



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

Jeffrey H. Coben, MD
Interim Cabinet Secretary

Sheila Lee
Interim Inspector General

March 28, 2023

[REDACTED]

RE: [REDACTED], A PROTECTED PERSON v. WV DHHR
ACTION NO.: 23-BOR-1146

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,

Lori Woodward, J.D.
Certified State Hearing Officer
Member, State Board of Review

Encl: Recourse to Hearing Decision
Form IG-BR-29

cc: Bureau for Medical Services
PC&A

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

█, A PROTECTED PERSON,

Appellant,

v.

Action Number: 23-BOR-1146

**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 PERSON. 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 15, 2023, on an appeal filed January 31, 2023.

The matter before the Hearing Officer arises from the December 16, 2022, decision by the Respondent to deny medical eligibility for services under the I/DD Waiver Program.

At the hearing, the Respondent appeared by Charlie Bowen, consulting psychologist for the Bureau for Medical Services. The Appellant was represented by her mother, █. The witnesses were placed under oath and the following documents were admitted into evidence.

Department's Exhibits:

- D-1 Bureau for Medical Services Provider Manual §§513.6 - 513.6.4
- D-2 Denial Notice, dated December 16, 2022
- D-3 Independent Psychological Evaluation (IPE) West Virginia I/DD Waiver, dated November 1, 2022
- D-4 Independent Psychological Evaluation, IPE I/DD, West Virginia I/DD Waiver, dated October 3, 2022; BDI-2 Screening Record Form; Parent/Primary Caregiver Form, Ages 0-5, ABAS-3; Parent/Primary Caregiver Form, Ages 0-5, ABAS-3
- D-5 Denial Notice, dated October 6, 2022
- D-6 Patient Health Summary dated March 30, 2022
- D-7 Amendment to the IEP Without Convening an IEP Team Meeting dated April 13, 2022
- D-8 Individualized Education Program, █ Schools Central Office, dated April 13, 2022

D-9 [REDACTED] Family Medicine, Office Visit dated September 21, 2017

Appellant's Exhibits:

A-1 Letter from [REDACTED] MD, Family Medicine, [REDACTED] Family Medicine, dated January 6, 2023

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 is a six-year-old child diagnosed with Down Syndrome whose parents applied for I/DD Waiver services.
- 2) On October 6, 2022, the Respondent issued a notice advising that the Appellant's I/DD Waiver application had been denied, explaining that the documentation failed to support the presence of substantial adaptive deficits in three or more of the six major life areas identified for I/DD Waiver eligibility. (Exhibit D-5)
- 3) The October 6, 2022 notice indicated that submitted documentation did show that the Appellant had a substantial adaptive deficit in the area of *Receptive or Expressive Language*. (Exhibit D-5)
- 4) The Appellant was evaluated in an Independent Psychological Evaluation (IPE) conducted on October 3, 2022 by licensed psychologist, [REDACTED], as part of her I/DD Waiver application. (Exhibit D-4)
- 5) ABAS-3 scores of three standard deviations below the mean are scaled scores of 1 or 2.
- 6) The October 2022 IPE ABAS-3 parent rated scores showed a scaled score of 1 in the area of *communication* and a score of 1 in the sub-domain of CIL in *community use*. (Exhibit D-4)
- 7) The October 2022 IPE indicated that achievement testing was unable to be completed due to the Appellant's age. (Exhibit D-4)
- 8) The Appellant requested a second medical evaluation which was administered on November 1, 2022 by licensed psychologist, [REDACTED]. (Exhibit D-3)
- 9) On December 16, 2022, the Respondent issued a notice advising that the Appellant's I/DD Waiver application had been denied, explaining that the documentation failed to support the presence of any substantial adaptive deficits in the six major life areas identified for Waiver eligibility. (Exhibit D-2)

- 10) Scores for the Appellant's pre-academic skills could not be obtained during the November IPE because she could not respond to the academic testing on the Wide Range Achievement Test-5th Edition (WRAT-5). (Exhibit D-3)
- 11) The Adaptive Behavior Assessment Scale – 3rd Edition (ABAS-3) on the Appellant's November IPE was rated by the Appellant's parent and teacher. (Exhibit D-3)
- 12) The parent rated ABAS-3 scores showed a score of 2 in *health and safety* which is a sub-domain of CIL. (Exhibit D-3)
- 13) The teacher rated ABAS-3 scores showed scores of 2 in the areas of *functional pre-academics*, *self-care*, and in the sub-domain of CIL of *social*, and a score of 1 in the area of *motor*. (Exhibit D-3)
- 14) The narrative descriptions in the October and November 2022 IPE and the April 2022 IEP do not support the low teacher scaled scores on the ABAS-3 testing.
- 15) The Appellant is able to ambulate independently without the use of any mechanical aids and is able to grasp small items. (Exhibits D-3 and D-4)
- 16) The Appellant does have an eligible diagnosis for I/DD Waiver program eligibility. (Exhibits D-2 through D-4)
- 17) The Appellant does not meet the functionality criteria for I/DD Waiver program eligibility.

APPLICABLE POLICY

Bureau for Medical Services Provider Manual §513.6.2, *Initial Medical Eligibility*, states: To be medically eligible, the applicant must require a level of care and services provided in an ICF/IID as evidenced by required evaluations and other information requested by the IP or the MECA and corroborated by narrative descriptions of functioning and reported history. An ICF/IID provides services in an institutional setting for persons with intellectual disability or a related condition. An ICF/IID provides monitoring, supervision, training, and supports.

Evaluations of the applicant must demonstrate:

- A need for intensive instruction, services, assistance, and supervision in order to learn new skills, maintain current level of skills, and/or increase independence in activities of daily living; and
- A need for the same level of care and services that is provided in an ICF/IID

The MECA determines the qualification for an ICF/IID level of care (medical eligibility) based on the IPE that verifies that the applicant has 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. For the IDDW Program,

individuals must meet criteria for medical eligibility not only by test scores, but also narrative descriptions contained in the documentation.

In order to be eligible to receive IDDW 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.

Bureau for Medical Services Provider Manual §513.6.2.1, *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 IDDW 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 disabilities 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 disabilities.

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.

Bureau for Medical Services Provider Manual §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.

Bureau for Medical Services Provider Manual §513.6.2.3, *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

The Appellant is a six-year-old with a diagnosis of Down Syndrome whose parents applied for I/DD Waiver services. As part of the I/DD waiver application, the Appellant underwent an IPE on October 3, 2022. On October 6, 2022, the Respondent sent notification of denial which stated that the presence of only one substantial adaptive deficit was found in the area of *receptive or expressive language*. The Appellant's parents requested a second IPE which was accomplished on November 1, 2022. On December 16, 2022, the Respondent denied the Appellant's I/DD Waiver Program application. The denial stated that the documentation submitted did not support the presence of any substantial adaptive deficits in the six major life areas identified for Waiver eligibility. The Appellant's parents appealed the Respondent's decision.

Policy requires that medical eligibility criteria in each of the following categories be met in order to be eligible for the I/DD Waiver program: 1) *Diagnosis* of Intellectual Disability or related condition, which constitutes a severe and chronic disability that manifested prior to age 22; 2) *Functionality* of at least three (3) substantial adaptive deficits out of the six (6) major life areas that manifested prior to age 22, 3) *Active Treatment* - the need for active treatment, 4) *ICF/IID Level of Care* need for services under the I/DD Waiver Program. Failure to meet any one of the eligibility categories results in a denial of program services.

In order to be eligible for the Medicaid I/DD Waiver Program, medical eligibility must be established by an IPE that includes assessments that support the diagnostic considerations offered and relevant measures of adaptive behavior.

The Respondent's representative, Charlie Bowen, testified that the Appellant did meet the diagnosis criteria for program eligibility. However, the documentation submitted did not show that the Appellant met the functionality criteria, thus the Appellant's application was denied.

On October 6, 2022, the Appellant was administered an IPE as a part of her I/DD Waiver application. The evaluating psychologist, [REDACTED], determined that the Appellant had Unspecified Intellectual Disability and Down Syndrome. The narrative contained within the October 2022 IPE under *receptive or expressive language* indicated that the Appellant's language is very limited, but she does say a few words. The ABAS-3 had a scaled score of 1 for this major life area.

On November 1, 2022, the Appellant underwent a second IPE which was administered by [REDACTED] I. The narrative contained in [REDACTED] assessment under the *receptive or expressive language* area indicated that the Appellant has very limited language comprehension and uses single words. However, the ABAS-3 which was rated by the Appellant's parent showed a scaled score of 3 as did the teacher rating. [REDACTED] indicated in the November IPE that the rating scores reflect ratings for the 5 – 21 year age range; whereas the previous adaptive behavior ratings were from the 0 – 5 year age range. The Appellant's April 2022 IEP noted that she demonstrates overall strength in this area and is able to follow 1-step directions, demonstrates an understanding of age appropriate vocabulary, frequently points and gestures to help communicate her requests and ideas, and clearly articulates single words. No substantial adaptive deficit was found in the area of *receptive or expressive language*.

Other functional areas in the ABAS-3 administered on the November 2022 IPE rated by the parent showed an eligible score in the area of *health and safety*, which is a subdomain of *capacity for independent living* (CIL). The teacher scored scales on the November 2022 IPE ABAS-3 ratings showed eligible scores in *functional pre-academics* and *self-care* with scores of 2, a score of 1 in *motor*, and a score of 2 in the subdomain for CIL in *social*. The parent rated ABAS-3 in the functional area of *functional pre-academics* showed a score of 3, a score of 4 in *self-care*, and a score of 4 in *social* (CIL).

[REDACTED], in his November 2022 IPE, concluded that the current ability testing was lower than recent testing which is indicative of moderate intellectual disabilities. [REDACTED] further posited that the difference between the teacher ratings and the parent ratings could be explained because the teacher may see more deficits in functional adaptive behaviors because a teacher has more opportunities to observe the Appellant in group settings. However, the IEP team narratives in the Appellant's April 2022 IEP do not appear to correlate to the low teacher rated ABAS-3 scores in the November 2022 IPE.

[REDACTED] noted that the Appellant's academic testing, or WRAT-5 assessment, was not administered as the Appellant was unable to respond, therefore an assessment of the Appellant's learning could not be ascertained. However, the April 2022 IEP narrative indicated that the Appellant was able to accurately put peg puzzles together independently and accurately match shapes and colors. Additionally, the IEP indicated that the Appellant "demonstrated the ability to use a dynamic display speech generating device to communicate 2 word phrases following a model and pointing cues." According to the narrative in the IEP, the Appellant recognizes the color purple and is able to move it to make choices, including how to make play choices on the device. No substantial adaptive deficit was found in the area of *learning*.

The April IEP narrative noted that the Appellant had been completing toileting steps independently and had been making progress. The October 2022 IPE narrative stated that the Appellant required total care for washing her hair and body but she would try to brush her teeth with some assistance. The November 2022 IPE narrative stated that the Appellant required assistance with dressing and washing. The Appellant is able to eat with her fingers and spoon and drink from a cup. Mr. Bowen explained that individuals who are 3 standard deviations below the mean would be close to infantile and noted that most 5 year olds still need a lot of assistance. No substantial adaptive deficit was found in the area of *self-care*.

Regarding the functional area of *mobility*, the Appellant is noted to be able to ambulate independently without the use of any mechanical aids. Mr. Bowen testified that in order to be considered as having a substantial adaptive deficit in mobility, an individual would be non-ambulatory and unable to self-propel in a wheelchair. No substantial adaptive deficit was found in the area of *mobility*.

The Appellant's mother believed that she was being discriminated against because there was a bias in standardized testing and could not understand why the descriptor was not used instead of the scaled score. Mr. Bowen explained that the descriptor of "extremely low" incorporates scores of 3 and maybe even scores of 4. Policy requires that scaled scores of 1 or 2 be used; therefore, scaled scores are relied upon instead of descriptors. Mr. Bowen further noted that policy also requires that the test scores must be corroborated by the narrative descriptions.

The test scores and narratives presented in the documentation for the I/DD Waiver application did not establish that the Appellant met the functionality criteria for program eligibility. The Respondent's decision to deny I/DD Waiver Program services is affirmed.

CONCLUSION OF LAW

Whereas the Appellant does not meet the medical eligibility criteria for the I/DD Waiver Program set forth by policy, the Respondent must deny her application.

DECISION

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

ENTERED this 28th day of March 2023.

Lori Woodward, Certified State Hearing Officer