deemed appropriate.

#### **BMS Manual § 513.6.2 provides, in part:**

To be medically eligible, the applicant must require the level of care and services provided in an ICF/IID as evidenced by required evaluations and other information requested by the IP or the MECA and corroborated by narrative descriptions of functioning and reported history. An ICF/IID provides services in an institutional setting for persons with intellectual disability or a related condition. An ICF/IID provides monitoring, supervision, training, and supports.

Evaluations of the applicant must demonstrate:

- A need for intensive instruction, services, assistance, and supervision in order to learn new skills, maintain current level of skills, and/or increase independence in activities of daily living; and
- A need for the same level of care and services that is provided in an ICF/IID.

The IPE verifies that the applicant has an intellectual disability with concurrent substantial deficits or a related condition which constitutes a severe and chronic disability with concurrent substantial deficits. An applicant must meet all the medical eligibility criteria in each of the following categories:

- Diagnosis;
- Functionality;
- Need for treatment; and
- Requirement of ICF/IID Level of Care

**BMS Manual § 513.6.2.1 provides, in part:**

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 may, if severe and chronic in nature, 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 disabilities 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 disabilities.

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 under Section 513.6.2.2, Functionality.

**BMS Manual § 513.6.2.2 provides, in part:**

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 ID normative populations when intellectual disability 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.

**DISCUSSION**

Pursuant to policy, in order for an applicant to be found eligible for the I/DD Waiver Program, an individual must meet medical eligibility criteria. Initial medical eligibility is determined by the Medical Eligibility Contracted Agent (MECA) through review of an Independent Psychological Evaluation (IPE) report completed by a member of the Independent Psychologist Network (IPN). To be medically eligible, criteria in each of the following categories must be met to be eligible for the I/DD Waiver Program: diagnosis, functionality, need for active treatment, and requirement of ICF/IID Level of Care. Once an eligible diagnosis is established, the Respondent then evaluates to see if the Appellant meets the functional criteria for the I/DD Waiver Program. An adaptive behavior assessment is used to identify if the Appellant exhibits substantial adaptive deficits in the six (6) major life areas (*Self-Care, Communication, Learning, Mobility, Self-Direction, and Capacity for Independent Living*).

Policy defines substantial adaptive deficits as standardized scores of three (3) standard deviations below the mean, or less than one percentile, when derived from a standardized measure of adaptive behavior. The applicant must also require the level of care and services provided in an ICF/IID as evidenced by required evaluations and other information requested by the IP or the MECA and corroborated by narrative descriptions of functioning and reported history. A need for intensive instruction, services, assistance, and supervision in order to learn new skills, maintain current level of skills, and/or increase independence in activities of daily living is required. Failure to meet any one of the eligibility categories results in a denial of program services.

On June 23, 2021, a Weschler Intelligence Scale for Children, Fifth Edition (WISC-V) was administered to the Appellant resulting in a full-scale Intelligence Quotient (IQ) of 63. Although the Appellant did refuse aspects of the WISC-V, along with fluctuating levels of motivation during the testing, the Psychologist concluded that the obtained results were deemed to be a valid reflection of the Appellant's current abilities. In determining the severity of the Appellant's autism, the Respondent considered the Gilliam Autism Rating Scale-3 (GARS-3) Index Score of 115. Ms. Linton explained that because a score of 115 indicates a "very likely probability of Autism Spectrum Disorder," the diagnosis of a mild intellectual disability was accepted. Ms. Linton testified that while the Appellant has an eligible diagnosis, the documentation failed to demonstrate he had the substantial adaptive deficits required by policy to meet Waiver eligibility. Additionally, Ms. Linton testified that the Appellant does not require the ICF/IID Level of Care necessary for I/DD Waiver Program eligibility.

During the June 2021 assessment, the Appellant was administered an ABAS-3 to evaluate the Appellant's adaptive functioning level. The Appellant must have a standardized score of one (1) or two (2) to establish a substantial deficit in the six (6) major life areas. In addition to the standardized scores, the narrative descriptions in the IPE must also support the existence of substantial deficits. Kerri Linton (Ms. Linton), consulting psychologist for the Respondent, testified that the Appellant was awarded a substantial adaptive deficit in the area of *Self-Care*. Because the Appellant was found to lack adaptive deficits in the areas of *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*), on July 14, 2021, the Appellant's application for the I/DD Waiver Program was denied. To establish that the Respondent correctly denied the Appellant eligibility, the Respondent had to demonstrate by a preponderance of evidence that the Appellant lacked substantial adaptive deficits in three (3) or more of the six (6) major life areas. It should also be noted that the Appellant has applied for and been denied I/DD Waiver Program eligibility on two prior occasions – May 07, 2020, and November 16, 2018.

When reviewing the Appellant's June 2021 IPE, the Appellant's parent and teacher ABAS-3 in the area of *Receptive or expressive language (communication)* reflected a scaled score of four (4). The Appellant's ABAS-3 completed February 06, 2020, reflected a scaled score of seven (7), and the Appellant's ABAS-3 completed October 30 and 31, 2018, reflected a scaled score of eight (8). Also provided were evaluations completed by Diversified Assessment Therapy Services on December 09, 2020, and April 13, 2021. At the time of the April 2021 Applied Behavior Analysis, an ABAS-3 was completed. However, because ABAS-3 individual skilled scaled scores were not provided, specific adaptive deficit capacities could not be distinguished.



The Respondent testified that to demonstrate a substantial delay, the Appellant would have to demonstrate little to no verbal ability or require the use of an augmented device for communication. The evidence entered demonstrates that the Appellant's functioning exceeded this threshold with his ability to use sentences that contain a noun and verb, usage of names of others he is familiar with, as well as his ability to discuss his favorite activities, and "joking around with his [classroom] aide, [REDACTED]."

In the area of *learning (functional academics)*, the Respondent testified that the Appellant's June 2021 ABAS-3 score reflected a scaled score of a three (3). While a score of three (3) is considered "Extremely Low," it is not defined by policy as a substantial deficit. The Appellant's February 2020, ABAS-3 reflected a "Low" scaled score of four (4), and the October 2018 ABAS-3 reflected a scaled score of nine (9). Additionally, a Wide Range Achievement Test, Fifth Edition (WRAT-5) was attempted to measure the Appellant's achievement levels in word reading. The mean, or average, of this test is 100, with three (3) standard deviations below the mean, resulting in an eligible score of 55 or below. The Appellant scored a total of 87 in reading computation, which falls in the nineteenth (19) percentile.

The Respondent explained that in order to meet the threshold of a substantial deficit in the area of *mobility*, an individual would normally be wheelchair bound, unable to self-propel, or unable transfer. The evidence demonstrated that the Appellant is independently ambulatory, and therefore, a substantial deficit in the area of *mobility* could not be awarded.

To demonstrate a substantial deficit in the area of *self-direction*, the evidence had to demonstrate that the Appellant was not able to make choices, show preferences, or start and stop activities independently. The Respondent clarified that the narrative does not look at the Appellant's ability to make *good* choices, but rather his ability to make his preferences noted. The Respondent testified that the Appellant's June 2021 ABAS-3 reflected a scaled score of four (4). While a score of four (4) is considered "Low," it is not defined by policy as a substantial deficit. The Appellant's February 2020 ABAS-3 reflected a "Low" scaled score of five (5), and the October 2018 ABAS-3 reflected a scaled score of eight (8). The narratives established that the Appellant has a strong preference revolving around electronics and computer/video games. While the IEP narrative and testimony reflect that the Appellant exhibits little ability to maintain self-control when frustrated, the narratives demonstrate that the Appellant is capable of initiating those activities he wishes to engage in. Although the Appellant may demonstrate barriers making appropriate choices, the evidence establishes that the Appellant is capable of initiating and choosing to participate in activities.

To demonstrate a substantial deficit in the area of *capacity for independent living*, the Appellant would have to be awarded deficits in at least three (3) of the following six (6) sub-domains: *home living, social skills, employment, health and safety, community, and leisure activities*. The Respondent explained that because of the Appellant's status as a minor, the area of employment is not considered. Therefore, the Appellant would have to be awarded deficits in three (3) of the five (5) remaining sub-domains. Ms. Linton testified that when measuring deficits within the sub-domains of *capacity for independent living*, the Appellant's *ability* is assessed, rather than his willingness to participate. The Respondent testified that per policy, the Appellant was found to have substantial delays in the areas of *health and safety* and *social skills*. When reviewing the Appellant's June 2021 ABAS-3 in the area of *home living*, the Appellant was given a three (3).

While a score of three (3) is considered “Extremely Low,” it is not defined by policy as a substantial deficit. The Appellant’s February 2020, ABAS-3 reflected an “Average” scaled score of eight (8), and the October 2018 ABAS-3 reflected a scaled score of seven (7). When reviewing the Appellant’s June 2021 ABAS-3 in the area of *community*, the Appellant was given a five (5). While a score of five (5) is considered “Low,” it is not defined by policy as a substantial deficit. The Appellant’s February 2020, ABAS-3 reflected an “Average” scaled score of eight (8), and the October 2018 ABAS-3 reflected a scaled score of five (5). The Appellant’s June 2021 ABAS-3 listed a “Low” scaled score of four (4) in the area of *leisure activities*. His February 2020 ABAS-3 listed a scaled score of six (6), or “Below Average”, and the October 2018 ABAS-3 reflected a scaled score of nine (9) in the area of *leisure activities*. Although the Appellant presents with some delay in the areas of *home living*, *community*, and *leisure activities*, the delays are not considered substantial as defined by policy.

Testimony was provided by the Appellant’s mother and witnesses in support of the Appellant’s need for I/DD Waiver Program services. The Appellant’s witness, [REDACTED] (Ms. [REDACTED]), contested the Appellant’s denial and suggested that even though the Appellant is currently receiving benefits provided by the Children with Serious Emotional Disabilities Waiver program, due to his history of “long-term behavior issues,” the I/DD Waiver Program would be a more appropriate level of care to meet the Appellant’s needs. The Appellant’s mother detailed that the Appellant requires “constant adult supervision” during his awake hours. She further testified that the Appellant cannot attend activities such as church, attend daycare, nor can she find someone willing to assist with watching the Appellant due to his aggressive behavioral issues. Additional testimony provided by the Appellant’s witness, [REDACTED] (Ms. [REDACTED]), argued the Appellant’s ABAS-3 administered by [REDACTED] in April 2021 reflect scores “all falling in the extremely low percentage.”

The April 13, 2021, ABAS-3 measured the Appellant’s three major adaptive domains (Conceptual, Social, and Practical) as: Conceptual – 59, Social – 63, Practical – 51, and General Adaptive Composite (GAC) 53. While these scores are indicative of the Appellant being assessed in the “extremely low range,” without individual skilled scaled scores, the assessment is not specific enough to distinguish which individual areas the Appellant’s functionality may have met the threshold that is required by policy. Although the Appellant’s representatives provided relevant information regarding his behaviors, the evidence and testimony did not disprove the Department’s position that the Appellant’s application failed to demonstrate substantial limitations in three (3) of the six (6) major life areas listed in policy.

### **CONCLUSIONS OF LAW**

- 1) Policy for the I/DD Waiver Program requires an applicant to meet medical eligibility criteria in each of the following categories: diagnosis, functionality, need for active treatment, and requirement of ICF/IID Level of Care.
- 2) The Appellant has an eligible diagnosis of Intellectual Disability.

- 3) Substantial deficits are evidenced by standardized adaptive behavior test scores three (3) standard deviations below the mean, or less than 1% when derived from a normative sample that represents the general population and must be supported by the narrative descriptions contained in the documentation submitted for review.
- 4) The Appellant did not have substantial adaptive deficits in at least three (3) of the six (6) major life areas as evidenced by standardized adaptive behavior test scores and the narrative descriptions contained within the evidence.

### **DECISION**

It is the decision of the State Hearing Officer to **UPHOLD** the Respondent's decision to deny the Appellant medical eligibility for the Medicaid I/DD Waiver Program.

ENTERED this \_\_\_\_ day of September 2021.

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**Angela D. Signore**  
State Hearing Officer