



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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Sheila Lee
Interim Inspector General

November 9, 2022

[REDACTED]

RE: [REDACTED] A PROTECTED INDIVIDUAL v. WVDHHR
ACTION NO.: 22-BOR-2233

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-2233

**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 November 3, 2022, on an appeal filed October 3, 2022.

The matter before the Hearing Officer arises from the August 24, 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 appeared by his West Virginia Department of Health and Human Services legal guardian, ██████████. Appearing as witnesses was ██████████, Child Protective Services Supervisor. 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 24, 2022
- D-3 Independent Psychological Evaluation dated August 11, 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 11, 2022, an Independent Psychological Evaluation (IPE), a requirement of the application process, was conducted with the Appellant. (Exhibit D-3)
- 3) The Appellant presented a diagnosis of Autism Spectrum Disorder Level 2, Borderline Intellectual Functioning, Attention Deficit Hyperactivity Disorder (Combined Presentation), Oppositional Defiant Disorder, Intermittent Explosive Disorder, Unspecified Depressive Disorder, Personal History of Physical Abuse in Childhood, and Social Exclusion or Rejection. (Exhibit D-3)
- 4) On August 24, 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 “documentation submitted for review does not support the presence of an eligible diagnosis for the I/DD Waiver program of intellectual disability or a related condition which is severe.” (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. Based on the information and evaluations submitted for review, the Appellant failed to meet the diagnostic eligibility criteria. Eligibility is established in the diagnostic area 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 diagnostic eligibility standards.

Evidence revealed that a Level 3 severity rating of Autism Spectrum Disorder meets the diagnostic eligibility criteria for the I/DD Waiver program. The Appellant, a Ward of the State of West Virginia, has a long history of psychiatric and residential care placements due to behavioral and mental health issues. (Exhibit D-3). Throughout 2016 to August 2022, various evaluations and reports have been completed on the Appellant which diagnosed the Appellant with varying degrees of Autism Spectrum Disorder. Those reports, which are documented in the IPE but not submitted for review during the I/DD eligibility determination process, lists no diagnosis of Autism Spectrum Disorder to Autism Spectrum Disorder Level 3 throughout that timeline. On August 11, 2022, [REDACTED] M.A. Licensed Psychologist, completed the IPE on the Appellant. A Gilliam Autism Rating Scale (GARS-3) was administered to determine a severity level of autism. The results of administered test indicated an Autism Index score of 115 with a Level 3 severity rating. Mr. Charlie Bowen, Respondent's witness, testified that the evaluating psychologist must rely on interviews, reports, and observations when determining a diagnosis for an individual. Based on her own determination, the psychologist determined that the Appellant presented the following diagnoses on the IPE including Autism Spectrum Disorder (Level 2), Borderline Intellectual Functioning, Attention Deficit Hyperactivity Disorder (Combined Presentation), Oppositional Defiant Disorder, Intermittent Explosive Disorder, Unspecified Depressive Disorder, Personal History of Physical Abuse in Childhood, and Social Exclusion or Rejection. Mr. Bowen indicated that the previous reports from 2016 through 2022 were not reviewed as part of the eligibility determination process for the Appellant's application for services. Mr. Bowen reported that while the Appellant may have been previously diagnosed with a Level 3 severity rating of Autism Spectrum Disorder, there was no supporting documentation or narrative descriptions outlined in the IPE to support that severity rating. Mr. Bowen purported that the Appellant's diagnosis of Autism Spectrum Disorder (Level 2), as documented in the IPE, failed to meet the severity criteria for diagnostic eligibility which resulted in the Appellant's denial of eligibility.

The Appellant's representatives, his legal guardians through the West Virginia Department of Health and Human Resources, contended that the Appellant meets the severity criteria of a diagnosis for program eligibility based on Level 3 severity rating outlined on the GARS-3. The Appellant's representatives noted that the outlined recommendations on the IPE indicate that the Appellant requires 24-hour supervision. The Appellant's representatives indicated that the Appellant lacks self-care, proper hygiene, and requires prompting with dress (for weather situations), medicine administration, and monitoring with eating and cooking.

There is no question that the timeline of the Appellant's early childhood documents a history of mental and behavioral issues which in some circumstances required hospitalization. However, the documentation presented for review on the IPE, presented a diagnostic impression of a Level 2 severity rating of Autism Spectrum Disorder. Additionally, the narrative descriptions outlined in the IPE did not support a consistent level of severity to warrant an eligible diagnosis under the diagnostic criteria. 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.

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.

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 November 2022

Eric L. Phillips
State Hearing Officer