



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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Interim Inspector General

[REDACTED]

[REDACTED]

RE: [REDACTED] v. WVDHHR
ACTION NO.: 22-BOR-1239

Dear [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: [REDACTED]
Stacy Broce, Bureau for Medical Services
Kerri Linton, Bureau for Medical Services

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

██,

Appellant,

v.

ACTION NO.: 22-BOR-1239

**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 ██████████. 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 ██████████ on an appeal filed with the Board of Review on ██████████.

The matter before the Hearing Officer arises from the Respondent's ██████████ decision to deny the Appellant medical eligibility for the Medicaid Intellectual/ Developmental Disabilities (I/DD) Waiver Program.

At the hearing, the Respondent appeared by Kerri Linton, Psychological Consultation and Assessment. Appearing as witnesses on behalf of the Respondent were Stacy Broce, Bureau for Medical Services; Sarah Clendenin, Psychological Consultation and Assessment; Lori Tyson, Bureau for Medical Services; Randall Hill, Bureau for Medical Services; Patricia Nisbet, Bureau for Medical Services, Kim O'Brien, Video Conference Host; and Andrew, Video Conference Captioner. The Appellant appeared *pro se* by ██████████ the Appellant's Guardian. Appearing as witnesses on behalf of the Appellant were ██████████, the Appellant's Co-Guardian; and ██████████, the Appellant's relative. All witnesses were sworn in and the following exhibits were entered as evidence.

Department's Exhibits:

- D-1 Bureau for Medical Services (BMS) Manual §§ 513.6-513.6.4
- D-2 BMS Notice, dated ██████████
- D-3 Behavioral Health Assessments Independent Psychological Evaluation (IPE), dated ██████████

- D-4 [REDACTED], PhD. IPE, dated [REDACTED]
- D-5 BMS Amended Notice, dated [REDACTED]
- D-6 [REDACTED], MA, IPE, dated [REDACTED]
- D-7 [REDACTED] MA, LPC, LCSW, dated [REDACTED]
- D-8 Letter from [REDACTED], MA BCBA, dated [REDACTED]
- D-9 Letter from [REDACTED], MA, dated [REDACTED]
- D-10 Letter from [REDACTED] MD, PLLC, dated [REDACTED]
- D-11 Letter from [REDACTED], MA, dated [REDACTED]
- D-12 Letter from [REDACTED], MD, dated [REDACTED]
- D-13 Letter from [REDACTED], MSW, LCSW, dated [REDACTED]
- D-14 [REDACTED] County Schools Special Education Department Psychological Assessment Report, dated [REDACTED]
- D-15 [REDACTED] County Board of Education Report of Academic Evaluation, dated [REDACTED]
- D-16 Asperger Syndrome Diagnostic Scale, date tested [REDACTED]
- D-17 [REDACTED] State Hospital Release Summary, discharge date [REDACTED]
- D-18 Social Work Clinical Process Note, dated [REDACTED]
- D-19 [REDACTED] State Hospital Clinical Progress Notes, Treatment Planning Conference Note/ Psychiatric Evaluation, dated [REDACTED]
- D-20 [REDACTED] Healthcare Progress Note, dated [REDACTED]
- D-21 [REDACTED] Preadmission Screening Report, dated [REDACTED]
- D-22 [REDACTED] Healthcare Records, dated [REDACTED]
- D-23 [REDACTED] Residential Discharge Summary, dated [REDACTED]
- D-24 [REDACTED] Hospital Discharge Summary, dated [REDACTED]
- D-25 [REDACTED] Hospital History and Physical, dated [REDACTED]
- D-26 Letter to [REDACTED], dated [REDACTED]

Appellant's Exhibits:

- A-1 Neurodevelopmental Disorders Excerpt
- A-2 Intellectual Developmental Disorders Excerpt
- A-3 Autism Spectrum Disorder Excerpt
- A-4 Application for a § 1915(c) Home and Community-Based Services Waiver
- A-5 Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Text Revision (DSM-5-TR) Intellectual Developmental Disorder Excerpt
- A-6 DSM-5-TR Autism Spectrum Disorder Excerpt
- A-7 Email Correspondence
- A-8 Letter from the Appellant's Representative
- A-9 Email Correspondence; Board of Review Decision of State Hearing Officer, dated [REDACTED]
- A-10 Analysis of the West Virginia I/DD Waiver Waitlist, dated [REDACTED]

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 Appellant applied for eligibility for the Medicaid Intellectual/Developmental Disabilities (I/DD) Waiver Program (Exhibits D-2 and D-5).
- 2) The Appellant turned 22 years old on [REDACTED] (Exhibits D-3 through D-7)
- 3) On [REDACTED], the Respondent issued a notice denying the Appellant's medical eligibility for the Medicaid I/DD Waiver Program because documentation failed to establish an eligible diagnosis at present or during the developmental period, before age 22 (Exhibit D-2).
- 4) The [REDACTED] notice indicated that documentation established the presence of Mental Illness at present and during the developmental period and stipulated that Mental Illness is specifically excluded as a potential related condition for Medicaid I/DD Waiver Program eligibility (Exhibit D-2).
- 5) The [REDACTED] notice did not identify lack of substantial deficits as a reason for Medicaid I/DD Waiver Program eligibility denial or identify which major life areas the Appellant did or did not have substantial deficits (Exhibit D-2).
- 6) The Respondent's [REDACTED] denial was based on review of the Appellant's records (Exhibit D-2).
- 7) Psychological Consultation and Assessment (PC&A) is the Medical Eligibility Contracted Agent (MECA) for the Respondent (Exhibit D-1).
- 8) PC&A determines Medicaid I/DD Waiver eligibility based upon an Independent Psychological Evaluation (IPE) that verifies that the applicant has a related condition which constitutes a severe and chronic disability with concurrent substantial deficits manifested before age 22 (Exhibit D-1).
- 9) The Appellant had a potentially eligible diagnosis in the developmental period (Exhibits D-3, D-9 through D-12, and D-17).
- 10) As of [REDACTED] — during the developmental period — the Appellant's symptoms were described as "moderate" (Exhibit D-12).
- 11) During the developmental period, clinical recommendations were made by the Appellant's clinician to address the Appellant's Asperger's symptoms in the academic setting (Exhibit D-11).
- 12) The Appellant has a history of mental illness diagnoses (Exhibits D-7, D-10, D-17 through

D-22, D-24, and D-25).

- 13) The Appellant has received medication treatment for mental illness (Exhibits D-3, D-4, D-10, D-15, D-17, D-20, and D-23 through 25).
- 14) The Appellant has received inpatient and outpatient treatment for symptoms of mental illness (Exhibits D-7, D, 10, D-12, D-15, D-17 through D-25).
- 15) The Appellant's diagnosis of Attention-Deficit Hyperactivity Disorder (ADHD) — a mental illness — pre-dates the Appellant's diagnosis of pre-DSM-5 Autism Spectrum related disorders (Exhibit D-15).
- 16) The Appellant has a diagnosis of Autism Spectrum Disorder, level 2 (Exhibits D-3, D-4, D-6, and D-13).
- 17) The Respondent consistently considered descriptive severity categories when determining Medicaid I/DD Waiver program eligibility (Exhibit A-9).
- 18) The DSM-5 provides that Autism Spectrum Disorder descriptive severity categories should not be used to determine eligibility for and provision of services.
- 19) The DSM-5 provides Autism Spectrum Disorder, severity Level 3, reflects an individual whose severe deficits in verbal and nonverbal social communication skills cause severe impairments in functioning, very limited initiation of social interactions, and minimal response to social overtures from others.
- 20) The DSM-5 provides Autism Spectrum Disorder, severity Level 3, reflects an individual whose inflexibility of behavior, extreme difficulty coping with change, or other restricted/ repetitive behaviors markedly interfere with functioning in all spheres and who demonstrates great distress/difficulty changing focus or action.
- 21) The ██████████ IPE concluded that the Appellant's mood changes could not be clearly attributed to autism spectrum disorder or an underlying mental illness (Exhibit D-4).
- 22) The ██████████ IPE concluded that the Appellant's reality testing and bizarre behavior could not be clearly attributed to autism spectrum disorder and/or could represent a comorbid mood and/or psychotic disorder (Exhibit D-3).
- 23) The Appellant had speech delay related to ear infections as an infant (Exhibits D-14 and D-15).
- 24) The Appellant attained basic motor milestones within the expected time frame (Exhibit D-15).
- 25) The Appellant has substantial deficits in at least three of the six major life areas (Exhibits D-3 and D-4).

APPLICABLE POLICY

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

To be eligible for the Medicaid I/DD Waiver Program, the applicant must meet medical eligibility. The applicant must have a written determination that they meet medical eligibility criteria. Initial medical eligibility is determined by the Medical Eligibility Contracted Agent (MECA) through review of an Independent Psychologist Evaluation (IPE); which may include: background information, mental status examination, a measure of intelligence, adaptive behavior, achievement and any other documentation deemed appropriate.

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 or the 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 a related condition which constitutes a severe and chronic disability with concurrent substantial deficits manifested prior to age 22. For the I/DD Waiver Program individuals must meet criteria for medical eligibility not only by test scores, but also narrative descriptions contained in the documentation.

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

BMS Manual § 513.6.2.1 provides in pertinent part:

If the applicant does not have a diagnosis of intellectual disability, the applicant must have a diagnosis of a related condition which constitutes a severe and chronic disability with concurrent substantial deficits manifested before age 22.

If severe and chronic in nature, a diagnosis of Autism may make an individual eligible for the Medicaid I/DD Waiver program. Additionally, an applicant who has a diagnosis of 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*.

BMS Manual § 513.6.2.2 provides in pertinent 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.

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.

Code of Federal Regulations 42 CFR § 435.1010(a)(2)-(6) provide in pertinent part:

Persons with related conditions means individuals who have a severe, chronic disability that meets all of the following conditions:

- Attributable to any other 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 mentally retarded persons, and requires treatment or services similar to those required for these persons,
- Manifested before the person reaches age 22,
- Is likely to continue indefinitely,
- Results in substantial functional limitations in three or more of the following areas of major life activity:
 - self-care
 - understanding and use of language
 - learning
 - mobility
 - self-direction
 - capacity for independent living.

DISCUSSION

The Bureau for Medical Services (BMS) has the authority to contract with Psychological Consultation and Assessment (PC&A) as the Medical Eligibility Contracted Agent (MECA) to determine applicant eligibility for the Medicaid I/DD Waiver Program. PC&A is required to determine the Appellant's eligibility through review of an Independent Psychological Evaluation

(IPE) report — which may include: background information, mental status examination, a measure of intelligence, adaptive behavior, achievement and any other documentation deemed appropriate. The MECA does not have the authority to change the information submitted for review and can only determine if the information provided aligns with the policy criteria for establishing Medicaid I/DD Waiver eligibility. The Board of Review cannot judge the policy and can only determine if the MECA followed the policy when making a decision about the Appellant's Medicaid I/DD Waiver eligibility. Further, the Board of Review cannot make clinical determinations regarding the Appellant's diagnosis and severity and can only decide if the Respondent correctly determined the Appellant's eligibility based on the diagnosis and severity reflected in the submitted documentation.

During the hearing, the Appellant's representative referenced and submitted evidence related to a revised edition of the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Text Revision (DSM-5-TR) that was not published until [REDACTED]. The Board of Review can only consider information that was available to the Respondent at the time of the Respondent's denial. Therefore, evidence related to the DSM-5-TR was given little weight. During the hearing, the Appellant's representative requested that the DSM-5 section pertaining to Autism Spectrum Disorders be entered into the record for Hearing Officer review. The parties stipulated to judicial review of DSM-5 pages 50 through 59.

To be eligible for the Medicaid I/DD Waiver Program, the Appellant had to have a severe and chronic disability attributable to a condition, other than mental illness, that resulted in an impairment of general intellectual functioning or adaptive behavior similar to those individuals with an Intellectual/Developmental Disability diagnosis. The related condition had to manifest before age 22, be likely to continue indefinitely, and result in substantial functional limitations in three or more areas of major life activity. To prove that the Respondent correctly denied the Appellant's eligibility for the Medicaid I/DD Waiver Program, the preponderance of evidence had to demonstrate that the Appellant did not have a diagnosis of a related condition which constituted a severe and chronic disability with concurrent substantial deficits manifested before age 22.

Diagnosis

Pursuant to the DSM-5, Autism Spectrum Disorder encompasses disorders previously referred to as Pervasive Developmental Disorder (PDD), not otherwise specified (NOS), and Asperger's disorder. The [REDACTED] IPE indicated that the Appellant's Autism Spectrum Disorder (previously diagnosed as PDD NOS/Asperger's) began in the developmental period. The evidence indicated that the Appellant did have a potentially eligible Autism Spectrum Disorder related diagnosis during the developmental period. Therefore, the presence of a potentially eligible diagnosis during the developmental period is established.

Severity

To be eligible for the Medicaid I/DD Waiver Program, the Appellant's related condition had to constitute a severe and chronic disability with concurrent substantial deficits manifested before age 22. The Respondent's witness testified that developmental history, functional programming, test scores, functionality at home and school, diagnosis, severity specifier, and whether the related diagnosis pre-dates mental illness are considered when assessing severe and chronic disability. The policy requires the Respondent to rely on information contained within the IPE and submitted

documentation.

During the hearing, the Appellant's representative argued that the Appellant had delayed speech development. The evidence established that the Appellant's delayed speech was related to ear infections during infancy. The Respondent's witness testified that the evidence indicated the Appellant overcame his barriers with communication and failed to meet criteria of a severe, chronic, and ongoing disability. The Respondent's witness testified that many individuals who meet the ICF/ IID level of care never develop communication skills. Further, the evidence verified that the Appellant's motor skill development was not delayed. The preponderance of the evidence failed to establish that the Appellant's Autism Spectrum Disorder related diagnoses significantly impaired the Appellant's developmental history.

While a portion of the evidence submitted indicated that the Appellant's clinician had made some recommendations regarding academic accommodations for Asperger's symptoms, the preponderance of evidence did not establish that the Appellant's Autism Spectrum Disorder related diagnosis resulted in an impairment of his general intellectual functioning. The evidence verified that the Appellant's test scores indicated significant impairment in at least three of the six major life areas; however, the narrative of the IPEs indicated that the Appellant has the ability to choose activities and make his preferences known, which conflicted with ABAS-3 results indicating the Appellant had severe deficits in the area of self-direction. The psychologist's narrative on the [REDACTED] IPE reflected that the Appellant's low level of adaptive functioning is inconsistent with his level of intelligence.

The testimony provided during the hearing affirmed that some of the Appellant's functioning deficits could be related to the Appellant's Autism Spectrum Disorder diagnosis. However, no evidence specifically verified which areas of functioning were directly impaired by the Appellant's Autism Spectrum Disorder diagnoses. More recently dated evidence did not clearly establish that the Appellant's functioning barriers are related to his Autism Spectrum Disorder diagnosis. Conversely, the narrative provided that the clinician could not determine whether the Appellant's mood and behaviors were attributable to Autism Spectrum Disorder or co-occurring mental illness. The MECA is required to rely on the information conveyed in the IPE; however, the information provided in the IPE failed to verify that the Appellant's functioning barriers were a result of his Autism Spectrum Disorder diagnosis and not mental illness. Therefore, the Hearing Officer could not affirm that the Appellant has a severe and chronic disability attributable to Autism Spectrum Disorder, not mental illness. Severe and chronic disabilities attributed to mental illness are precluded from Medicaid I/DD Waiver eligibility.

The Respondent's witness testified that if the related condition diagnosis and symptoms pre-dated the mental illness that individuals will typically be found eligible because the severe related condition and functioning came first. The evidence reflected that the Appellant's treatment for mental health pre-dated the onset of his Autism Spectrum Disorder related diagnosis. The evidence verified that the Appellant has received historic and significant treatment for his mental illness. Evidence reflected that during the developmental period, the Appellant's symptoms were "moderate." While many of the exhibits submitted as evidence indicate co-occurring diagnoses of Autism Spectrum Disorder related diagnoses and mental illness, the primary treatment provided to the Appellant was for the purpose of managing mental illness.

The Appellant's representative argued that the DSM-5 manual stipulated that Autism Spectrum Disorder severity specifiers should not be used to determine eligibility for and provision of services. Therefore, the Appellant's representative proffered that the MECA incorrectly used Autism Spectrum Disorder severity specifiers when determining whether the Appellant was medically eligible for the Medicaid I/DD Waiver Program. The Respondent affirmed that the severity specifier was considered but argued that consideration of the severity specifier was only a portion of the eligibility determination.

The Respondent's witness's testimony and review of DSM-5, page 51, established that "the descriptive severity categories should not be used to determine eligibility for and provision of services." The evidence entered by the Appellant established that the MECA consistently applied use of descriptive severity categories when determining Medicaid I/DD Waiver program eligibility. While the DSM-5 indicates that descriptive severity categories should not be used to determine service eligibility, the language of the DSM-5 does not preclude the MECA from using the severity level. The severity level is indicated by diagnosing clinicians on the IPE. The policy requires the MECA to consider information provided in the IPE and does not preclude the MECA from considering severity level specifiers when considering whether the Appellant's diagnosis met the severity level required for Medicaid I/DD Waiver Program eligibility. Because the MECA is not precluded by the DSM-5 or the policy from considering the autism descriptive severity category, the Respondent's determination that the Appellant did not meet diagnostic severity criteria can be affirmed.

CONCLUSIONS OF LAW

- 1) To be eligible for the Medicaid I/DD Waiver Program, the Appellant's related condition had to constitute a severe and chronic disability with concurrent substantial deficits manifested before age 22.
- 2) The preponderance of evidence failed to verify that the Appellant's diagnosis of Autism Spectrum Disorder constituted a severe and chronic disability with concurrent substantial deficits manifested before age 22.
- 3) The Respondent correctly denied the Appellant medical eligibility for the Medicaid I/DD Waiver Program.

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 [REDACTED].

Tara B. Thompson, MLS
State Hearing Officer