



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

March 30, 2023



RE:  **A PROTECTED INDIVIDUAL v. WVDHHR**  
**ACTION NO.: 23-BOR-1240**

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/KEPRO/PC&A

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

█, A PROTECTED INDIVIDUAL,

**Appellant,**

v.

**Action Number: 23-BOR-1240**

**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 March 29, 2023, on an appeal filed February 15, 2023.

The matter before the Hearing Officer arises from the January 17, 2023 decision by the Respondent to deny the Appellant's medical eligibility for I/DD waiver services.

At the hearing, the Respondent appeared by Charlie Bowen and Kerri Linton, Psychological Consultants with the Bureau of Medical Services. The Appellant appeared by her 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 17, 2023
- D-3 Independent Psychological Evaluation dated December 7, 2022
- D-4 West Virginia Birth to Three Evaluation dated April 7, 2021
- D-5 Letter from █ dated July 14, 2022
- D-6 Letter from █ dated August 2, 2022
- D-7 Sensory Processing Measure dated July 31, 2021
- D-8 West Virginia Birth to Three Evaluation/Assessment Summary Report dated July 31, 2021
- D-9 Milestones West Virginia Birth to Three Evaluation Assessment Report dated October 19, 2021
- D-10 Eating and Feeding Evaluation
- D-11 Individual Education Program dated November 29, 2022
- D-12 PEDI-CAT Report dated November 28, 2022

D-13 Sensory Profile 2 dated October 16, 2022

**Appellant's Exhibits:**

- A-1 Letter from [REDACTED], RN, Autism Family Coach
- A-2 Letter dated March 8, 2023 from [REDACTED] Behavioral Specialist
- A-3 Letter from [REDACTED], Head Start Teacher, [REDACTED] Elementary School

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 her mother, applied for services under the I/DD Waiver program.
- 2) On December 7, 2022, an Independent Psychological Evaluation (IPE), a requirement of the application process, was conducted with the Appellant. (Exhibit D-3)
- 3) The Appellant presented diagnoses of Autism Spectrum Disorder, Level 2, Requiring Substantial Supports, With Intellectual and Language Deficits and Pica Disorder.
- 4) The Appellant was awarded functional deficits in the areas of self-direction and receptive or expressive language.
- 5) On January 17, 2023, the Respondent issued a Notice of Denial which advised the Appellant that her application for I/DD Waiver services had been denied due to “documentation submitted for review does not support the presence of an eligible diagnosis or either 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 75<sup>th</sup> 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. On December 7, 2022, the Appellant, along with her mother, completed an Independent Psychological Evaluation (Exhibit D-3) as part of the I/DD application process. The evaluating psychologist administered a DP-4 with the Appellant as a measure of cognitive abilities. Charlie Bowen, Psychologist Consultant for the Bureau of Medical Services, indicated that achieved scores of 69 or below on the administered test would support the presence of an intellectual disability. In the cognitive evaluation of the test, the Appellant achieved a score of 75, which did not support an intellectual disability. Additionally, a GARS-3 was completed by the Appellant's mother which revealed an Autism Index score of 112 with a "very likely" probability of Autism Spectrum Disorder. The evaluating psychologist diagnosed the Appellant with Autism Spectrum Disorder, Level 2, Requiring Substantial Supports, with Intellectual and Language Deficits, along with Pica Disorder. Mr. Bowen indicated an eligible diagnosis for the program was not supported by the administered tests completed during the IPE, which resulted in the denial of the application.

The Appellant's mother provided letters of support from individuals which provide services for the Appellant. Each letter supported the Appellant's need for services under the program. The Appellant's mother contested that an additional functional deficit should have been awarded in Capacity for Independent Living because the Appellant has no concept of danger and requires constant supervision for her safety. The Appellant's mother indicated that she takes necessary safety

precautions around her home to ensure the well-being of her child. The Appellant's mother offered no contention to the diagnostic criteria for the program.

The documentation presented for review on the IPE presented a diagnostic impression of a Level 2 severity rating of Autism Spectrum Disorder, which does not meet the severity rating for program eligibility. Because the Appellant failed to meet the diagnostic criteria of a diagnosis of an Intellectual Disability or a related condition which is severe, she 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, she 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 March 2023.**

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Eric L. Phillips  
**State Hearing Officer**