



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

Bill J. Crouch
Cabinet Secretary

BOARD OF REVIEW
4190 Washington Street, West
Charleston, West Virginia 25313
304-746-2360
Fax – 304-558-0851

Jolynn Marra
Interim Inspector General

March 11, 2021

[REDACTED]

RE: [REDACTED], A MINOR v. WVDHHR
ACTION NO.:20-BOR-2694

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 MINOR,

Appellant,

v.

Action Number: 20-BOR-2694

**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' Common Chapters Manual. This fair hearing was convened on January 28, 2021, on an appeal filed December 17, 2020.

The matter before the Hearing Officer arises from the December 3, 2020 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.

Department's Exhibits:

- D-1 Intellectual and Developmental Disabilities Waiver (IDDW) Policy Manual §§ 513.6 through 513.6.4
- D-2 Notice of Denial, dated December 3, 2020
- D-3 Independent Psychological Evaluation (IPE), dated November 19, 2020

Appellant's Exhibits:

- A-1 Copy of IPE, dated November 19, 2020
- A-2 Nationwide Children's Progress Notes, dated March 3, 2020
- A-3 Nationwide Children's Discharge Instructions, dated March 3, 2020

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 November 10, 2020, Brian Bailey (Mr. Bailey), a Licensed Psychologist, completed an Independent Psychological Evaluation (IPE) on the Appellant. (Exhibit D-3)
- 4) The November 10, 2020 IPE lists a diagnosis of Global Developmental Delay. (Exhibit D-3)
- 5) On December 3, 2020, 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 of either Intellectual Disability or a related condition which is severe. (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.

On December 3, 2020, 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 Respondent had to demonstrate by a preponderance of evidence that the Appellant lacked an eligible diagnosis for I/DD Waiver Program eligibility purposes.

On November 19, 2020, an IPE was conducted for the Appellant by Mr. Bailey, an independent psychologist, to help determine I/DD Waiver Program eligibility. The Respondent testified that the Appellant's IPE included a diagnosis of Global Developmental Delay. The Respondent further testified that Global Developmental Delay is not considered a related condition or an Intellectual Disability.

The Respondent testified that one of the requirements for a psychologist who chooses to participate in the I/DD Waiver Program, when possible, is to administer a full battery Intelligence Quotient (IQ) test to help determine the presence of an Intellectual Disability.

The Respondent testified that it is very common that a 3-year-old cannot participate in a battery of intellectual testing, therefore, the psychologist will administer various types of assessments to determine cognitive functioning. The Appellant was administered a Developmental Profile 3 (DP3) which is an instrument used to determine intellectual and cognitive functioning, utilizing a parent survey and psychologist observations. The DP3 has physical, social-emotional, cognitive, and communication components. The Respondent testified that the Appellant's cognitive component was measured to be 68, which is below his peers, but not of clinical significance for I/DD Waiver purposes. The Respondent did state that the Appellant's communication score was a standard score of less than 55. The Respondent indicated that scores of 55 and below would be clinically significant for the I/DD Waiver program. However, the Respondent also testified that most psychologists will not use scores from the DP3 to determine if an individual has an Intellectual Disability. Without a full battery IQ test and a cognitive component of 68 on the DP3, a diagnosis of an Intellectual Disability could not be determined for the Appellant.

The Respondent testified that on November 19, 2020, the Gilliam Autism Rating Scale-Third Edition (GARS-3) was administered by Mr. Bailey. The Appellant scored an 81 on the GARS-3, which placed him in the very likely range to have symptoms of Autism. There are three (3) different levels of Autism, ranging from Level 1 (mild) to Level 3 (severe). The Respondent indicated that a score of 71 to 100 would place an individual in severity Level 2 for Autism. The Respondent testified that a diagnosis of Autism is a potentially eligible diagnosis but must be Level

3 to be considered a severe related condition. The GARS-3 did not reveal a severe level of Autism for the Appellant and Mr. Bailey did not diagnose the Appellant with Autism and instead gave a rule out diagnosis of Pervasive Developmental Disorder. Mr. Bailey indicated in the IPE that ratings of the Appellant are suggestive of a Pervasive Developmental Disorder and that additional observation and/or assessments would be necessary in order to substantiate or rule out a Pervasive Developmental Disorder.

The Appellant's mother testified that in March 2020 the Appellant started ongoing genetic testing at Nationwide Children's Hospital for Angelman and Fragile X syndromes. The Appellant's mother indicated that one test is administered every three (3) months and that is why the Appellant has only been diagnosed with Global Developmental Delay. The Appellant's mother testified that on February 2, 2021 the Appellant has an appointment to be evaluated for Autism by a neurologist in Charleston. Although the Appellant has multiple tests and appointments to determine his diagnosis, the Appellant's mother was unable to show that the Appellant has a current eligible diagnosis for I/DD Waiver purposes.

The Appellant's mother indicated that the Appellant has substantial deficits, especially regarding *Self-Care, Receptive or Expressive Language (Communication), Learning, Mobility, Self-Direction, and Capacity for Independent Living*, however; without a qualifying diagnosis, the Appellant is not medically eligible for the I/DD Waiver Program.

Based on testimony and the documentation submitted, the Appellant does not meet the diagnostic criteria for eligibility for the I/DD Waiver Program as Global Developmental Delay is not considered to be a related condition for the I/DD Waiver Program.

CONCLUSIONS OF LAW

- 1) Policy for the I/DD Waiver Program requires the applicant to have been diagnosed with an Intellectual Disability or related condition, which is severe and results in impairment of intellectual functioning, to meet diagnostic eligibility criteria.
- 2) Evidence submitted did not establish that the Appellant has an eligible diagnosis that is both chronic and severe.
- 3) Because the Appellant does not have an eligible diagnosis, 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