



**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 21, 2020



RE: ██████████, A MINOR v. WVDHHR
ACTION NO.:20-BOR-1792

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 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
Nora Dillard, BMS

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

■ A MINOR,

Appellant,

v.

Action Number: 20-BOR-1792

**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' Common Chapters Manual. This fair hearing was convened on July 22, 2020, on an appeal filed June 23, 2020.

The matter before the Hearing Officer arises from the June 1, 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 mother, ■. Appearing as a witness for the Appellant was ■, Behavior Specialist, with ■. 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 June 11, 2020
- D-3 Independent Psychological Evaluation (IPE), dated May 20, 2020
- D-4 Pediatric Office/Clinic Notes by ■, R.D., dated December 12, 2017
- D-5 Emory Genetics Lab Report, dated March 14, 2014
- D-6 Neurology Office/Clinic Note by ■, M.D., dated July 11, 2018
- D-7 Gastroenterology Office/Clinic Note by ■, CRNP, dated July 11, 2018

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) 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 May 20, 2020, [REDACTED] (Ms. [REDACTED]), a Licensed Psychologist, completed an Independent Psychological Evaluation (IPE) on the Appellant. (Exhibit D-3)
- 4) The May 20, 2020 IPE lists a diagnoses of Intellectual Disability, Severe, Provisional; Autism, Social Communication Level 3 Requiring Very Substantial Support, Restricted Repetitive Behavior Level 2 Requiring Substantial Support; and Pitt-Hopkins Syndrome for the Appellant. (Exhibits D-3)
- 5) On June 11, 2020, the Respondent issued a notice denying the Appellant's application for the I/DD Waiver Program because documentation provided for review did not support an eligible diagnosis of either Intellectual Disability or a related condition which is severe. The notice further indicated provisional diagnoses are not considered eligible diagnoses. (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

To be eligible for 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 Intellectual Disability or a related condition, which is severe and chronic, and which manifested prior to age 22.

On June 11, 2020, the Appellant's I/DD Waiver Program application was denied, as the Respondent found that documentation provided for review does not support an eligible diagnosis of either an Intellectual Disability or a related condition which is severe. The Appellant's denial notice further indicated that a provisional diagnosis is not considered an eligible diagnosis. The Respondent had to demonstrate by a preponderance of evidence that the Appellant lacked an eligible diagnosis for I/DD Waiver Program eligibility purposes.

On May 20, 2020, an IPE was conducted for the Appellant by Ms. [REDACTED] an independent psychologist, to help determine I/DD Waiver Program eligibility. The Respondent testified the Appellant's IPE included prior diagnoses of Pitt-Hopkins Syndrome, Autism, and Developmental Delays. Ms. [REDACTED] issued a provisional diagnosis of Intellectual Disability, along with diagnoses of Autism and Pitt-Hopkins Syndrome.

The Respondent testified that genetic or chromosomal disorders, such as Pitt-Hopkins Syndrome, are not always considered severe related conditions by themselves, as intellectual functioning can vary significantly among individuals. The Respondent further testified that for Pitt-Hopkins Syndrome to be considered a severe related condition, the individual must have an accompanying diagnosis of intellectual disability or another diagnosis considered to be severe.

The Respondent testified that intellectual functioning could not be determined as the Appellant was unable to participate in standardized intellectual and achievement testing. Because intellectual functioning was not determined through psychometric testing, only a provisional diagnosis of

intellectual disability was given. The Respondent indicated that a provisional diagnosis is a specifier that is used when there is a strong presumption that the full criteria will ultimately be met per disorder, but there is not enough information to make a firm diagnosis. The Respondent stated the provisional diagnosis can be regarded as “uncertainty” in the diagnosis.

The Respondent testified that on May 20, 2020, the Gilliam Autism Rating Scale-Third Edition (GARS-3) was administered by Ms. [REDACTED] and the Appellant scored 81, which placed her in the very likely range to have symptoms of Autism. The Respondent indicated a score of 71 to 100 would place an individual in severity level 2 for Autism. The Respondent testified that a diagnosis of Autism is a potentially eligible diagnosis but must be Level 3 to be considered a severe related condition. The GARS-3 did not reveal a severe level of Autism for the Appellant.

The Appellant’s witness testified that the Appellant is at risk of danger from others, is cognitively functioning on the kindergarten to first grade level, is in a self-contained classroom, has impaired speech, has allergic reactions to some foods, does not know right from wrong, needs assistance or guidance with most tasks, and is unable to retain information taught to her.

The Appellant’s mother testified that the Appellant receives Speech, Occupational, and Physical Therapies, and had two ear surgeries to correct her hearing. The Appellant’s mother also testified that the Appellant is unable to go upstairs, has no depth perception, and has major communication delays. The Appellant’s mother indicated the Appellant has “silent seizures” or “resets,” losing previously learned information with these resets about once a month. The Appellant’s mother stated the Appellant will eat until she vomits and has eaten non-food items, such as, “cat food and cat poop”. The Appellant’s mother also testified the Appellant was unable to complete a psychological evaluation at school. The Appellant’s mother feels that the Appellant struggles with functioning day to day and will need care for the rest of her life. The Appellant’s mother testified the Appellant was diagnosed with a severe intellectual disability through an IPE completed at [REDACTED] but that she is unable to get the records electronically transferred from [REDACTED].

Although both the Appellant’s mother and witness had compelling arguments, there was no psychometric data or other documents to show that the Appellant has a diagnosis of an intellectual disability or a severe related condition. Therefore, the Appellant does not meet the diagnostic criteria for eligibility for the I/DD Waiver Program. While policy lists Autism as a possible related condition and the Respondent stated that Pitt-Hopkins syndrome can also be a related condition, with a concurrent diagnosis of an intellectual disability, the documentation submitted does not support that the Appellant has an impairment that is severe. Further, the provisional diagnosis of an Intellectual Disability is not an eligible diagnosis because a provisional diagnosis cannot be accepted as an eligible diagnosis for the I/DD Waiver Program.

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 Pitt-Hopkins Syndrome is a severe related condition.
- 3) Evidence submitted did not establish that the Appellant's diagnosis of Autism is a severe related condition.
- 4) Evidence submitted did not establish that the Appellant has an eligible diagnosis of an Intellectual Disability.

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