



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

**Bill J. Crouch
Cabinet Secretary**

**BOARD OF REVIEW
Raleigh County District
407 Neville Street
Beckley, WV 25801**

**Jolynn Marra
Interim Inspector General**

January 14, 2020

[REDACTED]

RE: [REDACTED], A PROTECTED INDIVIDUAL v. WV DHHR
ACTION NO.:19-BOR-2787

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,

Kristi Logan
State Hearing Officer
Member, State Board of Review

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

cc: Bureau for Medical Services

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

■, A PROTECTED INDIVIDUAL,

Appellant,

v.

Action Number: 19-BOR-2787

**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 January 8, 2020, on an appeal filed December 2, 2019.

The matter before the Hearing Officer arises from the November 1, 2019, decision by the Respondent to deny the Appellant's application for services under the I/DD Waiver Program.

At the hearing, the Respondent appeared by Kerri Linton, consulting psychologist for the Bureau for Medical Services. The Appellant appeared by his mother ■, and ■, his father. Appearing as a witness for the Appellant was ■. All witnesses were sworn and the following documents were admitted into evidence.

Department's Exhibits:

- D-1 Bureau for Medical Services Provider Manual §513.6
- D-2 Notice of Denial dated November 1, 2019
- D-3 Independent Psychological Evaluation dated September 30, 2019
- D-4 Individualized Education Plan dated May 11, 2018
- D-5 Eligibility Committee Report dated November 14, 2017
- D-6 Autism Team Report dated November 14, 2017
- D-7 Student Observation Report dated November 13, 2017
- D-8 Reevaluation Determination Plan (undated)
- D-9 Individualized Education Plan dated October 23, 2017
- D-10 Psychoeducational Evaluation dated November 5, 2014

- D-11 Speech/Language Impairment Team Report dated December 10, 2014
D-12 Speech and Language Reevaluation Summary dated November 7, 2014
D-13 Educational Evaluation dated October 28, 2014

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 services under the I/DD Waiver Program.
- 2) The Respondent issued a Notice of Denial on November 1, 2019, advising that the Appellant's application had been denied as he did not have an eligible diagnosis of Intellectual Disability or related condition which is severe and that substantial adaptive deficits in three (3) or more of the six (6) major life areas had not identified (Exhibit D-2).

APPLICABLE POLICY

Bureau for Medical Services Provider 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 ICF/IID Level of Care.

Diagnosis

The applicant 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 the I/DD Waiver Program include but are 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 substantial deficits out of the six identified major life areas listed in Section 513.6.2.2.

Functionality

The applicant must have substantial deficits in at least three of the six 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 sub-domains: home living, social skills, employment, health and safety, community and leisure activities. At a minimum, three 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 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 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.

Active Treatment

Documentation must support that the applicant would benefit from continuous active treatment. Active treatment includes aggressive consistent implementation of a program of specialized and generic training, treatment, health services, and related services. Active treatment does not include

services to maintain generally independent individuals who are able to function with little supervision or in the absence of a continuous active treatment program.

DISCUSSION

Pursuant to policy, an individual must meet the medical eligibility criteria of a diagnosis of Intellectual Disability or related condition which constitutes a severe and chronic disability that manifested prior to age 22, the functionality criteria of at least three (3) substantial adaptive deficits out of the six (6) major life areas that manifested prior to age 22, the need for active treatment and a requirement of ICF/IID level of care.

To meet the diagnostic criteria for Waiver eligibility, an applicant must have a diagnosis of Intellectual Disability or related condition, which is severe, and which manifested prior to age 22. Policy further states that a related condition may be any condition, other than mental illness, that results in impairment of intellectual functioning or adaptive behavior similar to that of intellectually disabled individuals.

To meet the functionality criteria of Waiver eligibility, an applicant must demonstrate at least three (3) substantial adaptive deficits of the six (6) major life areas identified in policy. Policy defines a substantial deficit as standardized test scores of three (3) standard deviations below the mean, or less than one percentile, when compared to a normative population.

The Appellant was diagnosed with Autism Spectrum Disorder, without Language or Intellectual Impairments, during the Independent Psychological Evaluation that was conducted on September 30, 2019. The Respondent's witness, Kerri Linton, testified that Autism is a potentially eligible diagnosis for Waiver eligibility if the condition is severe and results in an impairment of intellectual functioning. According to the Weschler Intelligence Scale for Children (WISC) administered in September 2019, the Appellant has a full-scale Intelligence Quotient (IQ) of 89, which is below average intellectual functioning (Exhibit D-3).

The Wide Range Achievement Test (WRAT) that was administered in September 2019 measured the Appellant's achievement levels in math, reading and spelling. The mean, or average, of this test is 100, with three (3) standard deviations below the mean as a score of 55 or below. The Appellant's scores in math, reading and spelling were over 100, which is considered above average (Exhibit D-3).

Ms. Linton contended that based on the Appellant's IQ score and above average test scores on the WRAT, the Appellant does not have an intellectual impairment and does not meet the diagnostic criteria of an Intellectual Disability. Ms. Linton further explained that while Autism is considered a related condition that may qualify an applicant for Waiver eligibility, the Appellant's Autism cannot be considered severe as he does not exhibit a cognitive impairment.

Ms. Linton testified that not only did the Appellant fail to meet the diagnostic criteria for eligibility, he was not found to have at least 3 substantial adaptive deficits of the 6 major life areas. According to the Adaptive Behavior Assessment (ABAS) administered in September 2019, the Appellant had eligible scores of 3 standard deviations below the mean in the major life area of communication

and in social, which is a sub-domain of the major life area of capacity for independent living. To receive a deficit in capacity for independent living, the applicant must have eligible scores in at least 3 of the 6 sub-domains. The Appellant had only one eligible score in one sub-domain of capacity for independent living.

Regarding the major life area of receptive or expressive language, Ms. Linton referred to the narrative portion of the September 2019 evaluation which noted that although the Appellant exhibited mild delays, his speech was fully understood. Furthermore, Ms. Linton testified that according to the Appellant's most recent Individualized Education Plans, the Appellant was not receiving services to address speech or language delays (Exhibit D-4). Ms. Linton stated that the Appellant's abilities in receptive or expressive language do not support a substantial adaptive deficit in that area.

The Appellant's mother argued that the Appellant requires services to assist him with social situations so that he will be able to function independently as an adult. Ms. [REDACTED] contended that the Appellant's abilities will not improve without services and could not accept the Appellant's denial when other children with Autism are approved for the program.

Based on the documentation submitted, the Appellant does not have an Intellectual Disability and does not meet the diagnostic criteria for eligibility. While policy lists Autism as a related condition that could qualify an applicant for I/DD Waiver services, the documentation does not support that the Appellant has an impairment of general intellectual functioning or adaptive behavior similar to that of intellectually disabled persons, and does not require services similar to those for persons with intellectual disability.

Whereas the Appellant does not meet the diagnostic or functionality criteria for the I/DD Waiver Program, the Respondent acted in accordance with policy in the denial of his application for services.

CONCLUSIONS OF LAW

- 1) Policy requires that the diagnostic, functionality, need for active treatment criteria and the need for ICF/IID level of care must be met to establish medical eligibility for the I/DD Waiver Program.
- 2) To meet the diagnostic criteria, the applicant must have been diagnosed with an Intellectual Disability or related condition, which is severe and results in impairment of intellectual functioning or adaptive behavior similar to that of intellectually disabled individuals.
- 3) The documentation submitted failed to establish that the Appellant has an Intellectual Disability in conjunction with the diagnosis of Autism.
- 4) The Appellant does not meet the medical eligibility criteria for I/DD Waiver services.

DECISION

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

ENTERED this 14th day of January 2020.

**Kristi Logan
State Hearing Officer**