



**STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of the Inspector General**

**Sherri A. Young, DO, MBA, FAAFP
Interim Cabinet Secretary**

**Christopher G. Nelson
Interim Inspector General**

October 3, 2023

[REDACTED]

RE: [REDACTED] A PROTECTED PERSON v. WV DHHR
ACTION NO.: 23-BOR-2403

Dear [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,

Lori Woodward, J.D.
Certified State Hearing Officer
Member, State Board of Review

Encl: Recourse to Hearing Decision
Form IG-BR-29

cc: BMS, PC&A, Kepro

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

■ A PROTECTED PERSON,

Appellant,

v.

Action Number: 23-BOR-2403

**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 PERSON. 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 September 27, 2023, on an appeal filed August 1, 2023.

The matter before the Hearing Officer arises from the June 30, 2023 decision by the Respondent to deny medical eligibility for services under the Intellectual/Developmental Disabilities (I/DD) Waiver Program.

At the hearing, the Respondent appeared by Charley Bowen, consulting psychologist for the Bureau for Medical Services. The Appellant was represented by her mother, ■. Appearing as a witness for the Appellant was her father, ■. The witnesses were placed under oath and the following documents were admitted into evidence.

Department's Exhibits:

- D-1 Bureau for Medical Services Provider Manual §§513.6 - 513.6.4
- D-2 Denial Notice, dated June 30, 2023
- D-3 Independent Psychological Evaluation for West Virginia I/DD Waiver, evaluation date May 24, 2023
- D-4 ■, Developmental Testing, December 12, 2022
- D-5 Individualized Education Program, ■ Schools, IEP meeting date April 3, 2023

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 is a three-year-old whose parents applied for services under the I/DD Waiver Program.
- 2) As part of the application process, the Appellant was evaluated in an Independent Psychological Evaluation (IPE) conducted on May 24, 2023. (Exhibit D-3)
- 3) The Adaptive Behavior Assessment System, Third Edition-Parent Form (ABAS-3) was administered during the May 2023 evaluation of the Appellant. (Exhibit D-3)
- 4) The May 2023 ABAS-3 results for the Appellant were based on the responses provided by her mother. (Exhibit D-3)
- 5) The ABAS-3 produces results scaled to a mean of 10 and a standard deviation of 3, scores of 1 and 2 are deemed to be indicative of a substantial deficit in the area tested.
- 6) The Appellant obtained a qualifying score of 1 in the area of *Communication*, and a score of 2 in the area of *Social*, which is a sub-domain of *Capacity for Independent Living (CIL)* on the May 2023 ABAS-3, and no qualifying scores on the ABAS-3 test administered in December 2022 by [REDACTED] (Exhibits D-3 and D-4)
- 7) With results on the May 2023 ABAS-3 in other tested areas ranging from 3 to 10, the Appellant did not have scores indicating substantial functional deficits, for the I/DD Waiver Program. (Exhibit D-3)
- 8) The Appellant has a diagnosis of Autism Spectrum Disorder (ASD), Level 3, and Global Developmental Delay. (Exhibits D-3 and D-4)
- 9) The Respondent conceded that the Appellant has a program-eligible diagnosis.
- 10) The Respondent conceded that the submitted documentation showed that the Appellant demonstrated a substantial adaptive deficit only in the major life area of Receptive or Expressive Language. (Exhibit D-2)
- 11) On June 30, 2023, the Respondent sent notification to the Appellant that her I/DD Waiver application was denied noting that the documentation failed to support the presence of

substantial adaptive deficits in three or more of the six major life areas identified for Waiver eligibility. (Exhibit D-2)

APPLICABLE POLICY

Bureau for Medical Services Provider Manual §513.6.2, *Initial Medical Eligibility*, states: To be medically eligible, the applicant must require a level of care and services provided in an ICF/IID 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. An ICF/IID provides services in an institutional setting for persons with intellectual disability or a related condition. An ICF/IID provides monitoring, supervision, training, and supports.

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/IID

The MECA determines the qualification for an ICF/IID level of care (medical eligibility) based on the IPE that verifies that the applicant has 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. For the IDDW Program, individuals must meet criteria for medical eligibility not only by test scores, but also narrative descriptions contained in the documentation.

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.

Bureau for Medical Services Provider Manual §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.

DISCUSSION

Medical eligibility criteria in each of the following categories must be met in order to be eligible for the I/DD Waiver program: 1) Diagnosis of Intellectual Disability or related condition, which constitutes a severe and chronic disability that manifested prior to age 22; 2) Functionality of at least three (3) substantial adaptive deficits out of the six (6) major life areas that manifested prior to age 22, 3) Active Treatment - the need for active treatment, 4) ICF/IID Level of Care need for services under the I/DD Waiver Program. Failure to meet any one of the eligibility categories results in a denial of program services. 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 need the same level of care and services provided in an ICF/IID setting.

The Respondent contracts with Psychological Consultation and Assessment (PC&A) as the Medical Eligibility Contracted Agent (MECA) to determine applicant eligibility for the I/DD Waiver Program. PC&A is required to determine the Appellant's eligibility through review of an IPE report and other submitted documentation. Charley Bowen, a licensed psychologist employed by PC&A, reviewed the submitted documentation to determine the Appellant's eligibility for the I/DD Waiver Program. Although the Appellant was found to have met the eligible diagnosis criteria, only one substantial functional deficit was identified in the area of ***Communication***. On June 30, 2023, the Respondent sent notification to the Appellant that her I/DD Waiver application was denied because the documentation failed to support the presence of substantial adaptive deficits in three or more of the six major life areas identified for Waiver eligibility. The Appellant's mother contests the findings, noting that the Appellant has substantial deficits in the areas of *Self-Care, Self-Direction, Functional Learning, and Safety*.

The Respondent must prove by a preponderance of evidence that the submitted documentation failed to support the presence of at least three substantial functional adaptive deficits in the major life areas identified by policy.

Mr. Bowen reviewed the May 2023 IPE narratives and scores in the ABAS-3, which were derived from the responses provided by the Appellant's mother, [REDACTED]. The ABAS-3 produces results scaled to a mean of 10 and a standard deviation of 3, scores of 1 and 2 are deemed to be indicative

of a substantial deficit in the area tested. In reviewing the ABAS-3 scores, the contested areas of Self-Care, Self-Direction, and Functional Pre-Academics, were all scored as a 7, with a score of 4 in the sub-domain of Capacity for Independent Living in the area of Safety. Mr. Bowen also reviewed the ABAS-3 test scores from a December 2022 developmental testing done by [REDACTED] which did not show any substantial functional deficits as defined by policy in the areas tested.

The Appellant's mother, [REDACTED] testified that she does not agree with the test scores and believes that they do not reflect all of the Appellant's deficits. [REDACTED] testified that the Appellant cannot bathe herself, brush her own hair, and cannot put shoes on herself. [REDACTED] also stated that the Appellant cannot initiate tasks on her own and was unable to sit in a chair to be able to learn. Both [REDACTED] and the Appellant's father, [REDACTED] noted that the Appellant has no sense of safety and cannot be left alone.

However, in reviewing the evidence, the May 2023 IPE narratives appear to be inconsistent. The *Physical/Sensory Deficits* section of the narrative states that the Appellant is "very picky with her foods ... eats fruits and meats, but will not eat vegetables." Additionally, under the *Self-Care* section of the narrative, it notes that the Appellant "will bring a snack or a cup for her mom in order to get what she wants." This is inconsistent with the *Self-Direction* section of the narrative and [REDACTED] testimony that the Appellant has no self-direction ability and is not supported by the ABAS-3 score of 7. In reviewing the December 2022 IEP ABAS-3 score in the area of *Self-Direction*, the Appellant scored a 6 and an 8 in the area of *Self-Care*, which are consistent with the May 2023 IPE ABAS-3 test scores. In the area of health and safety and functional academics, the ABAS-3 scores and narratives do not reflect a substantial deficit in those areas.

[REDACTED] testified that because of the Appellant's behaviors it is difficult to find caregivers so she can continue working outside of the home. [REDACTED] applied for the I/DD Waiver Program in the hopes of receiving some respite from the constant overwatch that the Appellant requires. However, the Board of Review cannot change or judge the policy. Only a determination can be made by the Board of Review as to whether the Respondent correctly decided the Appellant's eligibility based on the submitted documentation. In reviewing the evidence and testimony presented, the Respondent correctly determined that the Appellant did not meet medical eligibility criteria for I/DD Waiver Program.

CONCLUSIONS OF LAW

- 1) Policy requires that in order to meet I/DD Waiver Program eligibility, an individual must meet all four criteria: Diagnosis, Functionality, Need for Active Treatment, and require an ICF/IID Level of Care.
- 2) The Appellant does have an eligible diagnosis for the I/DD Waiver Program.
- 3) The Appellant only demonstrated a substantial functional deficit in the area of *Communication*.

- 4) Policy requires an individual to have at least three substantial functional deficits in the major life areas identified for the I/DD Waiver program.
- 5) The Appellant did not meet medical eligibility requirements for the I/DD Waiver Program.

DECISION

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

ENTERED this 3rd day of October 2023.

Lori Woodward, Certified State Hearing Officer