



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

**Sherri A. Young, DO, MBA, FAAFP  
Interim Cabinet Secretary**

**Sheila Lee  
Interim Inspector General**

July 27, 2023



RE: ██████████, A PROTECTED INDIVIDUAL v. WVDHHR  
ACTION NO.: 23-BOR-1370

Dear ██████████:

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,

**Tara B. Thompson, MLS**  
State Hearing Officer  
Member, State Board of Review

Encl: Decision Recourse  
Form IG-BR-29

CC: Gary Michels, Assistant Attorney General

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

■ A PROTECTED INDIVIDUAL,

**Appellant,**

v.

**Action Number: 23-BOR-1370**

**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 26, 2023, and reconvened on June 14, 2023.

The matter before the Hearing Officer arises from the Respondent's December 14, 2022 decision to deny the Appellant medical eligibility for the Medicaid Intellectual/Developmental Disabilities Waiver Program.

At the hearing, the Respondent was represented by Gary Michels, Assistant Attorney General. Appearing as a witness on behalf of the Respondent was Kerri Linton, psychologist, Psychological Consultation and Assessment (PC&A). The Appellant appeared and was represented by her attorney, ■ Legal Aid of West Virginia. Appearing as witnesses for the Appellant were ■ the Appellant's uncle; ■ the Appellant's cousin; ■ the Appellant's cousin; ■ the Appellant's cousin; ■ the Appellant's therapist; ■ psychologist; ■ NP, ■ Genetics. Observing, not providing testimony, and taking notes on behalf of the Respondent's witness were Charlie Bowen and Jordan Mitchell, psychologists, PC&A. All those present and providing testimony were sworn in and the following documents were admitted into evidence.

**Department's Exhibits:**

- D-1 Bureau for Medical Services (BMS) Manual Chapter 513 Excerpt
- D-2 BMS Second Medical Notice of Denial, dated December 14, 2022

- D-3 Independent Psychological Evaluation (IPE), dated December 7, 2022
- D-4 IPE, dated October 21, 2022
- D-5 BMS Notice of Denial, dated November 7, 2022
- D-6 IPE, dated September 10, 2020
- D-7 BMS Notice, dated September 17, 2020
- D-8 IPE, dated August 3, 2020
- D-9 IPE Testing Forms, dated August 3, 2020
- D-10 BMS Notice, dated August 12, 2020
- D-11 IPE, dated February 6, 2013
- D-12 BMS Notice of Denial, dated February 18, 2013
- D-13 Psychological Evaluation, dated September 5, 1995
- D-14 [REDACTED] Services letter, by [REDACTED] dated August 23, 2022
- D-15 Neuropsychological Evaluation, dated October 29, November 26, and December 9, 2019
- D-16 Neuropsychological Evaluation Conclusions
- D-17 [REDACTED] Initial Exam Record, dated August 31, 2021
- D-18 [REDACTED] Discharge Record, dated December 7, 2021
- D-19 [REDACTED] letter, by [REDACTED], dated August 9, 2022
- D-20 [REDACTED] Medicine documentation, dated August 15, 2022
- D-21 [REDACTED] Medicine letter, by [REDACTED], APRN, NP-C, dated August 31, 2022

**Appellant’s Exhibits:**

- A-1 [REDACTED] letters
- A-2 [REDACTED] letter

Written closing statements were submitted following the convened hearing. 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 following Findings of Fact are set forth.

**FINDINGS OF FACT**

- 1) On December 14, 2022, the Respondent issued a notice advising the Appellant’s application for Medicaid Intellectual/Developmental Disabilities Waiver Program eligibility had been denied (Exhibit D-2).
- 2) The reason for denial was “documentation provided for review does not indicate an eligible diagnosis of Intellectual Disability or a Related Condition which is severe either at present or during the developmental period (prior to the age of 22)” (Exhibit D-2).
- 3) Because the Respondent determined the documentation did not support the presence of a qualifying diagnosis, the Respondent determined that the functionality requirement could not be met. Therefore, functionality is not addressed in the Respondent’s December 14, 2022 denial notice (Exhibit D-2).

## Diagnosis

- 4) The Appellant has a history of mental health diagnoses and treatment including psychiatric hospitalization and counseling beginning at age five (Exhibits D-3, D-6 through D-8, D-11, D-14, and A-1).

### *Intellectual Disability*

- 5) The Appellant's IQSEC1-related intellectual disability was present at birth, during the Appellant's developmental period, and at present (Exhibits D-20 and A-2).
- 6) The Appellant's IQSEC1-related intellectual disability is likely to continue indefinitely (Exhibit D-20).
- 7) Individuals diagnosed with the Appellant's genetic mutation may range in severity from mild to severe. Illness severity would not be expected to change over time.
- 8) ██████████ record revealed that "a pathogenic mutation was identified in ASH1L which is associated with autosomal dominant Intellectual Disability. This mutation is consistent with her clinical features and does confirm her diagnosis of Intellectual Disability and Autism" (Exhibit A-2).
- 9) In relation to the Appellant's genetic testing, *Positive* or *Pathogenic* means that there is enough evidence present to say that the variant can or does cause disease associated with the syndrome.
- 10) Individuals with pathogenic variants in this gene have been reported to have autosomal dominant intellectual developmental disorder-52. This condition is characterized by intellectual disability, speech delay, autism spectrum disorder, and behavioral problems such as attention problems, hyperactivity, and anxiety (Exhibits D-20 and A-2).
- 11) The Appellant's Borderline Intellectual Functioning was present during the developmental period and is likely to continue indefinitely (Exhibit D-6 through D-8, D-11, D-15, D-16, D-19, and D-21).

### *Autism Spectrum Disorder*

- 12) Autism spectrum disorder ranges in severity from Level 1, least severe, to Level 3, most severe.
- 13) The Appellant's diagnosed Autism Spectrum Disorder, Level 1 was present during the developmental period and is likely to continue indefinitely (Exhibits D-4, D-6, D-19, and D-21).

## APPLICABLE POLICY

**Bureau for Medical Services (BMS) Manual §§ 513.6 and 513.6.2 provide in relevant sections:**

Initial medical eligibility is determined by the Medical Eligibility Contracted Agent (MECA) through a review of an Independent Psychologist Evaluation (IPE) which may include background information, mental status examination, a measure of intelligence, adaptive behavior achievement, and any other documentation deemed appropriate. Psychologists in the IPN are identified and placed on a list following documented training by the MECA. The IPE includes assessments that support the diagnostic consideration offered and relevant measures of adaptive behavior. The IP is responsible for completing the IPE and uploading it to the required internet site within 60 days of the receipt date of the IPN Response Form.

To be medically eligible, the applicant must require the level of care and services provided in Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IID) as evidenced by the required evaluations and other information requested by the Independent Psychologist or the MECA and corroborated by the narrative descriptions of functioning and reported history. An ICF/IID provides monitoring, supervision, training, and support.

Evaluations must demonstrate the applicant needs intensive instruction, services, assistance, and supervision to learn new skills, maintain the current level of skills, and/or increase independence in activities of daily living and must demonstrate 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 based on the IPE that verifies the presence of an intellectual disability or related condition that constitutes a severe and chronic disability with concurrent substantial deficits manifested before age 22. For the I/DD Waiver Program, individuals must meet the criteria for medical eligibility by the test scores and by the narrative descriptions contained in the documentation.

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

**BMS Manual § 513.6.2.1 provides in relevant sections:**

The applicant must have a diagnosis of intellectual disability with concurrent substantial deficits manifested before age 22 or a related condition which constitutes a severe and chronic disability with concurrent substantial deficits manifested before age 22.

If severe and chronic in nature, a diagnosis of Autism may make an individual eligible for the Medicaid I/DD Waiver program.

Additionally, an 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 under *Section 513.6.2.2*

**Code of Federal Regulations 42 CFR § 435.1010(a)(2)-(6) provide in relevant sections:**

Persons with related conditions means individuals who have a severe, chronic disability that meets all the following conditions:

- Attributable to any other conditions, 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 like that of mentally retarded persons, and requires treatment or services like those required for these persons,
- Manifested before the person reaches age 22,
- Is likely to continue indefinitely,
- Results in substantial functional limitations in three or more of the following areas of major life activity:
  - Self-care
  - Understanding and use of language
  - Learning
  - Mobility
  - Self-direction
  - Capacity for independent living

**BMS Manual § 513.6.2.2 provides in relevant sections:**

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 ID normative populations when intellectual disability 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.

**BMS Manual § 513.6.2.3 provides in relevant sections:**

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 Respondent denied the Appellant medical eligibility for the Medicaid I/DD Waiver Program because the submitted documentation did not establish the presence of an eligible diagnosis before age 22. The Appellant's counsel argued the documentation demonstrates she meets eligibility criteria and requested that the Appellant be found eligible for the Medicaid I/DD Waiver Program.

The Bureau for Medical Services (BMS) contracts with Psychological Consultation and Assessment (PC&A) as the Medical Eligibility Contracted Agent (MECA) to determine the Appellant's eligibility for the Medicaid I/DD Waiver Program. PC&A is required to determine the Appellant's eligibility through a review of an Independent Psychological Evaluation (IPE) report — which may include background information, mental status examination, a measure of intelligence, adaptive behavior, achievement, and any other documentation deemed appropriate. The MECA does not have the authority to change the information submitted for review and can only determine if the information provided aligns with the policy criteria for establishing Medicaid I/DD Waiver eligibility. The Board of Review cannot judge the policy and can only determine if the MECA followed the policy when deciding the Appellant's Medicaid I/DD Waiver eligibility. Further, the Board of Review cannot make clinical determinations regarding the Appellant's diagnosis, severity, and functionality and can only decide if the Respondent correctly determined the Appellant's eligibility based on the diagnosis, severity, and functionality revealed in the submitted documentation.

## **Diagnosis**

The policy requires the Respondent to rely on the information contained within the IPE and the submitted documentation. Based on the information provided, the Respondent must determine whether the documentation supports the presence of an eligible diagnosis with concurrent substantial deficits manifested during the Appellant's developmental period. The evidence revealed that the Appellant had a history of mental illness. Pursuant to the policy, mental health diagnoses are ineligible for consideration as an eligible related condition.

## **Intellectual Disability**

The preponderance of the evidence indicated that the Appellant had a diagnosis of intellectual disability established by reliable genetic testing. The policy does not preclude genetic-related intellectual disability diagnoses from eligibility.

██████████ testified that individuals diagnosed with the Appellant's genetic mutation may range in severity from mild to severe and that severity would not be expected to change. ██████████ testified that the Appellant's genetic mutation would have been present since birth. Although not diagnosed during the developmental period, the preponderance of the evidence established the intellectual disability would have been present before age 22 and be likely to continue indefinitely.

## **Autism Spectrum Disorder**

To qualify as a related condition, the diagnosis of Autism must constitute a severe and chronic disability with concurrent substantial deficits manifested before age 22. The policy does not preclude the MECA from considering diagnostic severity level specifiers when considering whether the Appellant's diagnosis met the severity level required for Medicaid I/DD Waiver Program eligibility. Testimony from both parties revealed that autism spectrum disorder severity ranges from Level 1, the mildest, to Level 3, the most severe. To constitute a severe and chronic disability, the evidence had to establish the presence of Autism Spectrum Disorder, Level 3, with concurrent substantial deficits manifested before age 22.

At the time of the Respondent's denial, the Appellant had a diagnosis of Autism Spectrum Disorder, Level 1. Testimony provided during the hearing indicated the diagnosis would have been present during the developmental period and is likely to continue indefinitely. The preponderance of the evidence failed to establish the presence of Autism Spectrum Disorder, Level 3, with concurrent substantial deficits before age 22.

## **Concurrent Substantial Deficits**

To establish the presence of concurrent substantial deficits attributable to intellectual disability before age 22, the evidence had to demonstrate the presence of severe adaptive deficits in three or more areas as demonstrated by relevant standardized scores and corroborating narrative descriptions contained in the documentation.



Ms. Linton's testimony indicated that because the Respondent determined the documentation did not support the presence of a qualifying diagnosis, the functionality requirements could not be met. Therefore, functionality is not addressed in the Respondent's December 14, 2022 denial notice.

██████████ testified that *Positive* or *Pathogenic*, as reflected in the Appellant's genetic report, means that there is enough evidence present to say that the variant can or does cause disease associated with the Appellant's diagnosis. The evidence indicated that the Appellant's diagnosed intellectual disability may result in speech delay, autism spectrum disorder, and behavioral problems such as attention problems, hyperactivity, and anxiety. During the hearing, ██████████ provided testimony regarding his interpretation of the ABAS-3 he administered and indicated he believed in the score validity.

The Respondent incorrectly denied the Appellant medical eligibility based on a failure to identify a qualifying diagnosis of intellectual disability. The Respondent must determine whether the submitted documentation establishes the presence of concurrent substantial deficits attributable to an intellectual disability before age 22. The matter will be remanded for a determination of whether the Appellant meets the eligibility criteria in functionality and the remaining eligibility categories.

### **CONCLUSIONS OF LAW**

- 1) To be eligible for the Medicaid I/DD Waiver Program, the Appellant must have a diagnosis of intellectual disability with concurrent substantial deficits manifested before age 22 or a related condition that constitutes a severe and chronic disability with concurrent substantial deficits manifested before age 22.
- 2) The diagnosis of intellectual disability or a severe related condition must be likely to continue indefinitely and present with at least three concurrent substantial deficits.
- 3) The preponderance of the evidence revealed that the Appellant's Autism Spectrum Disorder, Level 1, diagnosis did not qualify as a related condition that constitutes a severe disability.
- 4) The preponderance of the evidence revealed the presence of an intellectual disability present since the Appellant's birth and is likely to continue indefinitely.
- 5) The Respondent incorrectly denied the Appellant's medical eligibility for the Medicaid I/DD Waiver Program based on the documentation's failure to establish the presence of an intellectual disability diagnosis.
- 6) Because the documentation demonstrated the presence of an intellectual disability manifested during the Appellant's developmental period, the Respondent must determine whether the submitted documentation establishes the presence of concurrent substantial deficits attributable to an intellectual disability before age 22.

**DECISION**

It is the decision of the State Hearing Officer to **REVERSE** the Respondent's decision to deny the Appellant medical eligibility for the Medicaid I/DD Waiver based on the failure of the documentation to establish the presence of an intellectual disability during the Appellant's developmental period. The matter is **REMANDED** to determine whether the submitted documentation establishes Medicaid I/DD Waiver Program eligibility in the areas of functionality, ICF/IID level of care, and the necessity for active treatment.

Entered this 27<sup>th</sup> day of July 2023.

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**Tara B. Thompson, MLS**  
State Hearing Officer