



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

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

Christopher G. Nelson  
Interim Inspector General

January 31, 2024



RE:  **A PROTECTED INDIVIDUAL v. WVDohS**  
ACTION NO.: 23-BOR-3276



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 Human Services. These same laws and regulations are used in all cases to ensure 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,

Eric L. Phillips  
State Hearing Officer  
Member, State Board of Review

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

cc: Gary Michaels, AAG

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

██████████ **A PROTECTED INDIVIDUAL,**

**Appellant,**

**v.**

**Action Number: 23-BOR-3276**

**WEST VIRGINIA DEPARTMENT OF  
HUMAN SERVICES BUREAU  
FOR MEDICAL SERVICES,**

**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 Office of Inspector General Common Chapters Manual. This fair hearing was convened on January 11, 2024, on an appeal filed October 19, 2023. The hearing reconvened on January 18, 2024, to clarify the submission of evidence.

The matter before the Hearing Officer arises from the September 25, 2023 decision by the Respondent to deny the Appellant's application for I/DD Waiver program services.

At the hearing, the Respondent appeared by Gary Michaels, Assistant Attorney General. The Respondent's witness included Kerri Linton, Psychological Consultant with the Bureau of Medical Services. The Appellant appeared by counsel of ██████████, both from Legal Aid of West Virginia. The Appellant's witnesses included ██████████ Appellant's mother and ██████████ Licensed Clinical Psychologist. 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 - 513.6.3
- D-2 Notice of Decision dated September 25, 2023
- D-3 Independent Psychological Evaluation completed August 28, 2023
- D-4 Independent Psychological Evaluation completed July 17, 2023
- D-5 Notice of Decision dated July 21, 2023

- D-6 [REDACTED] Office of Special Programs Autism Spectrum Disorder Observation Form dated February 7, 2019.
- D-7 TEACHH Autism Program Diagnostic and Interpretive Report dated December 19, 2012
- D-8 [REDACTED] Schools Education Evaluation Report dated March 12, 2021
- D-9 Individualized Education Report [REDACTED] Schools dated January 31, 2023
- D-10 [REDACTED] Schools Psychological and Multidisciplinary Evaluation Report dated February 18, 2019
- D-11 Speech and Language Evaluation by Lingucare Associates, Inc.
- D-12 Observation Report dated February 6, 2019
- D-13 Hearing Request Information

**Appellant's Exhibits:**

- A-1 Individualized Education Program [REDACTED] Schools dated September 21, 2023
- A-2 WPS Parent Caretaker Questionnaire dated August 12, 2023
- A-3 Adaptive Behavior Assessment System dated August 12, 2023
- A-4 I/DD Waiver File Log dated [REDACTED]
- A-5 Curriculum Vitae for [REDACTED]

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 15-year-old child.
- 2) The Appellant, through his mother, applied for benefits and services through the Respondent's Intellectual/Developmental Disabilities Wavier (I/DD) services program.
- 3) On July 17, 2023, an Independent Psychological Evaluation (IPE) (Exhibit D-4), a requirement of the application process, was completed with the Appellant and his mother.
- 4) The Appellant was diagnosed in the IPE with Autism Spectrum Disorder Level 2 and Borderline Intellectual Functioning.
- 5) On July 21, 2023, the Respondent issued a Notice of Decision (Exhibit D-5) to the Appellant's mother advising that the application for I/DD Waiver services had been denied because the "documentation submitted for review does not support the presence of an eligible diagnosis for the I/DD wavier program of intellectual disability or a related condition which is severe."
- 6) The Notice of Decision advised the Appellant of his right to a second psychological evaluation, within 60 calendar days, if the decision was based on medical reasons.

- 7) The Appellant exercised his right to a second psychological evaluation.
- 8) On August 28, 2023, an additional IPE (Exhibit D-3) was completed with the Appellant and his mother.
- 9) The second IPE (Exhibit D-3) diagnosed the Appellant with Autism Spectrum Disorder Level 2 requiring substantial supports, Unspecified Anxiety Disorder, and Borderline Intellectual Functioning.
- 10) On September 25, 2023, the Respondent issued a second Notice of Decision (Exhibit D-2) to the Appellant's mother advising that the application had been denied because the "documentation submitted for review does not support the presence of an eligible diagnosis for the I/DD waiver program of intellectual disability or a related condition which is severe."

### **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 75<sup>th</sup> 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

Policy requires that an applicant for I/DD Waiver services must have written documentation that they meet eligibility criteria. Initial medical eligibility is determined by the Medical Eligibility Contracted Agent (MECA) through a review of the IPE report completed by a member of the Independent Psychological network. The Respondent contracts with Psychological Consultation and Assessment (PC&A) as the MECA to determine applicant eligibility for the I/DD Waiver Program. The MECA determines if the information provided aligns with the policy criteria for establishing Medicaid I/DD Waiver eligibility. The Board of Review cannot judge the policy and can only determine if the MECA followed the policy when deciding about the Appellant's I/DD Waiver eligibility.

To be determined eligible for the I/DD Waiver program, an individual must meet the medical eligibility criteria of a diagnosis, functionality, the need for active treatment, and the requirement of ICF/IID level of care. Based on the information and evaluations submitted for review, the Appellant failed to meet the diagnostic eligibility criteria. Eligibility is established in the diagnostic area when an individual presents a diagnosis of an Intellectual Disability, or a related condition which constitutes a severe, and chronic disability with concurrent substantial deficits which manifested prior to age 22. The Appellant requested this fair hearing as an appeal to the Respondent's determination. The Respondent had to prove by a preponderance of the evidence that the documentation submitted failed to meet diagnostic eligibility standards.

Kerri Linton, the Respondent's consulting psychologist from PC&A, testified that Autism Spectrum Disorder can be considered a related condition under the diagnostic criteria, but the diagnosis must be severe with concurrent substantial deficits. Ms. Linton expounded that for program eligibility purposes, an Autism Spectrum Disorder, meets the severity criteria when it is assessed at a Level 3. On two separate occasions an IPE was conducted with the Appellant and his mother which diagnosed the Appellant with Autism Spectrum Disorder, Level 2, and Borderline Intellectual Functioning (Exhibit D-3 and Exhibit D-4). Additionally, the most recent IPE added a diagnosis of Unspecified Anxiety Disorder. Ms. Linton indicated that the Appellant's diagnosis of Borderline Intellectual Function and Unspecified Anxiety Disorder is not equivalent to an Intellectual Disability for program eligibility purposes. Ms. Linton reviewed the additional documentation submitted with the Appellant's application for I/DD services (Exhibit D-6 through D-11) and reported that while there were present diagnoses of Autistic Disorder in past observations, there was no additional information which demonstrated a severity level of the diagnosis.

██████████ Licensed Clinical Psychologist, the Appellant's witness, provided his review of the documentation submitted for the determination of the Appellant's eligibility for the I/DD Waiver program. It should be noted that ██████████ did not conduct an interview with the Appellant and only reviewed the documentation presented for the I/DD Waiver application. ██████████ offered his opinion concerning issues with the administered evaluations and offered that there was enough information presented to conclude the presence of a mild Intellectual Disability for the Appellant.

██████████ the Appellant's mother provided testimony concerning her son's issues and

education. [REDACTED] indicated that her son's Individualized Educational Plan (Exhibit D-9 and Exhibit A-1), is not an accurate reflection of his education level, specifically, in math, as he is in high school but participating in elementary level math courses. [REDACTED] outlined issues with her son in basic life areas purporting that he requires assistance with grooming, toiletry needs, and other hygiene. Additionally, [REDACTED] reported safety concerns with her son because he is unable to be independent and cannot be left alone.

Testimony revealed that applicants for the I/DD waiver program have the option to select a member from the Independent Psychological network to complete necessary observations and IPEs. On both IPEs conducted on behalf of the Appellant, each psychologist diagnosed the Appellant with Autism Spectrum Disorder with a Level 2 severity level and Borderline Intellectual Functioning. Presented diagnoses failed to demonstrate an Intellectual Disability. Additionally, the information submitted before the MECA failed to demonstrate that the Appellant currently meets the severity level needed to meet the diagnostic criteria for program eligibility. Therefore, the Respondent's denial of the Appellant's I/DD Waiver program application is affirmed.

### **CONCLUSIONS OF LAW**

- 1) Policy requires that 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.
- 2) The Appellant was diagnosed with Autism Spectrum Disorder, Level 2, which does not meet the severity criteria in policy.
- 3) The Appellant failed to meet the diagnostic criteria threshold for services under 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 application for services under the I/DD Waiver Program.

**ENTERED this \_\_\_\_ day of January 2024.**

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Eric L. Phillips  
**State Hearing Officer**