



**STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
OFFICE OF INSPECTOR GENERAL**

Bill J. Crouch
Cabinet Secretary

**Board of Review
416 Adams Street Suite 307
Fairmont, WV 26554
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Jolynn Marra
Interim Inspector
General

March 27, 2020



RE: ██████████, A MINOR v. WVDHHR
ACTION NO.: 20-BOR-1015

Dear Ms. ██████████

Enclosed is a copy of the decision resulting from the hearing held in the above-referenced matter.

In arriving at a decision, the Board of Review 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 that may be taken if you disagree with the decision reached in this matter.

Sincerely,

Tara B. Thompson
State Hearing Officer
State Board of Review

Enclosure: Appellant's Recourse
Form IG-BR-29

cc: Kerri Linton, Psychological Consultation & Assessment
Sarah Clendenin, Psychological Consultation & Assessment
Janice Brown, KEPRO

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

■, A MINOR,

Appellant,

v.

ACTION NO.: 20-BOR-1015

**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 minor. This hearing was held in accordance with the provisions found in Chapter 700 of the West Virginia Department of Health and Human Resources' (DHHR) Common Chapters Manual. This fair hearing was convened on February 12, 2020 an appeal filed January 2, 2020.

The matter before the Hearing Officer arises from the October 8, 2019 decision by the Department to deny the Appellant's application for Medicaid WV I/DD Wavier (I/DDW) Program medical eligibility.

At the hearing, the Respondent appeared by Kerri Linton, Psychological Consultation & Assessment. The Appellant appeared by her mother, ■. Appearing as a witness on behalf of the Appellant was ■, Parent Educator Resource Center Coordinator. All witnesses were sworn and the following documents were admitted into evidence.

Department's Exhibits:

- D-1 Bureau for Medical Services (BMS) Manual § 513.6- 513.6.4
- D-2 DHHR BMS Notice, dated October 8, 2019
- D-3 Independent Psychological Evaluation (IPE), dated August 8, 2019
- D-4 Score Summary
- D-5 Education Evaluation Report, dated April 20, April 25, and May 13, 2018
- D-6 Individualized Education Program (IEP), dated May 3, 2019
- D-7 Personalized Education Plan (PEP), undated
- D-8 Physician Letter, dated April 20, 2017

Appellant's Exhibits:

- A-1 Letter, dated February 3, 2020
- A-2 Letter, dated February 3, 2020
- A-3 Letter, dated January 30, 2020
- A-4 Letter, dated February 3, 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 following Findings of Fact are set forth.

FINDINGS OF FACT

- 1) The Appellant applied for the Medicaid I/DD Waiver (I/DDW) Program (Exhibit D-2).
- 2) On October 8, 2019, the Respondent issued a notice advising the Appellant that her application for I/DDW eligibility was denied due to lacking an eligible diagnosis of intellectual disability or a related condition which is severe. The notice offered further reasons for denial including that submitted documentation did not support the presence of substantial adaptive deficits in three or more of the six major life areas (Exhibit D-2).
- 3) The October 8, 2019 notice reflected that the Appellant was found to lack substantial adaptive deficits in the areas of *self-care, learning, self-direction, receptive or expressive language, mobility, and capacity for independent living* (Exhibit D-2).
- 4) The Respondent's October 8, 2019 denial was based on "8/8/19 IPE; 4/20, 4/25, 5/13/18 Education Evaluation Report (unsigned); 5/3/19 [REDACTED] County Schools IEP; Personalized Education Plan; 4/20/17 Letter from [REDACTED], MD; 10/6/19 Teacher ABAS-3"(Exhibit D-2).
- 5) The Appellant is a minor, under age 22 (Exhibit D-3).
- 6) The Appellant has a diagnosis of Intellectual Disability, Mild, and a diagnosis of Autism Spectrum Disorder, Level 1 (Exhibit D-3).
- 7) On August 8, 2019, psychologist [REDACTED] completed an Independent Psychological Evaluation (IPE) (Exhibit D-3).
- 8) The Appellant receives academic accommodation for ADHD and Math Learning Disability and receives 30% of her academic instruction in the special education setting (Exhibit D-3).
- 9) The Appellant lacks substantial deficits in the area of *self-care* (Exhibits D-3 through D-5).

- 10) The Appellant lacks substantial deficits in the area of *receptive or expressive language* (Exhibits D-3 through D-5).
- 11) The Appellant lacks substantial deficits in the area of *Learning* (Exhibits D-3 through D-5).
- 12) The Appellant lacks substantial deficits in the area of *mobility* (Exhibit D-3).
- 13) The Appellant lacks substantial deficits in the area of *self-direction* (Exhibits D-3 through D-5).
- 14) The Appellant lacks substantial deficits in the area of *capacity for independent living* (Exhibit D-3 and D-5).

APPLICABLE POLICY

Bureau for Medical Services (BMS) Manual § 513.6 provides in part:

In order for an applicant to be found eligible for the I/DD Wavier Program, they must meet medical eligibility ... Medical eligibility is determined by the Medical Eligibility Contract Agent (MECA) through a review of the IPE completed by a member of the Independent Psychologist Network.

BMS Manual § 513.6.1.1 provides in part:

The applicant chooses a psychologist in the Independent Psychologist Network (IPN) and contacts the independent psychologist (IP) to schedule the appointment The Independent Psychological Evaluation (IPE) is used to make a medical eligibility determination.

BMS Manual § 513.6.2 provides in part:

To be medically eligible, the applicant must require the level of care and services provided in an Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF) 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 ... 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.

The IPE verifies that the applicant has an intellectual disability with concurrent substantial deficits or a related condition which constitutes a severe and chronic

disability with concurrent substantial deficits. An applicant must meet all the medical eligibility criteria in each of the following categories:

- Diagnosis;
 - Functionality;
 - Need for treatment; and
- Requirement of ICF/IID Level of Care

BMS Manual § 513.6.2.1 provides in part:

The Applicant must have a diagnosis of intellectual disability with concurrent substantial deficits manifested prior to age 22.

If severe and chronic in nature, Autism is a related condition which may make an individual eligible for the I/DDW Program. Individuals with severe related conditions 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

BMS Manual § 513.6.2.2 provides in part:

The applicant must have substantial deficits in at least three of the six identified major life areas:

- Self-care;
- Communication;
- Learning;
- Mobility;
- Self-direction; and
- Capacity for independent living

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 [emphasis added] be supported not only by the relevant test scores, but also the narrative descriptions contained in the documentation submitted for review.

DISCUSSION

The Appellant contested the Respondent's decision to deny the Appellant medical eligibility for the I/DD Waiver Program and argued that the Appellant required additional support—which the I/DD Waiver Program could provide—due to the existence of deficits in all functioning areas except mobility.

Diagnosis

The Respondent had to demonstrate by a preponderance of evidence that the Appellant lacked an eligible diagnosis. The IPE verifies that the Appellant has diagnoses of Intellectual Disability, Mild, and a diagnosis of Autism Spectrum Disorder, Level 1. The respondent testified that to meet the severity level for I/DD Waiver Program medical eligibility, the Appellant had to have a diagnosis of Autism, Level 3. The Appellant's diagnosis of Autism Spectrum Disorder, Level 1 did not meet the criteria for a severe related condition.

The Respondent testified that the IPE, previous assessment, and supporting school documentation—regarding services provided to the Appellant in school—failed to support the IPE diagnosis of Intellectual Disability. The policy requires the Appellant's eligibility to be based on information contained in the IPE and that the Appellant must have a diagnosis of intellectual disability. There is no specification in the policy that requires the narrative of the IPE and supporting documentation to corroborate a diagnosis established by the IPE physician. While the policy grants authority to the Respondent to use a Medical Eligibility Contracted Agent (MECA) to conduct I/DD Waiver eligibility reviews, the policy does not grant the MECA the authority to veto the diagnosis of the IPE physician. Rather, BMS Manual § 513.6.1.1 specifies that the MECA makes a medical eligibility determination following receipt of the completed IPE that utilizes the current approved diagnostic system. There was no argument or evidence presented to demonstrate that the Appellant's diagnosing physician lacked credibility or failed to use "the current approved diagnostic system." As such, the IPE diagnosis of intellectual disability was found to be credible by this Hearing Officer and the Respondent incorrectly determined that the appellant lacked an eligible diagnosis.

ICF Level of Care Functioning

The policy specifies that the Appellant must have a diagnosis of I/DD or severe related condition with concurrent substantial deficits in at least three out of the six identified major life areas. To demonstrate that adaptive deficits were substantial, the evidence had to reflect that the Appellant had standardized adaptive behavior test scores three standard deviations below the mean or less than 1% when derived from a normative sample that represents the general population. During the hearing, testimony provided by the Respondent clarified that ABAS-3 scores reflecting these criterion would be scores of 1 or 2. The Appellant testified that the Appellant's functioning has deteriorated since evaluations conducted in [REDACTED] and argued that the teacher ABAS-3 scores were unreliable due to being completed by a teacher with a special relationship with the Appellant who scored the Appellant based on the Appellant's best performance. The October 8, 2019 denial notice provided the Appellant with an opportunity to request a second medical evaluation; however, a second medical evaluation was not requested. Therefore, the Board of Review may only consider the evidence available to the Respondent at the time of the Respondent's

determination and could not disregard the materials considered by the Respondent when making the Appellant's I/DD Wavier Program medical eligibility.

The policy requires the relevant test scores to be supported by the narrative descriptions contained in the documentation submitted for review. To demonstrate that the Respondent correctly denied the Appellant eligibility based on a lack of adaptive deficits, the Respondent had to prove that the Appellant lacked substantial adaptive deficits that require an ICF level of care in three or more of the six major life areas as identified by the policy.

To be eligible for an ICF level of care, the ICF level of care had to be verified by the IPE and corroborated by narrative descriptions of functioning and reported history. To demonstrate that the Appellant required an ICF level of care, the evaluations of the Appellant had to demonstrate a need for 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 a need for the same level of care and services that is provided in an ICF.

Self-Care

The Appellant's parent ABAS-3 score of 1 reflected that the Appellant had a substantial adaptive deficit in the area of *self-care*. The teacher ABAS-3 score of 12 did not corroborate the presence of a *self-care* substantial adaptive deficit requiring an ICF level of care. The Respondent testified that an individual requiring an ICF level of care for *self-care* would not be able to independently toilet, would need assistance with feeding, and would need total care with bathing, dressing, and grooming. The discussion narrative of the IPE and testimony provided at the hearing reflected that the Appellant was able to conduct self-care independently with prompting and reflected that the Appellant needed guidance to complete self-care tasks satisfactorily. Although the Appellant demonstrated an impaired ability to complete self-care tasks, the evidence was not sufficient to demonstrate that the Appellant presented with a history of significant adaptive deficits as required by policy. The policy requires both the standardized adaptive behavior test scores and the narrative to verify the existence of a substantial deficit. The Appellant's ABAS-3 scores and the IEP narrative conflict; therefore, a substantial deficit in the area of *self-care* could not be awarded.

Receptive or Expressive Language

The Appellant's parent and teacher ABAS-3 score in the area of *communication* reflected a score of 4. The discussion narrative of the IPE established that the Appellant is capable of communicating verbally as evidenced by clear speech, relevant content, and being able to follow two-step directives. The narrative demonstrated that the Appellant exhibited barriers "conceptualizing what she wants to communicate;" however, deficiency conceptualizing speech is not sufficient to establish a significant adaptive deficit. The Respondent testified that to demonstrate a substantial delay in *receptive or expressive language*, the Appellant would have to demonstrate "little to no verbal ability" or required the use of an augmented device for communication. The evidence entered demonstrated that the Appellant's functioning exceeded this threshold. The policy requires both the standardized adaptive behavior test scores and the narrative to verify the existence of a substantial deficit. The evidence failed to establish that the Appellant has a substantial deficit in the area of *receptive or expressive language*.

Learning

The Appellant's parent ABAS-3 score of 1 reflected that the Appellant had a substantial adaptive deficit in the area of *functional academics*. The teacher ABAS-3 score of 7 did not corroborate the presence of a substantial adaptive deficit in the area of *functional academics* which requires an ICF level of care. The Appellant's mother testified that the Appellant's diagnoses of mild intellectual disability and autism impact her ability to learn at school.

The Respondent testified that the ABAS-3 score was not consistent with the Appellant's test scores. The IPE narrative reflected that the Appellant is capable of reading, writing, using a calendar, and reporting her address and phone number, but exhibited barriers concentrating, using money, and telling time. The IPE further stated, "there were no indicators that [the Appellant] was under performing."

The Respondent testified that typically an achievement test is conducted to provide a measure for the Appellant's functioning in the area of *learning*; however, the Appellant refused to cooperate with the achievement test during the IPE and this measure was not available for consideration of the Appellant's functioning. During a May 2018 educational evaluation, a Kaufmann Test of Educational Achievement – Third Edition (KTEA3) was conducted to assess the Appellant's academic skills. The evidence demonstrated that the Appellant's KTEA3 scores ranged from 66 to 97. The Respondent testified that to demonstrate substantial adaptive deficits with learning, the Appellant's standardized scores would need to reflect scores at 55 or below. The Respondent testified that the data provided in the IPE and KTEA3 did not indicate a substantial deficit in the area of *learning*. Although the Appellant's testimony that the Appellant's ability to learn is impacted by her diagnoses, the policy requires both the standardized adaptive behavior test scores and the narrative to verify the existence of a substantial deficit. The Appellant's ABAS-3 scores conflict with and the IEP narrative and KTEA3 scores; therefore, a substantial deficit in the area of *learning* cannot be awarded.

Mobility

The evidence demonstrated that the Appellant is independently ambulatory. The Respondent testified that to be eligible for a substantial deficit in the area of *mobility*, the Appellant would not be able to walk alone or would use a wheelchair. During the hearing, the Appellant's mother testified that she did not contest the IPE adaptive assessment of the Appellant's mobility.

Self-Direction

The Appellant's parent ABAS-3 score of 2 reflected that the Appellant had a substantial adaptive deficit in the area of *self-direction*. The teacher ABAS-3 score of 8 did not corroborate the presence of a *self-direction* substantial adaptive deficit requiring an ICF level of care. To demonstrate substantial deficits in the area of *self-direction*, the evidence had to demonstrate that the Appellant was not able to make choices or start and stop activities independently. The evidence demonstrated that the Appellant is capable of choosing and initiating activities in which she wishes to engage. The IEP narrative and testimony during the hearing reflected that the Appellant exhibits barriers initiating pet care, appointment setting, medication administration, social plans, or completing homework; however, the narrative established that the Appellant is capable of responding to social invitations. Testimony provided during the hearing verified that the Appellant is capable of initiating activities which she wishes to engage in. Although the Appellant

demonstrates barriers making appropriate choices, the evidence demonstrated that the Appellant is capable of initiating and choosing to participate in activities; therefore, a substantial deficit in the area of *self-direction* cannot be awarded.

Capacity for Independent Living

The Respondent testified that the area of *work* functioning is not considered due to the Appellant's status as a minor. The Respondent further testified that to demonstrate a substantial deficit, the Appellant would have to demonstrate functioning deficits in at least three of the five areas assessed for *capacity for independent living*. The evidence failed to demonstrate that the Appellant presented with functioning deficits in at least three of the five areas assessed; therefore, a substantial deficit in the area of *capacity for independent living* could not be awarded.

The Appellant's parent ABAS-3 score of 1 and the teacher ABAS-3 score of 2 indicated that the Appellant had a substantial adaptive deficit in the area of *community use*. The Respondent testified that individuals who require an ICF level of care require 24-hour eyes-on supervision. The IPE narrative reflected that the Appellant can independently walk to the store —six blocks away. The Appellant testified during the hearing that although the measure was six blocks, the Appellant only had to navigate one street and would be unable to navigate in a more complex community setting. The IEP narrative reflected that the Appellant participates in the school band and attends social activities at the movies and restaurants. The Appellant argued that due to lack of participation related to the Appellant becoming overstimulated, the Appellant is currently failing band. The IPE narrative description of the Appellant's ability conflicts with the ABAS-3 score assessment and fails to demonstrate that the Appellant requires 24-hour eyes-on supervision at all times as evidenced by her ability to choose to attend activities in the community without constant supervision. The policy requires both the standardized adaptive behavior test scores and the narrative to verify the existence of a substantial deficit. The Appellant's ABAS-3 scores and the IEP narrative conflict; therefore, a substantial deficit in the area of *community use* could not be awarded.

The Appellant's parent ABAS-3 score of 1 indicated that the Appellant had a substantial adaptive deficit in the area of *home living*. The Respondent testified that individuals who require an ICF level of care and demonstrate a substantial deficit in the area of *home living*, are unable to complete tasks assigned. The IPE narrative reflected that the Appellant is capable of completing chores when prompted but does not initiate chore completion. The Appellant's mother argued that she must provide all instructions on how to complete activities as they are being completed. Although the evidence established that the Appellant has barriers with the willingness to complete tasks without prompting, the evidence failed to demonstrate that she could not complete tasks when prompted. The policy requires both the standardized adaptive behavior test scores and the narrative to verify the existence of a substantial deficit. The Appellant's ABAS-3 scores and the IEP narrative conflict; therefore, a substantial deficit in the area of *home living* could not be awarded.

The Appellant's parent ABAS-3 score of 1 indicated that the Appellant had a substantial adaptive deficit in the area of *health and safety*. The teacher ABAS-3 score of 10 did not corroborate the presence of a *health and safety* substantial adaptive deficit requiring an ICF level of care. The IPE narrative reflected that the Appellant cannot conduct nutrition planning or wound care. The IPE narrative and Appellant testimony indicated that when overstimulated, the Appellant will flee and

is vulnerable to strangers and exploitation. The IPE narrative demonstrated that the Appellant can recognize electrical, animal, and cook-stove dangers. The policy requires both the standardized adaptive behavior test scores and the narrative to verify the existence of a substantial deficit. The Appellant's parent and teacher ABAS-3 scores and the IPE narrative conflict; therefore, a substantial deficit in the area of *health and safety* could not be awarded.

The Appellant's parent ABAS-3 score of 2 indicated that the Appellant had a substantial deficit in the area of *leisure*. The teacher ABAS-3 score of 7 did not corroborate the presence of a *leisure* substantial adaptive deficit requiring an ICF level of care. The IPE narrative reflected that the Appellant enjoys texting friends and watching YouTube. The IPE and the Appellant's mother's testimony during the hearing reflect that during the summer, the Appellant attends activities, which her mother arranges, with friends three times per week. The Respondent testified that individuals requiring an ICF level of care and exhibiting substantial deficits in the area of *leisure* would be unable to initiate activities such as texting and using electronic devices to access YouTube. The policy requires both the standardized adaptive behavior test scores and the narrative to verify the existence of a substantial deficit. The Appellant's ABAS-3 scores and the IEP narrative conflict; therefore, a substantial deficit in the area of *leisure* could not be awarded.

The Appellant's parent ABAS-3 score of 6 and teacher ABAS-3 score of 8 indicated that the Appellant lacked a substantial deficit in the area of *social*. To demonstrate an ICF level of care and exhibit substantial deficits in the area of *social*, an individual would be unable to initiate or maintain relationships. The Appellant argued that social relationships come and go due to the Appellant's inability to maintain relationships; however, the Appellant also testified that the Appellant maintains a good relationship with a certain teacher. The evidence demonstrated that although the Appellant's mother schedules social activities for her, the Appellant is capable of attending and participating in social activities and texting friends. Neither the Appellant's ABAS-3 score or the IPE narrative reflected that the Appellant presented with a substantial deficit in the area of *social*; therefore, a deficit could not be awarded in the area of *social*.

CONCLUSIONS OF LAW

- 1) To meet medical eligibility for the I/DD Waiver Program, the Appellant must have an intellectual disability with concurrent substantial deficits in at least three of the six identified major life areas that require an ICF level of care.
- 2) The Appellant has an eligible diagnosis of Intellectual Disability.
- 3) Substantial deficits are evidenced by standardized adaptive behavior test scores three standard deviations below the mean or less than 1% when derived from a normative sample that represents the general population and must be supportive by the narrative descriptions contained in the documentation submitted for review.
- 4) The Appellant did not have substantial adaptive deficits in any of the six major life areas as evidenced by standardized adaptive behavior test scores and narrative descriptions contained within the evidence.

- 5) To be eligible for an ICF level of care, the ICF level of care had to be demonstrated by the IPE and corroborated by narrative descriptions of functioning and reported history.
- 6) The Appellant did not require an ICF Level of Care.

DECISION

It is the decision of the State Hearing Officer to **UPHOLD** the Respondent's decision to deny the Appellant medical eligibility for the Medicaid I/DD Waiver Program.

ENTERED this 27th day of March 2020.

Tara B. Thompson
State Hearing Officer