



STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of the Inspector General
Board of Review

Jeffery H. Coben, MD
Interim Cabinet Secretary

Sheila Lee
Interim Inspector General

April 21, 2023



RE: ██████████ A PROTECTED INDIVIDUAL v. WVDHHR
Action No.: 23-BOR-1191

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: Recourse to Hearing Decision
Form IG-BR-29

Cc: BMS/PC&A/Kepto

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

■ A PROTECTED INDIVIDUAL,

Appellant,

v.

Action Number: 23-BOR-1191

**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 April 13, 2023, on an appeal February 6, 2023.

The matter before the Hearing Officer arises from the January 12, 2023 decision by the Respondent to deny the Appellant's application for services under the I/DD Waiver program. The Respondent reviewed additional information and offered an amended denial notice dated February 7, 2023.

At the hearing, the Respondent appeared by Charlie Bowen, Psychological Consultant for the Bureau of Medical Services. The Appellant appeared by his 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 January 12, 2023
- D-3 Notice of Decision dated February 7, 2023
- D-4 Independent Psychological Evaluation dated December 27, 2022
- D-5 Progress Report-Individualized Education Plan
- D-6 Eligibility Committee Report-■ Schools
- D-7 ■ Schools Parent Report
- D-8 ■ Schools Health/Speech-Language Screening
- D-9 ■ Infant and Toddler Vision Screening Assessment
- D-10 ■ Schools Evaluation Report dated July 21, 2021

Appellant's Exhibits:

A-1 Various Reports

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, through his mother, applied for services under the I/DD Waiver program.
- 2) On December 27, 2022, an Independent Psychological Evaluation (IPE), a requirement of the application process, was completed with the Appellant and his mother.
- 3) On January 12, 2023, 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. While autism is considered to be a related condition, it must be severe to meet policy requirements.”
- 4) On February 7, 2023, 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. While autism is considered to be a related condition, it must be severe to meet policy requirements.”
- 5) The Appellant was diagnosed in the IPE with Autism Spectrum Disorder, Level 2, with Intellectual and Language Impairments, Requiring Substantial Supports, and Global Developmental Delay.

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.

As part of the application process, an Independent Psychological Evaluation was completed on the Appellant, which failed to yield a severe diagnosis to determine program eligibility. The evaluating psychologist completed a GARS-3, autism screening tool, with the Appellant's mother. The Appellant achieved an autism index score of 89, with a severity level 2. The diagnostic impression summarized in the IPE documents the Appellant's diagnoses as Autism Spectrum Disorder, Level 2, with Intellectual and Language Impairments, Requiring Substantial Supports and Global Developmental Delay. Charlie Bowen, Psychological Consultant for the Bureau of Medical Services, testified that the Appellant's diagnosis of Global Developmental Delay is not an intellectual disability and not considered a related condition because some children will improve with treatment. Mr. Bowen reviewed an Initial Assessment from [REDACTED] (Exhibit D-11), in which the attending therapist diagnoses the Appellant with Autism Spectrum Disorder, Level 3. Mr. Bowen testified that an Autism Spectrum Disorder Level 3 diagnosis would be chronic and maintained and that previous severity level was not demonstrated in the IPE.

██████████, Appellant's mother, offered contention to the validity of the IPE; specifically, the attending psychologist's diagnosis of the Autism Spectrum Disorder, Level 2. ██████████ indicated that when her son completed the assessment with ██████████ in July 2021 (Exhibit D-11) he was calm and cooperated with the assessment. However, when the IPE was completed for program evaluation, her son exhibited severe behaviors and she was asked to leave the psychologist office and complete the evaluation by phone. ██████████ testified that her son had significant delays at an early age, but he has not improved. She cited that her son's behaviors and aggression have escalated and he is now prescribed risperidone. ██████████ indicated that her son requires assistance with daily living functions including potty training, dressing and grooming. ██████████ also offered testimony which described an incident at her son's school in which he bit his teacher resulting in bleeding to her thumb.

While the Appellant's mother offered a dissatisfaction to the completed IPE, the denial notice specifically outlines that an individual has the right to a second psychological evaluation if the decision was based on medical reasons. The Appellant's mother failed to exercise this option; therefore, the decision concerning the Appellant's evaluation must be based on the findings presented in the IPE completed in December 2022. The documentation presented for review on the IPE presented a diagnostic impression of a Level 2 severity rating of Autism Spectrum Disorder. 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) Policy requires that an individual must meet the medical eligibility criteria of a diagnosis of Intellectual Disability or related condition, which constitutes a severe and chronic disability that manifested prior to age 22, the functionality criteria of at least three substantial adaptive deficits out of the six major life areas that manifested prior to age 22, the need for active treatment and a requirement of ICF/IID level of care to receive services under the I/DD Waiver Program.
- 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 April 2023.

Eric L. Phillips
State Hearing Officer