



STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
OFFICE OF INSPECTOR GENERAL
BOARD OF REVIEW
4190 Washington Street, West
Charleston, West Virginia 25313

Earl Ray Tomblin
Governor

Karen L. Bowling
Cabinet Secretary

March 10, 2016

[REDACTED]

RE: [REDACTED] v. WV DHHR
ACTION NO.: 16-BOR-1158

Dear Ms. [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,

Donna L. Toler
State Hearing Officer
Member, State Board of Review

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

cc: [REDACTED], APS Healthcare
Pat Nisbet, BMS

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

██████████,

Appellant,

v.

Action Number: 16-BOR-1158

**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 ██████████. 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 10, 2016, on an appeal filed January 21, 2016.

The matter before the Hearing Officer arises from the January 5, 2016 decision by the Respondent to deny the Appellant's application for the Intellectual Disabilities and Developmental Disabilities (I/DD) Waiver Program.

At the hearing, the Respondent appeared by ██████████, MA, Psychological Consultation & Assessment, Inc. The Appellant appeared and was represented by his mother, ██████████. All witnesses were sworn and the following documents were admitted into evidence.

*Present but not participating in the hearing was ██████████, Hearings Coordinator for PC&A. Ms. ██████████ was present to take notes for Ms. ██████████. The Appellant's representative had no objections to her presence.

Department's Exhibits:

- | | |
|-----|---|
| D-1 | Bureau for Medical Services Provider Manual, Chapter 513: I/DD Waiver Services, §§513.6, 513.6.1.1, 513.6.2, 513.6.2.1, 513.6.2.2 and 513.6.2.3 |
| D-2 | Correspondence from the Department to the Appellant, dated January 5, 2016 |
| D-3 | Independent Psychological Evaluation (IPE), evaluation date November 16, 2015 |

- D-4 Data Collection Form for Students with Disabilities, Individualized Education Program (IEP), effective school year 2004-05
- D-5 Individualized Education Program (IEP), effective school year 1994-95

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 I/DD Waiver Program services and the Respondent issued a January 5, 2016 notice to the Appellant denying the application. The reason for denial was "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-2)
- 2) The Appellant established the presence of substantial adaptive deficits in two major life areas identified for program eligibility: Learning and Receptive or Expressive Language. (Exhibit D-3)
- 3) [REDACTED] (Ms. [REDACTED] representative for the Respondent, is a licensed psychologist employed by Psychological Consultation & Assessment, Inc. (PC&A), a firm contracted by the Respondent to make eligibility determinations for the I/DD Waiver Program. Ms. [REDACTED] made the eligibility determination regarding the Appellant, and based her information on the Appellant's Independent Psychological Evaluation (IPE), the 1994-95 school year Individualized Education Programs (IEP) and the 2004-05 school year IEP. (Exhibits D-3 through D-5).
- 4) The Appellant's IPE includes the results of the Adaptive Behavior Assessment System – Second Edition (ABAS-II). The ABAS-II is a test instrument used to "assess cognitive and developmental disabilities with adaptive behavior rating scales." Standard scores on this instrument have a mean of ten and a standard deviation of three. For the purpose of establishing "substantial deficits," a standard score of one is three standard deviations below the mean. A standard score of two includes results from the sample that are "less than one percentile." The Appellant received standard scores of two on the ABAS-II in the major life areas of Learning (Functional Academics) and Communication. The Appellant received standard scores of one (1) or two (2) in two of the three required subdomains of the major life area of Capacity for Independent Living (Community Use and Social). (Exhibit D-2)

- 5) The Appellant's mother, [REDACTED], did not feel that the test scores accurately reflected the Appellant's abilities.

APPLICABLE POLICY

The policy regarding the functionality component of medical eligibility for the I/DD Waiver Program is located in Bureau for Medical Services Provider Manual, Chapter 513: I/DD Waiver Services, at §513.3.2.2. This policy reads as follows:

513.3.2.2 Functionality

The applicant must have substantial deficits in at least 3 of the 6 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 6 sub-domains: home living, social skills, employment, health and safety, community and leisure activities. At a minimum, 3 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 3 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 percentile when derived from MR normative populations when mental retardation 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.

DISCUSSION

The Respondent denied the Appellant's application for the I/DD Waiver Program based on unmet medical eligibility. The unmet medical eligibility component noted on the denial notice was functionality. The policy regarding functionality relies on the concept of "substantial deficits," and defines this concept strictly in terms of test scores "derived from a standardized measure of adaptive behavior," and the Appellant did not establish eligibility on this basis. Narrative descriptions in evidence or testimony may not substitute for lacking eligible test scores; they can only support existing eligible results.

Ms. [REDACTED] provided emotional testimony regarding concern for her son's safety and future well-being. While Ms. [REDACTED] concerns for the future of her son are understandable, the testimony and evidence presented on the Appellant's behalf failed to establish that the validity of the test scores obtained on the ABAS-II were inaccurate.

The decision of the Respondent to deny the Appellant's application for the I/DD Waiver Program is affirmed.

CONCLUSIONS OF LAW

- 1) Policy for the I/DD Waiver Program requires the demonstration of substantial deficits in at least three major life areas (also identified by policy). Because the Appellant only demonstrated substantial deficits in two major life areas, the functionality component could not be established.
- 2) Whereas the functionality component could not be established, medical eligibility for the program could not be established.

DECISION

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

ENTERED this ____ Day of March 2016.

Donna L. Toler
State Hearing Officer