



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

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

**Christopher G. Nelson
Interim Inspector General**

December 21, 2023



Re: ██████████ A PROTECTED INDIVIDUAL V WV DHHR
ACTION NO.: 23-BOR-3271

Dear ██████████:

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,

Angela D. Signore
State Hearing Officer
Member, State Board of Review

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

cc: Kerri Linton, Psychological Consultation & Assessment
Stacy Broce, Bureau for Medical Services

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

■ A PROTECTED INDIVIDUAL,

Appellant,

v.

Action Number: 23-BOR-3271

**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 December 06, 2023 on an appeal filed October 18, 2023.

The matter before the Hearing Officer arises from the September 27, 2023 determination by the Respondent to deny the Appellant's medical eligibility for services under the Intellectual and Developmental Disabilities Waiver (I/DD Waiver) Program.

At the hearing, the Respondent appeared by Charley Bowen, Consulting Psychologist for the Bureau for Medical Services (BMS). The Appellant was represented by her mother, ■. All witnesses were sworn and the following documents were admitted into evidence.

** Observing for the Respondent was Kerri Linton, Psychological Consultation & Assessment (PC&A).

Department's Exhibits:

- D-1 Bureau for Medical Services (BMS) Manual § 513.6- 513.6.4
- D-2 DHHR BMS Notice, dated September 27, 2023
- D-3 Independent Psychological Evaluation (IPE), dated September 11, 2023
- D-4 Psychoeducational Evaluation Report, dated October 21, 2020
- D-5 Educational Evaluation Report, dated November 03, 2020
- D-6 IPE, dated September 08, 2021
- D-7 IPE, dated November 16, 2021
- D-8 DHHR BMS Notice, dated December 13, 2021
- D-9 IPE, dated September 29, 2022
- D-10 IPE, dated October 07, 2022

- D-11 DHHR BMS Notice, dated November 21, 2022
- D-12 Individualized Education Progress (IEP), dated September 23, 2022
- D-13 Educational Evaluation Report, dated September 16, 2022
- D-14 Physician's Note, dated September 03, 2020

Appellant's Exhibits:

- A-1 Evaluation Report of Licensed Physician/Psychologist, dated October 17, 2022; and Evaluation Report of Licensed Physician/Psychologist, dated October 17, 2022
- A-2 Psychoeducational Evaluation Report, dated October 21, 2020
- A-3 IPE, dated September 08, 2021
- A-4 IPE, dated November 16, 2021
- A-5 IPE, dated September 29, 2022
- A-6 IPE, dated October 07, 2022
- A-7 [REDACTED] Progress Note, dated May 14, 2019
- A-8 Individualized Education Progress (IEP), dated September 23, 2022
- A-9 Physicians Note, dated September 03, 2020
- A-10 [REDACTED] Evaluation, dated September 08, 2021; [REDACTED] Schools Homebound Request, dated May 24, 2021; Letter from Physician, dated July 11, 2022; and [REDACTED] Schools SAT School Day Scores, dated Spring 2022

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, through the Bureau for Medical Services, contracts with Psychological Consultation & Assessment (PC&A) to perform functions related to the I/DD Waiver Program, including eligibility determination. (Exhibits D-2 and D-6)
- 3) On September 08, 2021, [REDACTED] a Licensed Psychologist, completed an Independent Psychological Evaluation (IPE) on the Appellant. (Exhibits D-6 and A-3)
- 4) The September 08, 2021, IPE lists diagnoses of Autism Spectrum Disorder, Level-1; Mood Disorder; ADHD, Inattentive Type; and Learning Disorder NOS. (Exhibits D-6 and A-3)
- 5) On November 16, 2021, [REDACTED], completed an additional IPE on the Appellant. (Exhibits D-7 and A-4)
- 6) The November 16, 2021, IPE lists a diagnoses of Autism Spectrum Disorder, Level-1 - requiring support for deficits in social communication and support in restricted, repetitive behaviors; ADHD, Combined Presentation, by history; and Generalized Anxiety Disorder, by history. (Exhibits D-7 and A-4)
- 7) On December 13, 2021, the Respondent issued a notice advising the Appellant that she was

ineligible for the I/DD Waiver Program because “Documentation provided for review does not reflect an eligible diagnosis of either Intellectual Disability or a related condition which is severe. The need for an ICF level of care is not reflected in the information provided for review” (Exhibit D-8)

- 8) The Respondent’s determination was based on the review of “November 16, 2021 IPE; August 27, 2021 [REDACTED] Schools [REDACTED] IEP; and September 08, 2021 Psychological Evaluation” (Exhibit D-8)
- 9) On September 29, 2022, [REDACTED] completed an IPE on the Appellant. (Exhibits D-8 and A-5)
- 10) The September 29, 2022, evaluation diagnosed the Appellant with Autism Spectrum Disorder, Level-1 - requiring supports; ADHD, Combined Presentation; Disruptive Mood Dysregulation Disorder; Generalized Anxiety Disorder; and Oppositional Defiant Disorder. (Exhibits D-8 and A-5)
- 11) On October 07, 2022, [REDACTED] completed an IPE on the Appellant. (Exhibits D-10 and A-6)
- 12) The October 07, 2022, evaluation diagnosed the Appellant with Autism Spectrum Disorder, Level-1; ADHD, Combined Type; Major Depressive Disorder, Recurrent, Moderate; and Borderline Intellectual Functioning. (Exhibits D-10 and A-6)
- 13) On November 21, 2022, the Respondent issued a notice advising the Appellant that she was ineligible for the I/DD Waiver Program because “Documentation provided for review does not reflect an eligible diagnosis of either Intellectual Disability or a related condition which is severe. The need for an ICF level of care is not reflected in the information provided for review” (Exhibit D-11)
- 14) The Respondent’s determination was based on the review of “October 07, 2022 IPE; May 23, 2022 Evaluation Report of Physician/Psychologist; May 16, 2022 Evaluation Report of Physician/Psychologist; February 17, 2014 Psychological Testing-Update with Medications; April 02, 2018 Academic Evaluation & Detailed Results; April 27, 2018 Visit Summary; April 30, 2018 Personality Evaluation; undated letter from [REDACTED]; September 24, 2020 Letter from [REDACTED]; May 24, 2021 Psychological Homebound Instruction Request; November 12, 2020 [REDACTED] Eligibility Committee Report and Specific Learning Disability Team Report; September 02, 2020 Letter from [REDACTED]; October 21, 2020 Confidential Psychoeducational Evaluation Report; November 03, 2020 [REDACTED] Educational Evaluation Report; November 16, 2021 IPE; December 13, 2021 Notice of Denial; September 08, 2021 PPSyScape PLLC Vocational Evaluation; July 11, 2022 Letter from [REDACTED]; August 27, 2021 [REDACTED] IEP, and IEP Snapshot; September 23, 2022 [REDACTED] IEP and PEP.” (Exhibit D-11)
- 15) On September 11, 2023, [REDACTED] completed an IPE on the Appellant. (Exhibit D-3)
- 16) The September 11, 2023, evaluation diagnosed the Appellant with Autism Spectrum Disorder, criteria A-Level 1, Criteria B-Level 1; Persistent Depressive Disorder, with Intermittent Major Depressive Episodes, Without Current Episodes, Mild; Generalized

Anxiety Disorder; Borderline Intellectual Functioning; and Unspecified ADHD. (Exhibit D-3)

- 17) On September 27, 2023, the Respondent issued a notice advising the Appellant that she was ineligible for I/DD Waiver Program benefits because “documentation submitted for review does not indicate an eligible diagnosis of Intellectual Disability or a related condition which is severe.” (Exhibit D-2)
- 18) The Respondent’s determination was based on the review of “September 11, 2023 IPE; October 21, 2020 Confidential Psychoeducational Evaluation Report; November 03, 2020 [REDACTED] Educational Evaluation Report; September 08, 2021 Psychological Evaluation; November 16, 2021 IPE; December 13, 2021 Notice of Denial; September 29, 2022 IPE for WV Children with Serious Emotional Disorder Waiver; October 07, 2022 IPE; November 21, 2022 Notice of Denial; September 23, 2022 [REDACTED] IEP, PEP; September 16, 2022 [REDACTED] Evaluation Report: Teachers; September 03, 2020 Letter from [REDACTED]” (Exhibit D-2)

APPLICABLE POLICY

Bureau for Medical Services (BMS) Manual § 513.6 provides, in part:

In order for an applicant to be found eligible for the IDWW Program, they must meet medical eligibility criteria. Initial medical eligibility is determined by the Medical Eligibility Contracted Agent (MECA) through review of an Independent Psychological Evaluation (IPE) report completed by a member of the Independent Psychologist Network (IPN); which may include background information, mental status examination, a measure of intelligence, adaptive behavior, achievement, and any other documentation deemed appropriate.

BMS Manual § 513.6.2 provides, in part:

To be medically eligible, the applicant must require the 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 IPE verifies that the applicant has an intellectual disability with concurrent substantial deficits or a related condition which constitutes a severe and chronic disability with concurrent substantial deficits. An applicant must meet all the medical eligibility criteria in each of the following categories:

- Diagnosis;
- Functionality;
- Need for treatment; and
- Requirement of ICF/IID Level of Care

BMS Manual § 513.6.2.1 provides, in part:

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 may, if severe and chronic in nature, make an individual eligible for the IDDW 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 disabilities 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 disabilities.

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 under Section 513.6.2.2, Functionality.

BMS Manual § 513.6.2.2 provides, in part:

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 ID normative populations when intellectual disability 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

Pursuant to policy, in order for an applicant to be found eligible for the I/DD Waiver Program, an individual must meet medical eligibility criteria. Initial medical eligibility is determined by the Medical Eligibility Contracted Agent (MECA) through review of an Independent Psychological Evaluation (IPE) report completed by a member of the Independent Psychologist Network (IPN). To be medically eligible, criteria in each of the following categories must be met for the I/DD Waiver Program: diagnosis, functionality, need for active treatment, and requirement of ICF/IID Level of Care. The applicant must have a diagnosis of intellectual disability with concurrent substantial deficits manifested prior to age twenty-two (22) or a related condition which constitutes a severe and chronic disability with concurrent substantial deficits manifested prior to age twenty-two (22). Once an eligible diagnosis is established, the Respondent then evaluates to see if the Appellant meets the functional criteria for the I/DD Waiver Program. An adaptive behavior assessment is used to identify if the Appellant exhibits substantial adaptive deficits in at least three (3) of the six (6) major life areas (*self-care, communication, learning, mobility, self-direction, and capacity for independent living*).

Policy defines substantial adaptive deficits as standardized scores of three (3) standard deviations below the mean, or less than one percentile (1%), when derived from a standardized measure of adaptive behavior. The applicant must also require the 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. 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 is required. Failure to meet any one of the eligibility categories results in a denial of program services. On September 27, 2023, the Appellant's application for the I/DD Waiver Program was denied based on a failure to meet the diagnostic criteria of an eligible diagnosis of an Intellectual Disability, or related condition, that manifested prior to age 22. The Respondent had to demonstrate by a preponderance of evidence that the Appellant lacked an eligible diagnosis that manifested prior to age 22 for I/DD Waiver Program eligibility purposes. It should be noted that the Appellant was denied I/DD Waiver Program eligibility on two (2) prior occasions – December 13, 2021 and November 21, 2022.

During a September 11, 2023 medical assessment, an ABAS-3 was administered to evaluate the Appellant's adaptive functioning level. The Appellant must have a standardized score of one (1) or two (2) to establish a substantial deficit in the six (6) major life areas. In addition to the standardized scores, the narrative descriptions in the IPE must also support the existence of substantial deficits. Charley Bowen (Mr. Bowen), consulting psychologist for the Respondent, testified that while Autism is, if severe, considered a related condition that may qualify an applicant for Waiver eligibility, the Appellant's diagnosis of Autism Spectrum Disorder, Level 1 did not meet the criteria for a severe related condition. In order to meet the severity level for I/DD Waiver medical eligibility, the Appellant had to have a diagnosis of Autism Spectrum Disorder, Level 3. At the time of the September 2023 assessment, a Weschler Adult Intelligence Scale, Fourth Edition (WAIS-IV) was administered. The scores revealed that the Appellant has a full-scale Intelligence Quotient (IQ) of 72, which is consistent with those in the borderline range. A Wide Range Achievement Test, Fifth Edition (WRAT-5) was also administered. The mean, or average, of this test is 100 with a standard deviation of 15. Three (3) standard deviations below the mean result in eligible scores of 55 or below. The Appellant scored a total of 90 in *word reading*, a 94 in *spelling*, a 78 in *math computation*, a total of 94 in *sentence comprehension*, and a *reading composite* of 91. A Gilliam Autism Rating, Third Edition (GARS-3) was also completed which registered an Autism Index score of 89, with a severity level of 2; however, it is reported that the assessing psychologist believes this to be an overestimate of the Appellant's symptoms. The Appellant was diagnosed with Autism Spectrum Disorder, criteria A-Level 1, Criteria B-Level 1; Persistent Depressive Disorder, with Intermittent Major Depressive Episodes, Without Current Episodes, Mild; Generalized Anxiety Disorder; Borderline Intellectual Functioning; and Unspecified Attention-Deficit/Hyperactivity Disorder (ADHD).

On October 21, 2020, a Psychoeducational Evaluation was completed. The Appellant was given a Weschler Intelligence Scale for Children, Fifth Edition (WISC-V) resulting in a full-scale IQ of 74, which falls within the very low range of ability at the fourth (4th) percentile rank. The assessing psychologist notes that this is the best representation of the Appellant's ability at the time of the assessment. During a November 03, 2020 Educational Evaluation, the Appellant was given the Woodcock-Johnson Tests of Achievement – IV, with scores of: Math Calculation Skills - 76, Broad Math - 76, and Math Facts Fluency - 73, being the only scores reflective of a borderline range. All other scores were evaluated in the average-low average range. A WAIS-IV was administered during a psychological evaluation conducted on September 08, 2021. The scores revealed that the Appellant has a full-scale IQ of 82, which is consistent with those in the low average range. The assessing psychologist noted that the Appellant was diagnosed with Autism Spectrum Disorder, but failed to determine a level. However, because a WRAT-5 was also conducted with scores of a 90 in *word reading*, an 84 in *spelling*, an 83 in *math computation*, a total of 91 in *sentence comprehension*, and an *autism spectrum disorder assessment scale* of 73, a diagnosis of Autism Spectrum Disorder, Level-1, could be considered. The Appellant was also diagnosed with Mood Disorder; ADHD, Inattentive Type; and Learning Disorder NOS.

An IPE was conducted on November 16, 2021, when the Appellant was sixteen (16) years old. According to the narrative of the report, a Childhood Autism Rating Scale, Second Edition (CARS-2) evaluation was done. The Respondent testified that the Appellant was assessed with a Total Raw Score of 30 – falling within the mild to moderate autistic range – and diagnoses of Autism Spectrum Disorder, Level-1 - requiring support for deficits in social communication and support in restricted, repetitive behaviors; ADHD, Combined Presentation, by history; and Generalized Anxiety Disorder, by history. An IPE conducted on September 29, 2022 for the WV Children with Serious Emotional Disorder Waiver Program reflects that a Behavior Assessment System for Children, Third Edition (BASC-3-Parent) was administered, with the assessing psychologist

noting diagnoses of: Autism Spectrum Disorder, Level-1 - requiring supports; ADHD, Combined Presentation; Disruptive Mood Dysregulation Disorder; Generalized Anxiety Disorder; and Oppositional Defiant Disorder. The Appellant's October 07, 2022 IPE included WAIS-IV scores all falling within the low average/borderline range, WRAT-5 scores all falling within the average range, with exception to arithmetic, which fell in the below average range. The Appellant's overall CARS score was 34, falling within the Mild/Moderate Autistic range. The assessing psychologist lists diagnoses of Autism Spectrum Disorder, Level-1; ADHD, Combined Type; Major Depressive Disorder, Recurrent, Moderate; and Borderline Intellectual Functioning.

Mr. Bowen testified that, after reviewing the totality of the supporting documentation submitted with the Appellant's September 27, 2023 I/DD Waiver application, the Appellant failed to meet medical eligibility for the I/DD Waiver Program. Mr. Bowen further explained that Autism Spectrum Disorder, Level-1 does not meet the diagnostic criteria of severe. He further testified that for I/DD Waiver Program eligibility purposes, the Appellant's Autism Spectrum Disorder would need to be assessed at a Level-3. The Appellant's representative ([REDACTED]) testified that the Appellant "presents very well," and because she does, finding support services has been challenging. [REDACTED] further testified that she agrees with the Appellant's assessment and realizes that she [the Appellant] has never been considered "bad enough" to warrant the need for specialized classroom instruction, but testified that the Appellant does still struggle with activities of daily living. She continued that, without direction and consistent prompting, the Appellant does not register the need to do or move to the next task. [REDACTED] further testified that there is utmost concern for how the Appellant would be capable of taking care of herself as she ages. She reasoned that, because the Appellant lacks the capacity to complete tasks and perform self-care without consistent prompting and direction from an adult, she's incapable of ever living alone. Additionally, [REDACTED] implored the Respondent for help. She testified that, while she does understand that the Appellant may not be a candidate for this program, the Appellant also has lifelong challenges that do still require the need for active treatment.

To meet medical eligibility for the I/DD Waiver Program, the Appellant must have an intellectual disability with concurrent substantial deficits or a related condition which constitutes a severe and chronic disability with concurrent substantial deficits that require an ICF/IID Level of Care. To demonstrate that the Appellant required an ICF/IID Level of Care, the evaluations of the Appellant had to reflect a need for intensive instruction, services, assistance, and supervision to learn new skills, maintain the 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 are provided in an ICF/IID setting. While policy lists Autism as a related condition that could potentially qualify an applicant for I/DD Waiver Program services, in order to meet the severity level required for I/DD Waiver Program medical eligibility, the Appellant had to have a diagnosis of Autism Spectrum Disorder, Level 3. Because no evidence was entered to establish that the Appellant has an Autism Spectrum Disorder, Level 3 diagnosis, intellectual disability, or another related condition which is severe, the Appellant's diagnosis did not meet the criteria established by policy to establish an eligible diagnosis for Medicaid I/DD Waiver Program purposes.

CONCLUSIONS OF LAW

- 1) To be medically eligible for the Medicaid I/DD Waiver Program, the Appellant had to meet medical eligibility criteria for diagnosis, functionality, need for active treatment, and require an ICF/ IID Level of Care.

- 2) To be eligible for the Medicaid I/DD Waiver Program, the Appellant must have an intellectual disability or a chronic and severe related condition.
- 3) To be eligible for the Medicaid I/DD Waiver Program, the Appellant's diagnosis of Autism Spectrum Disorder had to be qualified as a Level 3 diagnosis.
- 4) The preponderance of evidence failed to establish that the Appellant has an eligible diagnosis of intellectual disability or Autism Spectrum Disorder, Level 3.
- 5) Because the evidence failed to establish that the Appellant met the medical eligibility criteria for a qualifying diagnosis, the Respondent's decision to deny the Appellant medical eligibility for the Medicaid I/DD Waiver Program is affirmed.

DECISION

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

ENTERED this 21st day of December 2023.

Angela D. Signore
State Hearing Officer