



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

May 10, 2023

[REDACTED]

RE: [REDACTED], A PROTECTED PERSON v. WV DHHR
ACTION NO.: 23-BOR-1378

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-1378

**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 May 3, 2023, on an appeal filed March 13, 2023.

The matter before the Hearing Officer arises from the February 17, 2023, 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 his 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 February 17, 2023
- D-3 Independent Psychological Evaluation, IPE I/DD, West Virginia I/DD Waiver, evaluation date February 3, 2023
- D-4 Office of Special Education, Confidential Psychological Report, dated October 11, 2021
- D-5 █ Children's Hospital, Developmental Pediatrics, evaluation, dated December 1, 2017
- D-6 Independent Psychological Evaluation, IPE I/DD, West Virginia I/DD Waiver, evaluation date October 4, 2021
- D-7 Denial Notice, dated October 11, 2021
- D-8 Office of Special Education, Confidential Psychological Report, dated December 15, 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 applied for the I/DD Waiver Program.
- 2) The Respondent denied the Appellant's application for the I/DD Waiver Program in notices dated October 11, 2021 and February 17, 2023. (Exhibits D-7 and D-2)
- 3) The October 11, 2021 notice explained that the application was denied because "Documentation provided for review does not indicate an eligible diagnosis of either Intellectual Disability or a Related Condition which is severe ... Documentation submitted does not support the presence of substantial adaptive deficits in three or more of the six major life areas identified for Waiver eligibility." (Exhibit D-7)
- 4) On February 17, 2023, 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 Appellant was evaluated in Independent Psychological Evaluations (IPEs) conducted on October 4, 2021 and February 3, 2023. (Exhibits D-6 and D-3)
- 6) The October 2021 IPE did not provide a diagnosis of Intellectual Disability but provided a diagnosis of Autism, Social Level 2 and Attention-Deficit/Hyperactivity Disorder, Combined Presentation. (Exhibit D-6).
- 7) The February 2023 IPE provided a diagnoses of Autism Spectrum Disorder, social-emotional reciprocity requiring support (Level 1), restricted, repetitive behavior requiring support (Level 1, with accompanying cognitive and language impairment; Borderline Intellectual Functioning; and Attention Deficit/Hyperactivity Disorder, Combined Type, severe. (Exhibit D-3)
- 8) The Appellant was administered the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) test on both IPEs.
- 9) Results from the WISC-V are converted into standard scores with a mean of 100 and a standard deviation of 15 -- eligible scores are 69 and below.

- 10) The Appellant’s WISC-V results in October 2021 ranged from a low of 86 in Visual Spatial and Processing Speed, to a high of 94 in Fluid Reasoning, with a Full Scale IQ of 85. (Exhibit D-6)
- 11) The Appellant’s WISC-V results in February 2023 ranged from a low of 53 in Processing Speed Index of 53 to a high in Visual Spatial Index of 97, with a Full Scale IQ of 70. (Exhibit D-3)
- 12) The lower performance on the February 2023 IPE evaluation compared to the October 2021 IPE is explained by the Appellant’s ADHD and focus on the tasks and concern that he did his best during the WISC-V. (Exhibit D-3)
- 13) The Appellant was administered the Gilliam Autism Rating Scale – Third Edition (GARS-3), and obtained an Autism index score of 93, Level 2, from the evaluating psychologist in October 2021. (Exhibit D-6)
- 14) The February 2023 evaluating psychologist relied on a Social Communication Questionnaire, Lifetime Form, discussions with the Appellant’s mother, and review of the Appellant’s teachers’ ratings in his 2021 evaluation, to conclude the Appellant’s Autism as a Level 1. (Exhibit D-3)
- 15) The Appellant underwent an evaluation from the Office of Special Education in a report dated October 11, 2021, which assessed the Appellant has having a “moderate level of autism spectrum-related symptoms ... [the Appellant] does not fit the criteria related to restricted and repetitive behaviors and thus, the diagnosis of autism spectrum disorder.” (Exhibit D-4)

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

Medical eligibility criteria in each of the following categories must 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. 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 need the same level of care and services provided in an ICF/IID setting.

The Respondent contracts with Psychological Consultation and Assessment (PC&A) as the Medical Eligibility Contracted Agent (MECA) to determine applicant eligibility for the I/DD Waiver Program. PC&A is required to determine the Appellant's eligibility through review of an Independent Psychological Evaluation (IPE) report. 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 about the Appellant's I/DD Waiver eligibility. The Respondent must show by a preponderance of evidence that it correctly denied the Appellant's I/DD Waiver application.

The Respondent denied the Appellant's application as he did not meet the diagnostic criteria of an eligible diagnosis of an Intellectual Disability, or related condition, which is severe. The Appellant requested a fair hearing to appeal the Respondent's decision. The Respondent's denial of the Appellant's application was based on an unmet diagnostic requirement.

The Respondent showed by a preponderance of evidence that the Appellant did not meet the diagnosis criteria for program eligibility. Charlie Bowen, the Respondent's consulting psychologist, testified that the Appellant's diagnosis of Borderline Intellectual Functioning does not constitute an eligible diagnosis for program eligibility. Mr. Bowen referred to the WISC-V test that the Appellant underwent on both his IPEs. Results from the WISC-V are converted into standard scores with a mean of 100 and a standard deviation of 15 -- eligible scores are 69 and below. The Appellant's WISC-V results in October 2021 ranged from a low of 86 in Visual Spatial and Processing Speed, to a high of 94 in Fluid Reasoning, with a Full Scale IQ of 85. The Appellant's WISC-V results in February 2023 ranged from a low of 53 in Processing Speed Index of 53 to a high in Visual Spatial Index of 97, with a Full Scale IQ of 70. The examining psychologist, [REDACTED] opined that "Working memory and processing are more susceptible to variation in attention; however, [the Appellant] appeared focused on tasks and concerned that he did his best during the test. It is possible that he was being careful on processing speed tasks, and that contributed to his slower speed." Mr. Bowen explained that the lower test score in Processing Speed Index lowered the Appellant's Full Scale IQ from 85 in the October 2021 WISC-V testing to 70 in the February 2023 WISC-V testing. Additionally, Mr. Bowen referred to the Appellant's achievement scores on the Woodcock Johnson Tests of Achievement, Fourth Edition, (WJTA-4) administered during his February 2023 IPE. Scores of 55 and below are considered to be eligible scores under the WJTA-4. The Appellant's WJTA-4 test scores were non-eligible scores of 58 and above except for in the area of calculation. Mr. Bowen testified that the Appellant's diagnosis of Borderline Intellectual Disability does not constitute an eligible diagnosis for program eligibility. Scores of 69 and below meet the diagnosis criteria for intellectual disability.

The Appellant's diagnosis of ASD Level 1 did not meet the severity level to be considered a related condition for program eligibility. Mr. Bowen testified that to meet the severity level for program eligibility, the Appellant had to have a diagnosis of Autism, Level 3. The examining psychologist diagnosed the Appellant with ASD Level 1 in February 2023, and in October 2021, the Appellant was diagnosed with ASD Level 2, neither of which meet the severity level necessary to qualify as a related condition that is severe for program eligibility.

Mr. Bowen testified that because the Appellant did not meet the diagnostic criteria, adaptive functioning was not reviewed. The Appellant's mother testified that the Appellant requires constant reminders and supervision. However, it is noted that the Appellant is able to complete daily living skills, is able to assist with household chores, complete simple cooking albeit with prompting and supervision. However, without the necessary eligible diagnosis component, the Appellant has not met medical eligibility criteria for the I/DD Waiver Program. The Respondent correctly denied the Appellant's application on this basis.

CONCLUSIONS OF LAW

- 1) Because the Appellant does not have an eligible diagnosis for the I/DD Waiver Program, the diagnostic component of medical eligibility is unmet.
- 2) Because the diagnostic component is not met, the Appellant did not meet medical eligibility for the I/DD Waiver program.

- 3) Because the Appellant did not meet the medical eligibility requirements, the Respondent correctly denied the Appellant's application for 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 I/DD Waiver Program application.

ENTERED this 10th day of May 2023.

Lori Woodward, Certified State Hearing Officer