



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

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Board of Review
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Jolynn Marra
Interim Inspector General

September 21, 2021



RE: [REDACTED], A MINOR v. WVDHHR
ACTION NO.: 21-BOR-1847

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,

Tara B. Thompson, MLS
State Hearing Officer
State Board of Review

Enclosure: Appellant's Recourse
Form IG-BR-29

CC: Stacy Broce, Bureau for Medical Services
Janice Brown, KEPRO
Kerri Linton, Psychological Consultation and Assessment

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

█, A MINOR,

Appellant,

v.

ACTION NO.: 21-BOR-1847

**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 of Chapter 700 of the West Virginia Department of Health and Human Resources' (DHHR) Common Chapters Manual. This fair hearing was convened on September 1, 2021 on an appeal filed with the Board of Review on July 29, 2021.

The matter before the Hearing Officer arises from the Respondent's May 4, 2021 decision to deny the Appellant medical eligibility for the Medicaid Intellectual and Developmental Disabilities (I/DD) Waiver program.

At the hearing, the Respondent appeared by Kerri Linton, psychologist with Psychological Consultation and Assessment. The Appellant appeared *pro se* by her mother, █. Appearing as a witness on behalf of the Appellant was █ (Ms. █), deaf educator and outreach specialist with the West Virginia Technical Assistance Center. All witnesses were sworn in and the following exhibits were entered as evidence.

Department's Exhibits:

- D-1 Bureau for Medical Services (BMS) Manual § 513.6 through 513.6.4
- D-2 BMS Notice, dated May 4, 2021
- D-3 Independent Psychological Evaluation, dated April 9, 2021
- D-4 █ Evaluation, dated March 18, 2021
- D-5 █ Pre-K Evaluation Report, dated December 11, 2019
- D-6 █ documentation
- D-7 Cochlear Implant Report, dated January 15, 2021
- D-8 Cochlear Implant Report, dated September 18, 2020

D-9 Appellant's medical documentation

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) On May 4, 2021, the Respondent denied the Appellant's application for Medicaid I/DD Waiver program eligibility (Exhibit D-2).
- 2) The reason for denial indicated, "it is not clear if the disability meets policy definition of a chronic condition that is likely to continue indefinitely" (Exhibit D-2).
- 3) At the time of the Respondent's denial of the Appellant's medical eligibility, the Appellant was four years old (Exhibits D-4, D-5, D-7, D-8).
- 4) At 16 months of age, the Appellant had a diagnosis of Sensorineural hearing loss (SNHL) of both ears (Exhibit D-9).
- 5) On May 23, 2018, the Appellant had cochlear implant surgery on her right and left ears. The Appellant was one year old at the time of cochlear implant surgery (Exhibits D-4, D-7, and D-8).
- 6) On December 11, 2019, Battelle Developmental Inventory-2nd Edition (BDI-2) results indicated that the Appellant had a significant developmental delay in the domain of Receptive and Expressive Communication (Exhibit D-5).
- 7) On the BDI-2, the Appellant scored in the low-average range in the Adaptive and Cognitive domains, in the average range for Personal/Social domain, and in the high average development range in the Motor domain (Exhibit D-5).
- 8) The Appellant's Battelle Total Developmental Quotient was 85, in the 16th percentile (Exhibit D-5).
- 9) On September 18, 2020, an examination was conducted to check the internal function of the Appellant's cochlear implant due to the Appellant's limited progress, minimal speech and language, and very few responses to sounds despite full-time cochlear implant use (Exhibit D-8).
- 10) No major issues with the internal functioning of the Appellant's cochlear implants were identified (Exhibits D-4, D-7, and D-8).

- 11) On January 15, 2021, a cochlear implant follow-up examination was conducted. The Appellant was noted to respond to sounds more consistently during the evaluation, at home, and at school (Exhibit D-7).
- 12) As of January 15, 2021, the Appellant received speech therapy every other week, was not always cooperative, and had not made much progress in her speech development (Exhibit D-7).
- 13) As of March 18, 2021, the Appellant was unable to acquire receptive or expressive spoken language and was unable to process listening and spoken language (Exhibit D-4).
- 14) A Ski-Hi Language Development Scale (LDS) was used to determine the Appellants Receptive and Expressive Language range 20-22 months of age (Exhibit D-4).
- 15) The Appellant is unable to follow 2 step directions. She is capable of mimicking tasks but is unable to perform tasks without modeling (Exhibits D-3 and D-4).
- 16) The Appellant does not understand safety concerns such as hot, stop, traffic, fire, and other harmful situations and does not understand abstract concepts of time, days, and emotions (Exhibits D-3 and D-4).
- 17) The Appellant understands American Sign Language (ASL) signs for approximately 75 concrete terms. The Appellant has an ASL sign vocabulary of 20-50 concrete terms but does not use ASL signs spontaneously (Exhibits D-3 and D-4).
- 18) On April 9, 2021, a Slosson Intelligence Test- Primary (SIT-P) was administered during an IPE conducted with the Appellant (Exhibit D-3).
- 19) The Appellant's Verbal Scale Intelligence Quotient (IQ) is 35, Non-verbal Scale IQ is 83, and her Total Scale IQ is 55 (Exhibit D-3).
- 20) The Appellant has a diagnosis of Intellectual Disability, Mild (Exhibit D-3).
- 21) The Appellant's diagnosis is likely to continue indefinitely (Exhibits D-3 through D-8).
- 22) The results of the Adaptive Behavior Assessment System 3 (ABAS-3) indicated scores of 1 in the areas of *communication, community use, functional academics, home living, health and safety, leisure, self-care, self-direction, and social* (Exhibit D-3).
- 23) The Appellant's long-term prognosis is poor to guarded (Exhibit D-3).

APPLICABLE POLICY

Bureau for Medical Services (BMS) Manual §§ 513.6 and 513.6.2 provide in part:

To be found eligible for the Medicaid I/DD Waiver program, the applicant must meet medical eligibility. To be medically eligible, the applicant must require the level of care and services provided in Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IID) as evidenced by required evaluations and other information requested by the Independent Psychologist (IP) or the Medical Eligibility Contracted Agent (MECA) and corroborated by narrative descriptions of functioning and reported history

The MECA determines the qualification for an ICF/IID level of care based on the IPE that verifies that the applicant has an intellectual disability with concurrent substantial deficits manifested prior to age 22. For the Medicaid I/DD Waiver program, individuals must meet criteria for medical eligibility not only by test scores but also narrative descriptions contained in the documentation.

In order to be eligible to receive Medicaid 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

BMS Manual § 513.6.2.1 provides in part:

The applicant who has a diagnosis of intellectual disability must meet the following requirements:

- Likely to continue indefinitely; and,
- Must have the presence of at least three substantial deficits out of six identified major life areas listed under Section 513.6.2.2 *Functionality*

DISCUSSION

The Respondent denied the Appellant's application for Medicaid I/DD Waiver program eligibility. The Appellant contested the Respondent's decision and argued that the Appellant meets eligibility criteria for the Medicaid I/DD Waiver program. The Respondent did not dispute the Appellant's eligibility in the areas of functionality, need for active treatment, or requirement of ICF/IID level of care. The Respondent's testimony and notice of denial asserted that the Appellant's diagnosis of intellectual disability could not be affirmed as a chronic condition that is likely to continue indefinitely.

The Respondent had to prove by a preponderance of evidence that the Appellant's diagnosis of intellectual disability is not likely to continue indefinitely. The Respondent testified that the Appellant's young age, uncertainty of her progress with her cochlear implants, and above average

non-verbal IQ render the chronic status of the Appellant's diagnosis as unclear.

The policy stipulates that medical eligibility for the Medicaid I/DD Waiver program is based on the diagnoses verified by the IPE. The Respondent did not contest the reliability of the IPE and only argued that the likelihood of the diagnosis indicated on the IPE being indefinite could not be affirmed. The evidence verified that the Appellant has a diagnosis of Intellectual Disability, Mild. The IPE reflected that the Appellant's insight was developmentally delayed and the psychologist's long-term prognosis for the Appellant was poor to guarded.

During the hearing, the Appellant's witness testified that at three years post-cochlear implant activation, the Appellant should be functioning significantly higher than her current abilities demonstrate. The Appellant's witness testified that the Appellant has not progressed beyond typical functioning at 1-4 weeks post-cochlear implant activation. The evidence established that there is no mechanical malfunction of the Appellant's cochlear implants. The Appellant's witness testified that the Appellant is unable to obtain listening or spoken language and that the Appellant cannot process cause and effect with visual or auditory communication. The Appellant's witness testified that based on her observation of the Appellant's inability to progress with processing language, her opinion is that the Appellant's intellectual disabilities are likely to continue indefinitely.

The evidence established that the Appellant has no awareness of danger. Further, the evidence verified that the Appellant is capable of imitating modeled behavior and visual communication but is unable to follow instructions to complete tasks or use sign language spontaneously. The credible testimony of the Appellant's witness during the hearing and the narrative description of the Appellant's functioning in the documentation narrative corroborate the IPE intellectual disability diagnosis and long-term prognosis.

CONCLUSIONS OF LAW

- 1) To meet medical eligibility for the Medicaid I/DD Waiver program, a diagnosis of intellectual disability must be likely to continue indefinitely.
- 2) The preponderance of evidence verified that the Appellant has a diagnosis of intellectual disability that is likely to continue indefinitely.
- 3) The Respondent incorrectly denied the Appellant's medical eligibility for the Medicaid I/DD Waiver program based on the Appellant's diagnosis being unlikely to continue indefinitely.

DECISION

It is the decision of the State Hearing Officer to **REVERSE** the Respondent's decision to deny the Appellant medical eligibility for the Medicaid I/DD Waiver program. The matter is **REMANDED** for consideration of whether the Appellant meets Medicaid I/DD Waiver

program medical eligibility in the areas of functionality, need for active treatment, and requirement of ICF/IID level of care. Subsequent eligibility decisions are subject to appeal through the Board of Review.

ENTERED this 21st day of September 2021.

Tara B. Thompson, MLS
State Hearing Officer