



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 2, 2021

[REDACTED]

RE: [REDACTED], A PROTECTED INDIVIDUAL v. WVDHHR
ACTION NO.:20-BOR-2602

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: Kerri Linton, Department Representative

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

█, A PROTECTED INDIVIDUAL,

Appellant,

v.

Action Number: 21-BOR-2602

**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 December 30, 2020, on an appeal filed November 30, 2020.

The matter before the Hearing Officer arises from the September 10, 2020 determination by the Respondent to deny the Appellant medical eligibility 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 (BMS). The Appellant appeared by his mother, █. Appearing as a witness for the Appellant was his cousin, █. All witnesses were sworn and the following documents were admitted into evidence.

Department's Exhibits:

- D-1 Intellectual and Developmental Disabilities Waiver (IDDW) §§ 513.6 through 513.6.4
- D-2 Notice of Denial, dated September 10, 2020
- D-3 Independent Psychological Evaluation (IPE), dated July 23, 2020
- D-4 █ County Schools Report of Psychological Evaluation, dated April 15, 2013
- D-5 Individualized Education Program (IEP), dated March 2, 2016
- D-6 Order of Appointment, dated June 1, 2018
- D-7 Findings of Recommendation of Hygiene Commissioner, dated June 1, 2018
- D-8 Psychological Evaluation, dated January 8, 2020

Appellant’s Exhibits:

- A-1 Marshall University Spring 2021- Student Schedule for [REDACTED]; and West Virginia Autism Training Center at Marshall University Program Description
- A-2 Marshall University Spring 2021 – Student Schedule for [REDACTED]; End of Semester Plan for [REDACTED]; and Marshall University Future Planning: The College Years Form
- A-3 Marshall University Email Correspondence

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 July 23, 2020, Tracy P. Smith (Ms. Smith), a Licensed Psychologist, completed an Independent Psychological Evaluation (IPE) on the Appellant. (Exhibit D-3)
- 4) At the time of the July 23, 2020 IPE, the Appellant was 22 years and one (1) month of age. (Exhibit D-3)
- 5) The Appellant’s overall full-scale Intelligence Quotient (IQ) is 98. (Exhibit D-3)
- 6) The Appellant has a diagnosis of Autism Spectrum Disorder and Attention-Deficit Hyperactivity Disorder, Combined Type, Moderate. (Exhibit D-3)
- 7) On September 10, 2020, 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 the need for an ICF/IDD level of care is not supported within the documentation submitted for review. (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 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 Individualized Education Program (IEP), Occupational Therapy evaluation, etc. if requested by the IP for review.

BMS Provider Manual § 513.6.2.3 Active Treatment provides in part:

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.

DISCUSSION

In order to be eligible to receive I/DD Waiver Program services, an applicant must be considered medically eligible in the following four (4) categories: diagnosis, functionality, the need for active treatment, and the requirement for an ICF/IID Level of Care. Medical eligibility is considered by looking at each of the categories in order, beginning with the 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 age 22. Additionally, the individual must require the type of care given to individuals who reside in ICF/IID group homes.

On September 10, 2020, the Appellant's I/DD Waiver application was denied because the Respondent found that documentation submitted for review did not support the presence of an eligible diagnosis of an Intellectual Disability or a severe related condition as required for the I/DD Waiver Program eligibility. The notice further advised the Appellant that the need for an ICF/IID level of care is not supported by the documentation submitted for review. The Respondent had to

demonstrate by a preponderance of evidence that the Appellant lacks an eligible diagnosis and does not require an ICF/IID level of care.

On July 23, 2020, an IPE was completed by, Ms. Smith, an independent psychologist, to help determine I/DD Waiver program eligibility. At the time of the July 23, 2020 IPE, the Appellant was 22 years and one (1) month of age. Policy requires an eligible diagnosis must be present prior to the age of 22.

The Appellant's most recent IPE listed past diagnoses of Autistic Disorder and Attention-Deficit Hyperactivity Disorder Combined traits. Ms. Smith issued a current diagnoses for the Appellant of Autism Spectrum Disorder (Autism), Level 1, Without Intellectual or Communication Impairment; and Attention-Deficit Hyperactivity Disorder, Combined Type, Moderate. The Respondent indicated 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 Weschler Adult Intelligence Scale, Fourth Edition (WAIS-IV). The WAIS-IV instrument indicated the Appellant's overall full-scale IQ was 98, which is in the above-average range for intellectual functioning. The Appellant's IQ of 98 was the lowest intelligence quotient that could be found in the documentation submitted for review. The Respondent indicated that the psychologist who conducted the January 2020 evaluation used scores from a Wechsler Intelligence Scale for Children (WISC-IV) that was administered to the Appellant when he was a child. The WISC-IV was administered as part of an April 15, 2013 school psychological evaluation and placed the Appellant's full-scale IQ at 117. In addition to the two IQ tests, the Respondent testified that other documentation submitted also shows the Appellant is functioning at or around the average range of intellect and that he does not have a cognitive impairment that is consistent with an individual who requires an ICF/IID level of care.

The Respondent testified that the Appellant's achievement, or academic learning, was also found to be in the average range. The IPE included a Wide Range Achievement Test, Fifth Edition (WRAT-5). The Appellant's WRAT-5 scores ranged from 72 up to 99. The Respondent testified that these scores indicate the Appellant's academic skills were in the low average to average range. Additionally, the Appellant's ██████████ County Schools Re-evaluation Determination Plan from September 4, 2015, lists achievement scores that ranged from 70 to 104. The Respondent further testified that the Appellant graduated high school in 2017 and is currently in college at ██████████ studying criminal justice. The Respondent indicated the Appellant's achievement scores and his enrollment in college indicate that he has adequate cognitive functioning which is inconsistent with an individual requiring an ICF/IID level of care.

The IPE included a Childhood Autism Rating Scale, Second Edition (CARS2-ST), which is used to identify individuals with Autism and severity levels of Autism. The CARS2-ST raw score of 38.5, equivalating to a T-score of 52, found in the IPE, placed the Appellant in the severity group of severe symptoms for Autism Spectrum Disorder according to Ms. Smith. However, the Respondent indicated that this particular assessment (CARS2-ST) is given to higher functioning individuals with Autism with different protocols being administered based on the functioning level

of the individual. This testimony was deemed credible, as the IPE later noted that the Appellant has symptoms consistent with a high-functioning level of Autism which is referenced on the Autism Spectrum Disorder, Level 1, without language or intellectual impairments, most likely previously referenced as Asperger's Disorder on the DSM-IV. The Respondent testified the lowest level of support is an Autism Spectrum Disorder, Level 1, without intellectual or communication impairment. The respondent further testified that individuals with Autism Spectrum Disorder, Level 1, may need support, but the support does not rise to the level needed for an ICF/IID level of care. This evidence supports, that although the Appellant may have a diagnosis of Autism, his Autism is not a severe related condition for the I/DD Waiver Program.

The Respondent also reviewed previous psychological evaluations for the Appellant available at the time of consideration. The Appellant's March 25, 2013 school psychological evaluation referenced Asperger's Syndrome and indicated he was in the high average range of Autism. The Appellant's April 15, 2016 reevaluation for his ██████████ County Schools' plan indicated the diagnoses of Attention Deficit Disorder (ADD) and Autism Spectrum Disorder (Autism). The psychological evaluation conducted on January 8, 2020, indicated the Appellant has a diagnosis of Autistic Disorder. The January 8, 2020 evaluation lists a diagnosis of Autism at a level 2. However, to be considered for I/DD Waiver eligibility as a severe related condition, the Respondent testified that the Appellant would need to have an Autism severity level of 3. While policy lists Autism as a possible related condition, the documentation submitted does not support that the Appellant's Autism is severe or that he has an impairment of general intellectual functioning.

The Respondent testified the Appellant's IEP indicated that the Appellant was enrolled in special education services while in school and explained that his primary area of exceptionality listed on the IEP was for "other health impairments." The Respondent suggested that this likely means that the Appellant's Autism was not determined to be severe. The Appellant's mother testified the Appellant's IEP was listed as "other health impairments" either because it was before the DSM-V and there was no classification for Autism or because she was tired of fighting with the school system. On the IEP, Autism was listed as one of the primary areas of exceptionality under which an individual could receive special education services. Upon review of the IEP, this hearing officer was unable to determine why the Appellant did not receive services for Autism and instead received services under "other health impairments." The Appellant's mother also testified the Appellant spent more than half of his school day in special education. Although the IEP corroborates the testimony that the Appellant received special education services in school, the Respondent testified that it does not reflect that he needs the same services offered for an individual who has a severe related condition or needs an ICF/IID level of care for I/DD Waiver eligibility purposes.

The Appellant's mother testified that her son is a Junior in college at ██████████. The Appellant's mother further testified that the Appellant is part of ██████████ Autism College Program through which he receives numerous support services and still struggles with his college courses. The Appellant's mother and witness testified the Appellant is vulnerable because he is very trusting of others and he could easily be taken advantage of. The Appellant's mother and witness are concerned with the Appellant's future and how he will live on his own with gainful employment. The testimony given by the Appellant's mother and witness established that the

Appellant may benefit from additional support services implemented for his daily living. However, their testimony did not reflect that the Appellant requires support consistent with individuals receiving I/DD Waiver services and requiring an ICF/IID level of care.

Based on testimony and the documentation submitted, the Appellant does not have an Intellectual Disability or a severe related condition and therefore does not meet the diagnostic criteria for eligibility for the I/DD Waiver Program. Further, the evidence does not support that the Appellant needs an ICF/IID level of care.

CONCLUSIONS OF LAW

- 1) The evidence submitted did not establish that the Appellant has an eligible diagnosis that is both chronic and severe.
- 2) The evidence did not establish that the Appellant requires an ICF/IID level of care.
- 3) Because the Appellant does not have an eligible diagnosis and does not require an ICF/IID level of care, 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