



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

Bill J. Crouch
Cabinet Secretary

BOARD OF REVIEW
P.O. Box 1736
Romney, WV 26757
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Jolynn Marra
Inspector General

September 26, 2022

[REDACTED]

RE: [REDACTED] A PROTECTED INDIVIDUAL v. WVDHHR
ACTION NO.: 22-BOR-2030

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 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,

Eric L. Phillips
State Hearing Officer
Member, State Board of Review

Encl: Appellant's Recourse to Hearing Decision
Form IG-BR-29

cc: BMS/PC&A/KEPRO

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

█, A PROTECTED INDIVIDUAL,

Appellant,

v.

Action Number: 22-BOR-2030

**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 September 22, 2022, on an appeal filed August 23, 2022.

The matter before the Hearing Officer arises from the August 4, 2022 decision by the Respondent to deny the Appellant's application for I/DD Waiver services.

At the hearing, the Respondent appeared by Charlie Bowen, Psychological Consultant, Bureau of Medical Services. The Appellant was represented by █, mother.

All witnesses were sworn and the following documents were admitted into evidence.

Department's Exhibits:

- D-1 Bureau of Medical Services Provider Manual § 513
- D-2 Notice of Decision dated August 4, 2022
- D-3 Independent Psychological Evaluation dated August 1, 2022
- D-4 █ School Incident Summary May 2022
- D-5 Letter of Disciplinary Action May 2022

- D-6 Individualized Education Program dated May 26, 2022
- D-7 [REDACTED] School Final Grades 2021 School Year
- D-8 Letter from [REDACTED] dated July 21, 2022
- D-9 [REDACTED] Schools Behavior Intervention Plan dated May 17, 2022
- D-10 [REDACTED] Schools Individualized Education Plan dated May 17, 2022
- D-11 [REDACTED] Schools Plan of Care dated May 17, 2022
- D-12 Child Symptom Inventory dated June 21, 2022

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 Hearing Officer sets forth the following Findings of Fact.

FINDINGS OF FACT

- 1) The Appellant applied for services under the I/DD Waiver program.
- 2) On August 1, 2022, an Independent Psychological Evaluation (IPE), a requirement of the application process, was conducted with the Appellant. (Exhibit D-3)
- 3) The Appellant was diagnosed with Oppositional Defiant Disorder, Attention Deficit Hyperactivity Disorder, and Borderline Intellectual Functioning. (Exhibit D-3)
- 4) On August 4, 2022, the Respondent issued a Notice of Denial which advised the Appellant that his application for I/DD Waiver services had been denied due to the “documentation provided for review does not indicate an eligible diagnosis of either Intellectual Disability or a Related Condition which is severe.” Additionally, the notice documented that the documentation failed to support the presence of substantial adaptive deficits in three or more of the six major life areas identified for Waiver eligibility. (Exhibit D-2)

APPLICABLE POLICY

Bureau for Medical Services 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 ICF/IID Level of Care.

Diagnosis

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, if severe and chronic in nature, may 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 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 substantial deficits out of the six identified major life areas listed in Section 513.6.2.2.

Functionality

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 Intellectual Disability (ID) normative populations when ID 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.

Active Treatment

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

To be determined eligible for the I/DD Waiver program, an individual must meet the medical eligibility criteria of a diagnosis, functionality, the need for active treatment, and the requirement of ICF/IID level of care. The information and evaluations submitted on behalf of the Appellant failed to establish eligibility in the diagnostic and functionality areas. Eligibility in those areas is determined when an individual presents a diagnosis of an intellectual disability or a related condition which constitutes a severe and chronic disability with concurrent substantial deficits which manifested prior to age 22. The Respondent had to prove by a preponderance of the evidence that the documentation submitted failed to meet eligibility standards in the diagnostic and functionality criteria.

Charlie Bowen, Respondent's witness, reviewed the IPE (Exhibit D-3) and testified that the assessments and narrative descriptions failed to identify a diagnosis which would establish the Appellant's eligibility under the diagnostic criteria. Mr. Bowen indicated that the Appellant's diagnoses as outlined in the IPE (Exhibit D-3) of Oppositional Defiant Disorder, Attention Deficit Hyperactivity Disorder, and Borderline Intellectual Functioning were not considered eligible diagnoses under the program guidelines. As part of the IPE process, the Appellant's intellectual and cognitive abilities were assessed through a Wechsler Intelligence Scale in which the Appellant scored a full-scale intelligence quotient (IQ) of 74 which is considered in the borderline range of functioning.

Information derived from the IPE failed to identify functional deficits in three of the six major life areas as it relates to the functionality criteria. The Appellant's adaptive behaviors were assessed

through an Adaptive Behavior Assessment System. Testimony revealed that scaled scores of 1 or 2 in the functional areas are considered eligible, and deficits in the life areas are awarded when the narrative documentation supports the evaluated scores. The Appellant achieved eligible scores in the areas of Health and Safety, Social, and Self-Care, but no other areas. Mr. Bowen testified that scores in Health and Safety and Social did not support a deficit in Capacity for Independent Living as the Appellant failed to achieve scores in at least three subcomponents of that functional deficit. Mr. Bowen testified that the narrative descriptions associated with self-care did not support awarding a deficit in that area because the documentation notes that the “[Appellant] is able to provide for most of his self-help needs; however, he will not initiate/complete most tasks without significant amounts of prompting and reminders. He is able to dress himself but has difficulty with buttons and he requires assistance in choosing clothing appropriate for the weather conditions.”

The Appellant’s representative provided testimony concerning her son’s difficulties related to the functionality criteria of policy but offered no contention to his eligibility under the diagnostic criteria. Testimony indicated that the Appellant experiences difficulties in the areas of self-care, communication, self-direction, learning and safety. The Appellant’s representative testified that prior to the child’s adoption from state’s custody, he received no care for his condition. Testimony indicated that the Appellant’s mother assists him with the self-care tasks of brushing his teeth and bathing. In regard to communication and learning, the Appellant is unable to write his name without hands-on assistance from his teacher. Additionally, testimony indicated that the Appellant has no concept of safety due to setting multiple fires and attempts to play with knives and scissors as swords.

The evidence is clear that the Appellant did not present a diagnosis which is considered severe and chronic. Because the Appellant failed to meet the diagnostic criteria of a diagnosis of an Intellectual Disability or a related condition which is severe, he does not meet the diagnostic criteria for eligibility under the program. Additionally, the Appellant failed to achieve relevant test scores with supporting documentation to identify substantial adaptive deficits in any of the six major life areas. Because the Appellant failed to demonstrate substantial deficits in at least three of the six major life areas, he failed to meet the functionality criteria for eligibility under the I/DD Waiver program.

CONCLUSIONS OF LAW

- 1) An individual must meet diagnostic criteria of a diagnosis of an Intellectual Disability or a related condition, which constitutes a severe and chronic disability that manifested prior to age 22.
- 2) The Appellant did not have a diagnosis of an intellectual disability or a related condition which is considered severe; therefore, he did not meet the diagnostic criteria for services under the I/DD Waiver program.

- 3) An individual must meet functionality criteria by exhibiting substantial deficits in three of six major life areas.
- 4) The Appellant did not demonstrate three substantial deficits in the six major life areas; therefore, he did not meet the functionality criteria for services under the I/DD Waiver program.

DECISION

It is the decision of the State Hearing Officer to **UPHOLD** the Respondent's denial of the Appellant's application for services under the I/DD Waiver Program.

ENTERED this _____ day of September 2022.

Eric L. Phillips
State Hearing Officer