



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

**Bill J. Crouch
Cabinet Secretary**

**BOARD OF REVIEW
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**Jolynn Marra
Interim Inspector General**

August 6, 2020



RE: [REDACTED], A PROTECTED INDIVIDUAL v. WVDHHR
ACTION NO.:20-BOR-1728

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,

Danielle C. Jarrett
State Hearing Officer
Member, State Board of Review

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

cc: Kerri Linton, PC&A
Sarah Clendenin, PC&A

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

■, A PROTECTED INDIVIDUAL,

Appellant,

v.

Action Number: 20-BOR-1728

**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 July 30, 2020, on an appeal filed June 5, 2020.

The matter before the Hearing Officer arises from the April 7, 2020 determination by the Respondent to deny the Appellant medical eligibility for services under the Intellectual and Development Disabilities (I/DD) Waiver Program.

At the hearing, the Respondent appeared by Kerri Linton, consulting psychologist for the Bureau for Medical Services (BMS). The Appellant appeared by her representative, Jennifer Abbott, Adult Protective Services (APS) Worker, with WVDHHR. All witnesses were sworn and the following documents were admitted into evidence.

Department's Exhibits:

- D-1 Intellectual and Development Disabilities Waiver (I/DD Waiver Program) Policy Manual §§ 513.6 through 513.6.4
- D-2 Notice of Denial, dated April 7, 2020
- D-3 Independent Psychological Evaluation (IPE) by ■, M.D., dated March 9, 2020
- D-4 Initial Psychiatric Evaluation by ■, M.D., dated October 9, 2015
- D-5 Medication Records, dated August 31, 2018 through January 10, 2020
- D-6 Independent Psychological Evaluation (IPE) by ■, M.A., dated August 27, 2015
- D-7 Notice of Denial, dated September 15, 2015

Appellant's Exhibits:

A-1 [REDACTED] County Schools Board of Education Official Record, dated June 8, 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) An application was made on behalf of the Appellant for services under the I/DD Waiver Program.
- 2) The Respondent, Psychological Consultation & Assessment (PC&A), is contracted through the Bureau for Medical Services (BMS) to perform functions related to the I/DD Waiver Program, including eligibility determinations.
- 3) On March 9, 2020, [REDACTED] (Mr. [REDACTED]), a Licensed Psychologist, completed an Independent Psychological Evaluation (IPE) with the Appellant. (Exhibit D-3)
- 4) At the time of the March 9, 2020 IPE, the Appellant was 33 years of age. (Exhibit D-3)
- 5) In March 2020, the Appellant's assessed overall full-scale Intelligence Quotient (IQ) was 66. (Exhibit D-3)
- 6) The Appellant has diagnoses of Schizophrenia; Cannabis Disorder, Mild; Amphetamine Use Disorder, Mild; and Mild Intellectual Disability. (Exhibit D-3)
- 7) As part of the March 2020 IPE, Mr. [REDACTED] administered the Adaptive Behavior Assessment System (ABAS-3) instrument. (Exhibit D-3)
- 8) PC&A relies on ABAS-3 scores, along with narrative descriptions in the IPE, to determine the level of adaptive functioning. Scaled scores of one (1) and two (2) are considered eligible scores on the ABAS-3 for the I/DD Waiver Program. (Exhibit D-3)
- 9) The Appellant scored a two (2) in the major life area of *Self-Direction*. (Exhibit D-3)
- 10) Scores in the remaining major life areas of *Self-Care*, *Receptive or Expressive Language*, *Learning*, *Mobility*, and the subdomains of *Capacity for Independent Living* (*Social*, *Community*, and *Leisure*) ranged from 3 to 8. (Exhibit D-3)
- 11) Both the ABAS-3 score and the supporting narrative description established a substantial delay in the major life area of *Self-Direction* as the Appellant is unable to follow directions, stay on task, and requires frequent re-direction. (Exhibit D-3)

- 12) Both the IPE and supporting narrative description established a substantial delay in the subdomain of *Capacity for Independent Living for Home Living* as the Appellant resides in a group home. (Exhibit D-3)
- 13) Both the IPE and supporting narrative description established a substantial delay in the subdomain of *Capacity for Independent Living for Health & Safety* as the Appellant requires attention and regular supervision as she of high risk to be exploited or hurt by others. (Exhibit D-3)
- 14) On April 7, 2020, the Respondent issued a notice of denial, advising the Appellant's application was denied as documentation provided for review did not support the degree of intellectual disability required for an Intermediate Care Facility (ICF) level of care and because mental illness is specifically excluded as an eligible diagnosis. (Exhibit D-2)

APPLICABLE POLICY

I/DD Waiver Program Policy Manual § 513.6.2 states that to be eligible to receive I/DD Waiver 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 Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IDD) Level of Care.

I/DD Waiver Program Policy Manual § 513.6.2.1 Diagnosis provides in part:

The application 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 I/DD Waiver Program include, but 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 Disability 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 disability.

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 (3) substantial deficits out of the six (6) identified major life areas listed in § 513.6.2.2.

I/DD Waiver Program Policy Manual § 513.6.2.2 Functionality provides in part:

The applicant must have substantial deficits in at least three (3) of the six (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 six (6) sub-domains: home living, social skills, employment, health and safety, community, and leisure activities. At a minimum, three (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 three (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 75th percentile when derived from Intellectual Disability (ID) normative populations when ID has been diagnosed and the scores are derived from the 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 scores 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 Individualized Education Program (IEP), Occupational Therapy evaluation, etc. if requested by the IP for review.

DISCUSSION

In order to be eligible to receive I/DD Waiver Program services, an applicant must be considered medically eligible in the following four categories: diagnosis, functionality, the need for active treatment, and the requirement of an ICF/IID Level of Care. Medical eligibility is considered by looking at each of these categories in order, beginning with diagnosis. If any of these eligibility categories are not met, medical eligibility for the I/DD Waiver program is denied. To meet the diagnostic criteria for I/DD Waiver eligibility, an applicant must have a diagnosis of an Intellectual Disability or a related condition, which is severe and chronic, and which manifested prior to age 22.

On April 7, 2020, the Appellant's I/DD Waiver application was denied, as the Respondent found that documentation did not support the degree of intellectual disability required for an ICF level of care, prior to the age of 22. The notice further indicates that mental illness is specifically excluded as an eligible diagnosis. The Respondent had to demonstrate by a preponderance of evidence that the Appellant lacked an eligible diagnosis for I/DD Waiver eligibility purposes. The notice further indicated the Appellant did not meet functionality requirements of substantial deficits in three (3) of the six (6) major life areas.

On March 9, 2020, an IPE was conducted with the Appellant by an independent psychologist, Mr. [REDACTED] to help determine I/DD Waiver program eligibility. At the time of the March 9, 2020 IPE, the Appellant was 33 years of age. The Respondent indicated the Appellant had eclipsed the developmental period at the time of evaluation, meaning the eligible diagnosis must be present prior to the age of 22.

The Appellant's most recent IPE included a history of prior diagnoses of "Unspecified Psychosis not due to a substance or known physiological condition, by history; Other Psychoactive Substance Abuse, by history; and Borderline Intellectual Functioning". Mr. [REDACTED] issued current diagnoses for the Appellant of "Schizophrenia; Cannabis Use Disorder, Mild; Amphetamine Use Disorder, Mild; and Mild Intellectual Disability". The Respondent testified that a diagnosis of Mild Intellectual Disability is a potentially eligible diagnosis, if severe and accompanied by impairment of general intellectual or cognitive functioning.

The Respondent also reviewed the Appellant's psychiatric evaluation completed on October 9, 2015. The Appellant's psychiatric evaluation indicated the Appellant remained psychotic and did not respond to treatment. The evaluation further indicated the Appellant's thought processing was disorganized and illogical. At that time, the Appellant was prescribed and taking four (4) different psychotic medications. The Respondent testified that at that time, a five (5) axis system was used in diagnosis impressions and an Intellectual Disability would be listed under axis two (2). Axis two (2) listed a diagnosis of "Deferred", meaning a diagnosis was not rendered. The Respondent further testified a "not rendered" diagnosis was possibly due to the Appellant's degree of mental illness and her history of substance abuse.

Because a diagnosis of Mild Intellectual Disability is a potentially eligible diagnosis, the Respondent reviewed the Appellant's intellectual functioning for the I/DD Waiver Program. To determine the Appellant's intellectual functioning, Mr. [REDACTED] utilized scores from the Weschler

Adult Intelligence Scale, Fourth Edition (WAIS-IV). The Respondent revealed that individuals with an eligible diagnosis for the I/DD Waiver Program have impaired intellectual functioning and typically have IQ scores of 55 and below. The WAIS-IV instrument indicated the Appellant's overall full-scale IQ was 66, which is in the mild range for intellectual functioning. The Respondent testified that the Appellant's IQ of 66 was the lowest intellect that could be found in the documentation submitted for review. For example, in April 2001 a psychological evaluation was completed for the Appellant, listing a full-scale IQ of 76 and in April 2013 the Appellant's full-scale IQ was 71. The Respondent testified that other documentation submitted shows the Appellant does have significant developmental problems in cognitive impairment. The Respondent added that because the Appellant has a major mental illness, such as Schizophrenia, and is taking psychotropic medication, it is typical that the Appellant's cognitive impairment declines as she ages. Although, the Appellant has a borderline Intellectual Disability, she does not have an impairment of intellectual functioning that is severe or requires an ICF/IDD Level of Care.

The IPE included a Wide Range Achievement Test, Fourth Edition (WRAT-4). The Appellant's WRAT-4 scores ranged from 55 to 70. These scores indicate the Appellant's academic skills were in the below average range. The Respondent explained that, similar to cognitive functioning, substantial deficits with respect to achievement, would be scores of 55 and below on the WRAT-4. The Respondent acknowledged that the Appellant was enrolled in special education services while in school and explained that enrollment in special education does not equate to a severe impairment.

The IPE also included an Adaptive Behavior Assessment System Parent/Caregiver Ages 16-89 (ABAS-3) standardized assessment used to evaluate different aspects of adaptive functioning. The Appellant must score a one (1) or a two (2) to reflect the degree of limitations required by policy definition of substantial deficits. Once adaptive behaviors are measured, they are compared to same-aged peers. An adaptive behavior assessment is used to identify if the Appellant exhibits substantial adaptive deficits in the six (6) major life areas (*Self-Care, Learning, Self-Direction, Communication, Mobility, and Capacity for Independent Living*). Policy defines substantial adaptive deficits as standardized scores of three (3) standard deviations below the mean when derived from a standardized measure of adaptive behavior. The Respondent testified the Appellant scored a two (2) in *Self-Direction*. The Respondent testified the Appellant also scored a two (2) in *Home Living*, a subdomain of the major life area of *Capacity for Independent Living*. Policy states in order to receive a substantial deficit for *Capacity for Independent Living*, a minimum of three (3) sub-domains must be substantially limited to meet the criteria for a deficit in *Capacity of Independent Living*. While scores reflected the Appellant scored low to average in other adaptive skills, policy defines a substantial deficit as three (3) standard deviations below the mean, less than one percentile.

The Appellant's representative argued the Appellant should have been awarded an additional deficit in the area of *Health and Safety*, a subdomain of the major life area of *Capacity for Independent Living*. The Appellant's representative testified the Appellant does not have awareness for the safety of herself or others. The Appellant's representative testified the Appellant is known to elope and go to a known drug house. The Appellant's representative indicated the Appellant has been evicted from the [REDACTED] group-home where she resides for failing drug screens, but due to placement issues, she has remained at [REDACTED]. The Appellant's representative

further testified the Appellant has to be prompted to do her daily living activities and that she is consistently non-compliant when taking her medication. The Appellant's representative believes the Appellant could benefit from the I/DD Waiver Program, however, she did state that she needs drug rehabilitation services along with 24-hour care. The evidence provided and testimony given by the Appellant's representative established that the Appellant has an additional deficit in the area of *Health & Safety*. Even with the additional subdomain of *Health & Safety*, policy requires that the individual must have deficits in three (3) of the six (6) major life areas and *Health & Safety* with *Home Living* is not enough to establish a second deficit.

Based on testimony and the documentation submitted, the Appellant does not meet the diagnostic criteria for eligibility for the I/DD Waiver Program. While policy lists a Mild Intellectual Disability as a possible related condition, the documentation submitted does not support that the Appellant has an impairment which is severe.

CONCLUSIONS OF LAW

- 1) Policy for the I/DD Waiver Program requires the applicant to have been diagnosed with an Intellectual Disability or related condition, which is severe and results in impairment of intellectual functioning to meet diagnostic eligibility criteria.
- 2) Evidence submitted did not establish that the Appellant's diagnosis of Mild Intellectual Disability is both chronic and severe.
- 3) Pursuant to policy, the Appellant must demonstrate substantial adaptive deficits in at least three (3) of the six (6) major life areas.
- 4) The Appellant demonstrated a substantial deficit in the major life area of *Self-Direction*.
- 5) Because the Appellant only has one (1) substantial deficit in the six (6) major life areas identified in the I/DD Waiver Program policy, the functional component could not be established.
- 6) Because the Appellant did not meet the diagnostic and functional requirements, medical eligibility could not be established.

DECISION

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

ENTERED this _____ day of August 2020.

Danielle C. Jarrett
State Hearing Officer