



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 29, 2023

[REDACTED]

RE: [REDACTED], A PROTECTED PERSON v. WV DHHR
ACTION NO.: 23-BOR-1159

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: BMS, PC&A, Kepro

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

█, A PROTECTED PERSON,

Appellant,

v.

Action Number: 23-BOR-1159

**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 22, 2023, on an appeal filed January 31, 2023.

The matter before the Hearing Officer arises from the November 2, 2022, decision by the Respondent to deny medical eligibility for services under the I/DD Waiver Program.

At the hearing, the Respondent appeared by Kerri Linton, consulting psychologist for the Bureau for Medical Services. The Appellant was represented by her mother, █. Appearing as a witness for the Appellant was her father, █. 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 November 2, 2022
- D-3 Independent Psychological Evaluation (IPE) West Virginia I/DD Waiver, dated October 26, 2022; ABAS-3 Parent Form; WISC-V form; WRAT-5 form; GARS-3 form
- D-4 Child Development Unit Evaluation dated March 17, 2015
- D-5 Occupational Therapy Evaluation dated May 12, 2015

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 is a nine-year-old child whose parents applied for I/DD Waiver services on her behalf.
- 2) On October 26, 2022, the Appellant underwent an IPE evaluation as part of her I/DD Waiver application. (Exhibit D-3)
- 3) The October 2022 IPE was administered by licensed psychologist, [REDACTED], who diagnosed the Appellant with ASD, Level 2, Borderline Intellectual Functioning, Specific Learning Disorder with impairment in reading, written expression, and mathematics. (Exhibit D-3)
- 4) On November 2, 2022, the Respondent issued a notice advising that the Appellant's I/DD Waiver application had been denied, explaining that the documentation did not indicate an eligible diagnosis of intellectual disability or a related condition which is severe. (Exhibit D-2)
- 5) The November 2, 2022 notice indicated that submitted documentation did show that the Appellant had a substantial adaptive deficit in the areas of *learning* and *self-direction*. (Exhibit D-2)
- 6) The Appellant's IPE assessments did not support the diagnostic considerations offered and relevant measures of adaptive behavior to meet medical eligibility for the I/DD Waiver program.

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 nine-year-old whose parents applied for I/DD Waiver services on her behalf. As part of the I/DD waiver application, the Appellant underwent an IPE on October 26, 2022. On November 2, 2022, the Respondent sent notification of denial which stated that documentation provided for review did not indicate an eligible diagnosis of intellectual disability or a related condition which is severe. The documentation did, however, show the presence of two substantial functional deficits in the areas of *learning* and *self-direction*. The Appellant's parents appealed the Respondent's decision.

Policy mandates that a medically eligible applicant require the level of care and services provided in an Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IID) as evidenced by required evaluations and other information corroborated by narrative descriptions of functioning and reported history. The Medical Eligibility Contract Agent (MECA) determines the qualification for medical eligibility based on the IPE that verifies that the applicant has an intellectual disability with concurrent substantial deficits or a related condition which is severe and chronic with concurrent substantial deficits. In order to be medically eligible, each of the following categories must be met: 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.

The Respondent showed by a preponderance of evidence that the Appellant did not meet the diagnosis criteria for program eligibility. Kerri Linton, the Respondent's consulting psychologist, testified that the Appellant's diagnosis of Borderline Intellectual Disability does not constitute an eligible diagnosis for program eligibility. Ms. Linton explained that on the Appellant's October 2022 IPE, the Appellant's intellectual/cognitive ability was tested using the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V) which showed that the Appellant's full scale IQ score was 70. Ms. Linton testified that most individuals who qualify under this test have scores of 55 and below. Additionally, the Appellant's diagnosis of Autism did not meet the severity level to be considered a related condition for program eligibility. Ms. Linton testified that to meet the severity level for program eligibility, the Appellant had to have a diagnosis of Autism, Level 3. The administering psychologist diagnosed the Appellant with Autism, Level 2. Ms. Linton explained that although the GARS-3, which is the Autism test administered during the October 2022 IPE, rated the Appellant at an autism index of 102 and severity level of 3, the administering psychologist evaluates the totality of the scores to determine the severity level for the final diagnosis.

The Respondent showed by a preponderance of evidence that the documentation submitted for review demonstrated only two substantial adaptive deficits in the areas of *learning* and *self-direction*. The Adaptive Behavior Assessment System, Third Edition (ABAS-3), which measures adaptive behavior, was rated by the Appellant's mother. Ms. Linton testified that an eligible score of 3 standard deviations below the mean of 10, or less than 1 percentile, is a scaled score of a 1 or 2. Ms. Linton stated the only eligible scores from the ABAS-3 were in the areas of *functional academics (learning)* and *self-direction*. The parent rated ABAS-3 score of 1 in *health and safety* which is a sub-domain under CIL, does not constitute a substantial deficit standing alone. By policy, at least three sub-domains under CIL must be found in order to be considered a substantial adaptive deficit. Other sub-domains of CIL on the parent rated ABAS-3 were: *community use* =4, *home living* = 5, *leisure* = 6, *social* = 6.

Although the Appellant's parents contend that the Appellant cannot self-care at all, the narrative under *self-care* in the October 2022 IPE noted that the Appellant is able to dress and undress mostly independently, able to button, use a zipper, and tie her shoes. The Appellant is able to use utensils, although she is unable to prepare simple meals. Additionally, the ABAS-3 showed the parent rating under *self-care* as a 3. Although the Appellant's ABAS-3 test score of 3 is very low, it does not meet the threshold of a substantial delay as defined in policy.

The Appellant's parents contended that the Appellant was "coached" in several areas of the testing and felt it was not an accurate measure of her abilities. Although the Appellant's parents expressed dissatisfaction with the October 2022 IPE at the hearing, it is noted that a second medical evaluation was not requested.

The Appellant's parents were concerned that without the additional support that the I/DD Waiver program could provide to the Appellant, she would be unable to care for herself should anything happen to them. Although the parents' concern is understandable, to be eligible for the I/DD Waiver program, an individual must demonstrate the need for an ICF level of care which is verified

by the IPE and corroborated by narrative descriptions of functioning and reported history. Policy requires both the standardized adaptive behavior test scores and narrative to verify the existence of a substantial deficit.

The Respondent showed by a preponderance of evidence that the documentation submitted for review did not establish that the Appellant's diagnoses of borderline intellectual disability and ASD met the severity level required for program eligibility, and that the Appellant's delays do not meet the threshold of a substantial delay as defined in policy. 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 29th day of March 2023.

Lori Woodward, Certified State Hearing Officer