



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

June 22, 2023

[REDACTED]  
[REDACTED] W, Suite 300  
Charleston, WV 25313

RE: [REDACTED] A PROTECTED INDIVIDUAL, v. WVDHHR  
ACTION NO.: 23-BOR-1783

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,

Pamela L. Hinzman  
State Hearing Officer  
Member, State Board of Review

Encl: Appellant's Recourse to Hearing Decision  
Form IG-BR-29

cc: [REDACTED]  
Stacy Broce, WVDHHR  
Kerri Linton, PC&A  
Janice Brown, KEPRO

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

■■■■ A PROTECTED INDIVIDUAL,

**Appellant,**

v.

**Action Number: 23-BOR-1783**

**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 June 7, 2023.

The matter before the Hearing Officer arises from the February 21, 2023 decision by the Respondent to deny I/DD Waiver Medicaid benefits.

At the hearing, the Respondent appeared by Charley Bowen, Licensed Psychologist and Long-Term Care Clinical Consultant for the Bureau for Medical Services. The Appellant was represented by ■■■■ Senior Advocate for Disability Rights of West Virginia. Appearing as a witness for the Appellant was ■■■■ the Appellant's sister. All witnesses were sworn and the following documents were admitted into evidence.

**Department's Exhibits:**

- D-1 Bureau for Medical Services Policy Chapter 513.6
- D-2 Notice of Decision dated February 21, 2023
- D-3 Independent Psychological Evaluation dated January 11, 2023
- D-4 Notice of Decision dated January 7, 2016
- D-5 Notice of Decision dated September 28, 2020
- D-6 Independent Psychological Evaluation dated November 6, 2015

**Appellant's Exhibits:**

- A-1 Notice of Decision dated February 21, 2023
- A-2 Independent Psychological Evaluation dated January 11, 2023

- A-3 Notice of Decision dated January 7, 2016
- A-4 Notice of Decision dated September 28, 2020
- A-5 Bureau for Medical Services I/DD Waiver Policy Manual
- A-6 Social Security Administration documentation dated March 23, 2023
- A-7 Code of Federal Regulations, Part 404, Subpart P, Appendix 1
- A-8 [REDACTED] special education documentation
- A-9 Independent Psychological Evaluation dated September 14, 2020

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, who is currently 59 years old, applied for the Intellectual and Developmental Disabilities (I/DD) Waiver Medicaid Program.
- 2) The Appellant is a resident of [REDACTED].
- 3) The Respondent sent the Appellant a Notice of Decision on February 21, 2023, indicating that his I/DD Waiver Program application was denied (Exhibits D-2 and A-1).
- 4) The Appellant's application was denied because documentation submitted for review did not indicate an eligible program diagnosis of either intellectual disability or a severe related condition with concurrent substantial deficits within the developmental period (prior to age 22) (Exhibits D-2 and A-1)
- 5) An Independent Psychological Evaluation (IPE) was completed for the Appellant on January 11, 2023 (Exhibits D-3 and A-2).
- 6) The Appellant suffered a traumatic brain injury at age eight when he was thrown out of a second-story window to escape a house fire.
- 7) The Appellant was enrolled in special education classes at [REDACTED] (Exhibit A-8).
- 8) The Appellant has a history of mental illness (Exhibits D-3 and A-2).
- 9) The Appellant was diagnosed with Intellectual Disability (Intellectual Developmental Disorder), mild; schizoaffective disorder, bipolar type; antisocial personality disorder; and alcohol dependence (uncomplicated) on the January 2023 IPE (Exhibits D-3 and A-2).
- 10) The Appellant attained a full-scale IQ score of 60 on the Weschler Adult Intelligence Scale-4<sup>th</sup> Edition (Exhibits D-3 and A-2).

- 11) The Appellant received scores of 1 in all functional areas on the Adaptive Behavior Assessment Scale-3<sup>rd</sup> Edition (ABAS-3) during the January 2023 IPE (Exhibits D-3 and A-2).
- 12) The Appellant is fully ambulatory (functional area of *mobility*) (Exhibits D-3 and A-2).
- 13) The Appellant can speak with intelligible articulation, using short sentence phrases and simple vocabulary. He can converse with others, displaying appropriate voice tone and eye contact (functional area of *receptive or expressive language*) (Exhibits D-3 and A-2).
- 14) The Appellant can orally read most words and his word decoding skills are at a sixth-grade level. He can add, subtract, and do simple multiplication. The Appellant writes legibly and can spell simple words. His math and spelling skills are at a second to third grade-level (functional area of *learning*) (Exhibits D-3 and A-2).
- 15) The Appellant has difficulty remembering simple information and lacks the orientation to perform tasks independently (functional area of *learning*) (Exhibits D-3 and A-2).
- 16) The Appellant is toilet trained and eats independently. He can attend to his bathing and personal hygiene needs with supervision. The Appellant has difficulty choosing the correct clothing for the setting, and is unable to tie his shoes or cut his toenails and fingernails. He must be prompted to get out of bed (functional area of *self-care*) (Exhibits D-3 and A-2).
- 17) The Appellant chooses his foods and preferred activities. He requires supervision for almost all tasks due to difficulty with concentration and attention. He does not have an adequate understanding of the time required to follow schedules independently (functional area of *self-direction*) (Exhibits D-3 and A-2).
- 18) The Appellant has no prognosis for independent living due to his limited cognitive ability (functional area of *capacity for independent living*) (Exhibits D-3 and A-2).
- 19) In 1983, the Appellant was determined disabled at age 19 by the Social Security Administration (SSA) based on mental retardation code 3180 (Exhibit A-6).
- 20) The Appellant has a history of working in basic maintenance jobs, but his intellectual and physical capacities appear to be diminishing (Exhibits D-3 and A-2).

### **APPLICABLE POLICY**

West Virginia Medicaid Regulations, Chapter 513.6 (Exhibits D-1 and A-5) state:

#### **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 may, if severe and chronic in nature, 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 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 the 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*.

#### **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 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.

### **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**

To qualify for the I/DD Waiver Medicaid Program, policy dictates that an 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.

The Respondent's representative, Charley Bowen, Licensed Psychologist, testified that no evidence was provided to establish that the Appellant had a diagnosis of intellectual disability or a related condition with the concurrent substantial functional deficits prior to age 22. While the Appellant suffered a traumatic brain injury (a potentially eligible diagnosis) at age eight, Mr. Bowen stated that no documentation was presented to substantiate the severity of the injury and the resulting associated deficits. As the Appellant suffers from mental illness, Mr. Bowen contended that it is unclear whether mental illness preceded the Appellant's intellectual disability.

Mr. Bowen reviewed areas of the Appellant's January 2023 IPE, noting that the Appellant can complete self-care tasks independently, but requires some supervision. The Appellant speaks with intelligible articulation, and can add, subtract, and do simple multiplication. He can read, write, and spell. He can choose foods and activities, but requires supervision. The psychologist conducting the January 2023 IPE believed that the Appellant could not live independently and would require supervision. Mr. Bowen testified that it appears the Appellant's abilities have diminished from age 52 to 59 based on his review of previous IPEs.

██████████, Senior Advocate with Disability Rights of West Virginia, testified that the Appellant received special education services following his traumatic brain injury. ██████████ stated that records from the Appellant's special education services prior to 1979 were lost in a

flood, but a transcript was provided by [REDACTED] indicated that the Appellant was determined disabled by the Social Security Administration in 1983 based on mental retardation code 3180. She pointed out that the Appellant received a full-scale IQ score of 60 on his 2023 IPE and reviewed ABAS-3 scores and narrative information from the document. [REDACTED] stated that she did not believe the evaluation was completed with “due diligence” because the Appellant’s family was not interviewed regarding his condition and medical records from the [REDACTED] were not requested.

The Appellant’s sister, [REDACTED], testified about the circumstances of the Appellant’s traumatic brain injury. She indicated that the Appellant was taken to [REDACTED] after his injury, but that the hospital has been closed for several years and medical records could not be obtained. [REDACTED] stated that she wanted to participate in the Appellant’s January 2023 IPE, but she was not informed of the date. [REDACTED] testified that she could have provided more accurate information concerning her brother’s condition and contended that the Appellant’s traumatic brain injury occurred prior to his mental illness.

Mr. Bowen testified that the Respondent does not dispute the Appellant’s participation in special education classes, but school records, such as an Individualized Education Program, were not provided to address the Appellant’s level of impairment. While the Appellant had a program-eligible IQ score and ABAS-3 scores of 1 (based on information provided by hospital staff) in functional areas on the IPE, the scores are inconsistent with the Appellant’s abilities as described in the IPE narrative information. Mr. Bowen indicated that the Social Security Administration’s criteria for assessing intellectual disability and establishing deficits is less stringent than I/DD Waiver criteria.

Given the Appellant’s current age, the difficulty in obtaining his medical records prior to age 22 is noted. Social Security Administration regulations in the Code of Federal Regulations define the establishment of an intellectual disorder (mental retardation is a historically used term) as a disorder that is characterized by significantly subaverage general intellectual functioning and significant deficits in current adaptive functioning, and manifestation of the disorder before age 22. Signs may include poor conceptual, social, or practical skills evident in adaptive functioning. It is unclear how significant deficits are specifically determined by the SSA. No SSA records were provided concerning the documentation used to determine the presence of significant deficits at the time of the disability determination. Therefore, it is impossible to determine whether the Appellant’s condition prior to age 22 met medical eligibility criteria for I/DD Waiver eligibility. It is noteworthy that the Appellant was diagnosed with a mild intellectual disability on the January 2023 IPE and his low ABAS-3 scores were inconsistent with narrative information concerning his functional abilities.

As there is no evidence to determine whether the Appellant’s traumatic brain injury and subsequent functional deficits would have met severity requirements for the I/DD Waiver Program prior to age 22, the Respondent’s decision to deny I/DD Waiver Medicaid benefits is affirmed.

### **CONCLUSIONS OF LAW**

- 1) To qualify for I/DD Waiver Medicaid benefits, policy states that an individual 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.
- 2) While the Appellant had a potentially eligible diagnosis of traumatic brain injury prior to age 22 and was determined disabled by the SSA at age 19, there is no documentation to verify whether his condition prior to age 22 met specific severity requirements of the I/DD Waiver Program.
- 3) The Respondent's decision to deny I/DD Waiver Medicaid benefits based on medical ineligibility is affirmed.

### **DECISION**

It is the decision of the State Hearing Officer to **UPHOLD** the Respondent's action to deny I/DD Waiver Medicaid benefits.

**ENTERED this 22nd day of June 2023.**

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**Pamela L. Hinzman  
State Hearing Officer**