



**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 12, 2023

[REDACTED]

Re: [REDACTED] A PROTECTED INDIVIDUAL V WV DHHR
ACTION NO.: 23-BOR-2854

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,

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
[REDACTED]

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

■ A PROTECTED INDIVIDUAL,

Appellant,

v.

Action Number: 23-BOR-2854

**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 November 14, 2023 on an appeal filed September 15, 2023.

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

At the hearing, the Respondent appeared by Kerri Linton, Consulting Psychologist for the Bureau for Medical Services (BMS). The Appellant was represented by his grandfather, ■. ■. Appearing as a witness for the Appellant was his father, ■. All witnesses were sworn and the following documents were admitted into evidence.

** Observing for the Respondent was Charley Bowen, 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 June 27, 2023
- D-3 Independent Psychological Evaluation (IPE), dated May 19, 2023
- D-4 IPE, dated December 14, 2022 and January 12, 2023
- D-5 IPE, dated February 01, 2023
- D-6 DHHR BMS Notice, dated February 20, 2023
- D-7 Diagnostic Impressions Report, dated May 26, 2023

Appellant's Exhibits:

- A-1 IPE, dated December 14, 2022 and January 12, 2023
- A-2 IPE, dated February 01, 2023
- A-3 IPE, dated May 19, 2023
- A-4 Diagnostic Impressions Report, dated May 26, 2023
- A-5 Individualized Education Progress (IEP), dated April 06, 2023
- A-6 Occupational Therapy Progress Report, dated July 24, 2023
- A-7 DHHR BMS Notice, dated February 20, 2023
- A-8 Hand typed Request for Fair Hearing, undated

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 IDDW Program, including eligibility determination. (Exhibit D-2 and D-6)
- 3) On December 14, 2022 and January 12, 2023, [REDACTED], a Licensed Psychologist, completed an Independent Psychological Evaluation (IPE) on the Appellant. (Exhibit D-3)
- 4) The December 14, 2022 and January 12, 2023, IPE lists a diagnosis of Global Developmental Delay. (Exhibit D-3)
- 5) On February 01, 2023, [REDACTED], completed an additional IPE on the Appellant. (Exhibit D-5)
- 6) The February 01, 2023, IPE lists a diagnosis of Global Developmental Delay and Language Disorder. (Exhibit D-5)
- 7) On February 20, 2023, the Respondent issued a notice advising the Appellant that he was ineligible for IDDW 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-6)
- 8) The Respondent's determination was based on the review of "February 01, 2023 IPE; December 14, 2022 and January 12, 2023 Psychological Evaluation" (Exhibit D-6)
- 9) On May 19, 2023, [REDACTED], completed an IPE on the Appellant. (Exhibit D-3)

- 10) The May 19, 2023, evaluation diagnosed the Appellant with Autism Spectrum Disorder, Level II, and Receptive/Expressive Language Disorder. (Exhibit D-3)
- 11) On June 27, 2023, the Respondent issued a notice advising the Appellant that he was ineligible for IDDW 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)
- 12) The Respondent’s determination was based on the review of “May 19, 2023 IPE; December 14, 2022 and January 12, 2023 Psychological Evaluation; February 01, 2023 Independent Psychological Evaluation; February 20, 2023 Notice of Denial; May 26, 2023 Diagnostic Impression Report” (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 IDDW 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 to be eligible for the I/DD Waiver Program: diagnosis, functionality, need for active treatment, and requirement of ICF/IID Level of Care. 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 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.

During a May 19, 2023 IPE completed by [REDACTED] a parent/teacher 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. Kerri Linton (Ms. Linton), 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 2 did not meet the criteria for a severe related condition. In order to meet the severity level for IDD Program medical eligibility, the Appellant had to have a diagnosis of Autism Spectrum Disorder, Level 3. It should also be noted that the Appellant was denied I/DD Waiver Program eligibility on one prior occasion – February 20, 2023.

In the area of *mobility*, the Respondent explained that in order to meet the threshold of a substantial deficit, an individual would normally be wheelchair bound, unable to self-propel, or unable to transfer. Because the evidence demonstrated that the Appellant is independently ambulatory, a

substantial deficit in the area of *mobility* could not be awarded. To demonstrate a substantial deficit in the area of *self-direction*, the evidence had to demonstrate that the Appellant was not able to make choices, show preferences, or start and stop activities independently. The Appellant's May 2023 parent ABAS-3 reflected a scaled score of four (4), while his teacher ABAS-3 reflected a scaled score of three (3). Although the Appellant may demonstrate barriers in making appropriate choices, the evidence establishes that the Appellant is capable of initiating and choosing to participate in activities, and therefore, a deficit could not be awarded. When reviewing the Appellant's May 2023 IPE, the Appellant's ABAS-3 in the area of *receptive or expressive language (communication)* reflected a scaled score of three (3) on the parent assessment, and a scaled score of one (1) on the teacher assessment.

In the area of *learning (functional academics)*, the Appellant's parent and teacher ABAS-3 scores reflected a scaled score of eight (8). In the area of *self care*, the Appellant's parent ABAS-3 reflected a scaled score of three (3) and a scaled score of one (1) on the teacher assessment. The Respondent testified that the Appellant was awarded a substantial adaptive deficit in the area of *capacity for independent living* (which includes the following six sub-domains: *home living, social skills, employment, health and safety, community, and leisure activities*). However, because the Appellant was found to lack adaptive deficits in the areas of *receptive or expressive language (communication)*, *learning (functional academics)*, *mobility*, *self-direction*, and *self care*, on June 27, 2023, the Appellant's application for the I/DD Waiver Program was denied. It should be noted that the administering psychologist's observations of the Appellant at the time of assessment details the teacher assessment portion as an inaccurate and unreliable measure of the Appellant's abilities at that time. Additionally, a Childhood Autism Rating Scale (CARS) evaluation was done. The Respondent testified that the Appellant was assessed with a Total Raw Score of 31.5 – falling within the mild/moderate autistic range, which the administering psychologist noted was a valid and reliable measurement of the Appellant at the time of assessment.

The Respondent further testified that a previous IPE was completed on December 14, 2022 and January 12, 2023, by [REDACTED]. An attempt was made to administer the Wechsler Preschool and Primary Scale of Intelligence, Fourth Edition (WPPSI-IV) test to obtain the full scale IQ; however, because the psychologist administered verbal portions of the assessment despite the Appellant being nonverbal at the time of testing, the Respondent testified that even though scores were recorded, the assessment should be interpreted cautiously. The Respondent further testified that as a result of the Appellant being nonverbal, a diagnosis of an Intellectual Disability was not provided. The Appellant was also given an ABAS-3 during the December 14, 2022 and January 12, 2023 assessment. The Respondent testified that all of the Appellant's parent ABAS-3 scores reflected a scaled score higher than a one (1) or two (2), as required by the policy. The Appellant was given a diagnosis of Global Developmental Delay at the time of the December 14, 2022 and January 12, 2023 assessment, which does not meet the policy definition of a severe related illness.

A third IPE dated February 01, 2023, completed by [REDACTED], was included with the Appellant's application. Stimulatory behavior and emotional reciprocity with his parents was present during the assessment. A Developmental Profile 4 (DP4) was completed that registered the following scores: Adaptive Behavior - 69, Physical - 60, Social-Emotional - 64, Cognitive - 100, Communication - 66, and General Development - 73. An Adaptive Behavior Assessment System, Third Edition (ABAS-III) was completed that displayed one eligible score in the area of *community use* that listed a scaled score of one (1) when compared to other children this age. Additionally, a Gilliam Autism Rating, Third Edition (GARS-3) was completed which registered an Autism Index score of 83, with a severity level of 2. It is further noted that Autism Spectrum

Disorder is determined to not be of a diagnosable magnitude at the time of the assessment. The assessing psychologist further noted that the Appellant is consistently presenting with Language Disorder and Global Developmental Delay with possible ADHD symptomatology. A Diagnostic Impressions Report completed May 26, 2023, at the West Virginia Autism Training Center was included with diagnoses of Autism Spectrum Disorder, Level 2 and Receptive/Expressive Language Disorder.

During the hearing, the Appellant's representative [REDACTED] questioned the May 19, 2023 IPE completed by [REDACTED]. He argued that the teacher portion of the assessment should not be considered unreliable since the assessment was completed by a teacher who is very familiar with the Appellant. [REDACTED] confirmed that since the Appellant was awarded a substantial adaptive deficit in the area of *capacity for independent living*, and because both parties agree that he is not limited in his mobility, substantial adaptive deficits would need to be awarded in the remaining categories. [REDACTED] further argued that in the area of *self-care* on the May 2023 IPE notes that the Appellant is totally dependent in the areas of bathing, dressing, and grooming, and is not toilet trained, yet the Appellant was not awarded a substantial adaptive deficit. In the area of *receptive or expressive language (communication)*, he asserted that the Appellant's speech is significantly delayed and is considered abnormal for his age. In the area of *community use*, the Appellant must be watched at all times. The [REDACTED] testified that while the IPE completed on December 14, 2022 and January 12, 2023, by [REDACTED], did not include a diagnosis, it did include an intelligence quotient (IQ) test of 55, falling into the extremely low range and ranked below the first (1st) percentile; a verbal comprehension subtest falling into the extremely low range and ranked below the first (1st) percentile; a vocabulary acquisition index falling into the very low range and ranked below the thirteenth (13th) percentile; and visual motor integration falling into the very low range and ranked below the fifth (5th) percentile.

The Respondent explained that making an eligibility determination for younger children such as the Appellant can be quite challenging due to the difficulty in determining what is typical of a younger child and what may be due to an Intellectual Disability. Further, the Respondent explained, as children age, it becomes easier to distinguish between the discrepancies of what may be considered normal and what may be an Intellectual Disability. The Respondent further testified that she feels as if the Appellant is "on the cusp."

To meet medical eligibility for the IDDW 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 be eligible for an ICF/IID Level of Care, the need must be verified by the IPE and corroborated by narrative descriptions of functioning and reported history. 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 does list Autism as a related condition that could potentially qualify an applicant for IDDW services, in order to meet the severity level required for IDDW Program medical eligibility, the Appellant had to have a diagnosis of Autism Spectrum Disorder, Level 3. Because the Appellant was diagnosed with Autism Spectrum Disorder, Level 2, and no other related condition which is severe, the Appellant's diagnosis did not meet the criteria established by policy to establish an eligible diagnosis for Medicaid IDDW Program purposes.

CONCLUSIONS OF LAW

- 1) To be medically eligible for the Medicaid IDWW 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 IDWW Program, the Appellant must have an intellectual disability or a chronic and severe related condition.
- 3) To be eligible for the Medicaid IDWW 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 IDWW 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 12th day of December 2023.

Angela D. Signore
State Hearing Officer