



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

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Cabinet Secretary**

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**Jolynn Marra
Interim Inspector General**

April 22, 2020

[REDACTED]

RE: [REDACTED], A PROTECTED INDIVIDUAL v. WV DHHR
ACTION NO.: 20-BOR-1187

Dear Ms. [REDACTED]

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

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,

Todd Thornton
State Hearing Officer
Member, State Board of Review

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

cc: Bureau for Medical Services
PC&A
KEPRO

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

■, A PROTECTED INDIVIDUAL,

Appellant,

v.

Action No.: 20-BOR-1187

**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 March 12, 2020, on an appeal filed February 6, 2020.

The matter before the Hearing Officer arises from the Respondent's January 9, 2020 decision to deny the Appellant's application for participation in the I/DD Waiver Program due to unmet medical eligibility.

At the hearing, the Respondent was represented by Kerri Linton. The Appellant was represented by her mother, ■. All witnesses were sworn and the following documents were admitted into evidence.

EXHIBITS

Department's Exhibits:

- | | |
|-----|--|
| D-1 | Bureau for Medical Services Provider Manual (excerpt)
Chapter 513 – Intellectual and Developmental Disabilities Waiver (IDDW)
§§ 513.6 – 513.6.4 |
| D-2 | Notice of Decision, dated January 9, 2020 |
| D-3 | Independent Psychological Evaluation, dated November 25, 2019 |

- D-4 Psychological Evaluation from Creative Behavioral Connections, dated May 15, 2018 and May 18, 2018 (Evaluation dates)
- D-5 Procedure Note by [REDACTED], MD, of [REDACTED], signed November 16, 2018
- D-6 Procedure Note by [REDACTED], MD, of [REDACTED], signed May 15, 2019
- D-7 EEG Report from [REDACTED], dated July 25, 2017
- D-8 Ambulatory EEG Monitoring by [REDACTED], MD, from [REDACTED], conducted March 25, 2015 and March 26, 2015
- D-9 Letter from [REDACTED], MD, of [REDACTED], to [REDACTED], DO, dated March 17, 2004

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 was an applicant for the I/DD Waiver Program.
- 2) The Respondent, through its Bureau for Medical Services, contracts with Psychological Consultation & Assessment (PC&A) to perform functions related to the I/DD Waiver Program, including eligibility determination.
- 3) Kerri Linton, a licensed psychologist employed by PC&A, made the eligibility determination regarding the Appellant.
- 4) The Appellant submitted a November 25, 2019, independent psychological evaluation in conjunction with this application. (Exhibit D-3)
- 5) The Appellant additionally submitted a prior psychological evaluation (Exhibit D-4) and other medical records (Exhibits D-5, D-6, D-7, D-8, and D-9) as part of the application process.
- 6) By notice dated January 9, 2020, (Exhibit D-2) the Respondent notified the Appellant that her application for the I/DD Waiver Program was denied.

- 7) This notice (Exhibit D-2) provided the reason for denial as “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,” and indicated the only major life area determined to have met this designation was *Learning*.
- 8) The functionality of the Appellant was assessed using the Adaptive Behavior Assessment System 3 (ABAS-3) results documented on the November 2019 psychological evaluation (Exhibit D-3).
- 9) The Appellant obtained test scores indicative of substantial deficits in two of the ABAS-3 subtests: *Community Use* (one sub-domain of the six comprising the major life area *Capacity for Independent Living*), and *Functional Academics* (corresponding with the major life area of *Learning*). (Exhibit D-3)
- 10) The ABAS-3 scores for the Appellant were based on ratings provided by the Appellant’s mother. (Exhibit D-3)
- 11) The functionality of the Appellant was also assessed during a May 2018 psychological evaluation (Exhibit D-4) using the Vineland Adaptive Behavior Scales – Third Edition (Vineland-III).
- 12) The narrative describing the Appellant’s results on the Vineland-III read, in part, “[Appellant’s] v-scale scores are 2 for Receptive, 1 for Expressive, and 5 for Written.” (Exhibit D-4, page 9 of 11, *Communication Domain*)
- 13) The table presenting the Appellant’s results for the same test, from the same evaluation, contradicts the scores shown in the narrative section, providing a Receptive v-scale score of one (1), an Expressive v-scale score of one (1), and a Written v-scale score of 44. (Exhibit D-4, page 10 of 11)
- 14) Ms. Linton testified that she did not award the Appellant a substantial deficit in *Receptive or Expressive Language* because of the unclear Vineland-III scores for the Appellant from the May 2018 psychological evaluation (Exhibit D-4) and their inconsistency with ABAS-3 scores on the November 2019 evaluation (Exhibit D-3).
- 15) The Appellant did not obtain a test score indicative of a substantial deficit in the ABAS-3 subtest for *Communication* (corresponding with the major life area of *Receptive or Expressive Language*) on the November 2019 psychological evaluation (Exhibit D-3).

APPLICABLE POLICY

The policy regarding the I/DD Waiver Program is located in the Bureau for Medical Services Provider Manual, Chapter 513.

At §513.6.2, this policy addresses initial medical eligibility, and reads, “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.”

At §513.6.2.2, this policy addresses the functionality component and its required criteria. The policy requires an applicant to have substantial deficits in at least three of the six major life areas – self-care, receptive or expressive language, learning, mobility, self-direction and capacity for independent living. The capacity for independent living is further divided into six sub-domains – home living, social skills, employment, health and safety, community and leisure. Policy requires a minimum of three of these sub-domains to be substantially limited for an applicant to meet the criteria for this major life area.

Functionality policy (§513.6.2.2) also defines substantial deficits 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 [intellectually disabled] normative populations when intellectual disability has been diagnosed and the scores are derived from a standardized measure of adaptive behavior.”

DISCUSSION

The Appellant requested a fair hearing in response to the decision of the Respondent to deny her application for the I/DD Waiver Program based on its finding that she did not establish medical eligibility. The Respondent must show by a preponderance of the evidence that the Appellant did not establish medical eligibility for the program.

The Respondent denied the Appellant’s application for I/DD Waiver Services due to unmet functionality. The Respondent determined the Appellant met the criteria for a substantial adaptive deficit in one major life area – *Learning* – but this was insufficient to meet the policy requirement for at least three major life areas.

The Respondent reviewed medical records regarding the Appellant (Exhibits D-5, D-6, D-7, D-8, and D-9) and two psychological evaluations of the Appellant: a November 2019 evaluation (Exhibit D-3) and a May 2018 evaluation (Exhibit D-4). The Appellant’s medical records (Exhibits D-5, D-6, D-7, D-8, and D-9) did not provide test scores to quantify the Appellant’s functionality and the May 2018 psychological evaluation of the Appellant was unreliable.

The May 2018 psychological evaluation (Exhibit D-4) of the Appellant provided Vineland-III scores which were inconsistent with the Appellant’s ABAS-3 scores on her November 2019 psychological evaluation (Exhibit D-3). However, the May 2018 evaluation also has numerous internal inconsistencies and unclear statements. The evaluating psychologist for this report appears to have transcribed scores incorrectly from the narrative section to the table. Additionally, the test instrument is referred to alternately as Vineland-III and “Vinland-II [*sic*]” in the narrative section, and as VABS-II in the heading for the table showing the scores. Although these may be only typographical errors, they eliminate the reliability of the evaluation.

It cannot be discerned by this Hearing Officer if the Vineland-III or Vineland-II was used, and which scores shown in the evaluation report – if any – reflect the Appellant’s results. For these reasons, the May 2018 psychological evaluation (Exhibit D-4) is given no weight.

The November 2019 psychological evaluation of the Appellant (Exhibit D-3) shows an ABAS-3 test score for *Functional Academics* which supports the Respondent’s finding that the Appellant met the policy criteria for a deficit in the corresponding major life area of *Learning*. This evaluation also revealed the Appellant obtained a test score indicative of a substantial limitation in *Community Use* – one of the sub-domains of the major life area of *Capacity for Independent Living*. However, policy requires at least three of these sub-domains to be substantially limited to establish a deficit in the area as a whole.

Testimony from the Appellant’s mother described the medical conditions of the Appellant. The Appellant suffers from seizures and short-term memory loss. After a recent seizure the Appellant had to relearn many things. There was no evidence provided on the Appellant’s behalf that was not part of the initial application documents reviewed by the Respondent’s consulting psychologist.

With only one substantial adaptive deficit (*Learning*), the Appellant did not meet the functionality component of medical eligibility, and the Respondent was correct to deny the Appellant’s application on this basis.

CONCLUSIONS OF LAW

- 1) Because the Appellant did not establish substantial adaptive deficits in at least three of the six major life areas set by policy, the Appellant did not meet the required functionality component of medical eligibility for the I/DD Waiver Program.
- 2) Because the Appellant did not establish medical eligibility, the Respondent must deny the Appellant’s application for participation in the I/DD Waiver Program.

DECISION

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

ENTERED this ____ Day of April 2020.

Todd Thornton
State Hearing Officer