



**STATE OF WEST VIRGINIA
OFFICE OF INSPECTOR GENERAL
BOARD OF REVIEW**

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

**Christopher G. Nelson
Interim Inspector General**

January 17, 2024

[REDACTED]

RE: [REDACTED] a Juvenile v. WV DoHS
ACTION NO.: 23-BOR-3533

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 Human Services. 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: WV DoHS, BMS

**WEST VIRGINIA OFFICE OF INSPECTOR GENERAL
BOARD OF REVIEW**

■ A JUVENILE,

Appellant,

v.

Action Number: 23-BOR-3533

**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 JUVENILE. This hearing was held in accordance with the provisions found in Chapter 700 of the Office of Inspector General Common Chapters Manual. This fair hearing was convened on January 10, 2024.

The matter before the Hearing Officer arises from the August 17, 2023 decision by the Respondent to deny I/DD Waiver Program services.

At the hearing, the Respondent appeared by Charley Bowen, consulting psychologist for the Bureau for Medical Services. The Appellant was represented by his father, ■. Appearing as a witness for the Appellant was his grandmother, ■. All 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 - 513.6.3
- D-2 Denial Notice, dated August 17, 2023
- D-3 Independent Psychological Evaluation, evaluation date July 21, 2023
- D-4 Ophthalmology prescription
- D-5 Outpatient Pediatric Referral dated March 20, 2023
- D-6 WRC Physical Therapy Pediatric Discharge Summary, dated January 27, 2023
- D-7 WRC Physical Therapy Pediatric Initial Evaluation, dated August 1, 2022
- D-8 WRC Occupational Therapy Pediatric Initial Evaluation, dated July 17, 2023
- D-9 West Virginia Department of Health and Human Resources Children with Disabilities Community Services Program (CDCSP) Intermediate Care Facility for Individuals with

Intellectual Disabilities (ICF/IID) Level of Care Evaluation (CDCSP-2A), dated May 11, 2023

- D-10 [REDACTED] Public Schools Combined Developmental and Speech /Language Assessment, dated August 3, 2020
- D-11 Individualized Education Program, dated August 12, 2020
- D-12 Kindergarten Family Report, 2022 – 2023
- D-13 Printout of email from [REDACTED] dated June 15, 2023
- D-14 IEP Progress Report, dated February 5, 2021
- D-15 Progress Monitoring Report, dated May 10, 2023
- D-16 Progress Report – IEP Goals and Objectives, dated May 19, 2023
- D-17 IEP, dated August 12, 2020
- D-18 IEP, dated March 25, 2022
- D-19 Adjustment to the IEP without convening an IEP team meeting, dated February 10, 2023
- D-20 Neuropsychological Evaluation, dated April 11, 28, and May 5, 2022

Appellant's Exhibits:

- A-1 Pediatric Neuropsychology Report, dated August 21 and September 1, 2023

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 the I/DD Waiver Program.
- 2) The Appellant was evaluated in an Independent Psychological Evaluation (IPE) conducted on July 21, 2023 by licensed psychologist [REDACTED] who diagnosed the Appellant with Adjustment Disorder with Disturbance of Emotions and Conduct 309.4, Oppositional Defiant Disorder 313.81, Rule Out Autism Spectrum Disorder Level 3, Duchenne Muscular Dystrophy, per medical records. (Exhibit D-3)
- 3) Evaluations administered to the Appellant during his July 2023 IPE included: intellectual/cognitive abilities - Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V); adaptive behavior - ABAS-3; functional academics - WISC-V; Wide Range Achievement Test – 5th Edition (WRAT-5); and autism screening - Gilliam Autism Rating Scale – 3 (GARS-3). (Exhibit D-3)
- 4) The administered evaluations during the July 2023 IPE did not result in any eligible scores which meet program eligibility requirements.
- 5) During the July 2023 IPE evaluation, the Gilliam Autism Rating Scale – 3 (GARS-3) was utilized to measure the likelihood and severity of Autism Spectrum Disorder (ASD) for the Appellant. (Exhibit D-3)

- 6) The Appellant's GARS-3 results produced an Autism Index of 114, corresponding to the probability of ASD as very likely, and a noted severity level of 3; however, the examiner questioned the results. (Exhibit D-3)
- 7) The Respondent denied the Appellant's application for the I/DD Waiver Program in a notice dated August 17, 2023. (Exhibit D-2)
- 8) The August 17, 2023 notice explained that the application was denied because "Documentation submitted for review does not indicate an eligible diagnosis Intellectual Disability or a Related Condition which is severe ... Documentation submitted does not 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 §513.6.2.1, *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 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 in Section 513.6.2.2, Functionality.

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.

Bureau for Medical Services Provider Manual §513.6.2.3, *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

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 Independent Psychological Evaluation (IPE) report. 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. The Respondent must show by a preponderance of evidence that it correctly denied the Appellant's I/DD Waiver application.

The Respondent denied the Appellant's application because he did not meet the diagnostic criteria of an eligible diagnosis of an Intellectual Disability, or related condition, which is severe. The Appellant requested a fair hearing to appeal the Respondent's decision.

The Respondent showed by a preponderance of evidence that the Appellant did not meet the diagnosis criteria for program eligibility. Charley Bowen, the Respondent's consulting psychologist, testified that the WISC-V results from the July 2023 IPE showed that the Appellant had a low average range of intellectual functioning. The WISC-V results are converted into standard scores with a mean of 100 and a standard deviation of 15 -- eligible scores are 69 and below. The Appellant's WISC-V results ranged from a low of 74 in Working Memory Index to a high of 108 in Visual Spatial Index, 100 in Processing Speed Index, a 91 in Fluid Reasoning Index and an 89 in Verbal Comprehension Index, with a Full Scale IQ of 89 which is considered to be in the low average range. The examiner, [REDACTED], a licensed psychologist, opined that the WISC-V test scores should be seen as a baseline as she believed the results may have been an underrating of the Appellant's true intellectual functioning. Mr. Bowen testified that the Appellant's diagnosis of Borderline Intellectual Disability does not constitute an eligible diagnosis for program eligibility.

Mr. Bowen also testified that ASD could potentially be considered a related condition to meet the diagnostic criteria for program eligibility. However, to be considered a related condition, it must be a severe and chronic disability with concurrent substantial deficits. For ASD to be considered a potential related condition, there must be a diagnosis of a Level 3 severity. Although the Appellant's GARS-3, scored by his grandmother, showed results indicating a potential level 3 severity, the examiner questioned whether some of the Appellant's symptoms related to his diagnosis of Oppositional Defiant Disorder (ODD), Duchenne Muscular Dystrophy, and/or Adjustment Disorder contributed to the GARS-3 results. Thus, the examiner concluded that the diagnosis of ASD should be further evaluated. No diagnosis of ASD Level 3 was found. Additionally, during a neuropsychological examination and report in September 2023, the Appellant's ASD was confirmed, however, no level of severity was indicated.

The ABAS-3 Parent Form, completed by the Appellant's grandmother during the July 2023 IPE, evaluated the Appellant's adaptive behavior. 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 areas tested. There were no areas of eligibility identified on the ABAS-3 results which met the criteria to be considered as a substantive deficit for adaptive behaviors. Mr. Bowen testified that he also reviewed the IEPs submitted with the Appellant's I/DD Waiver Program application. Mr. Bowen noted that the accommodations noted on the Appellant's IPEs were not indicative of those made for individuals with intellectual disabilities or ASD.

██████ testified that the Appellant needs assistance with dressing and bathing. ██████ stated that the Appellant needs assistance in and out of the shower and cannot stand by himself in the shower. Although the testimony provided by the Appellant's witnesses did show that the Appellant requires assistance with some of his activities of daily living, the documentation provided did not show that the assistance that the Appellant currently requires meets the severity level needed to meet the diagnostic component for program eligibility. Therefore, the Respondent's denial of the Appellant's I/DD Waiver program application is affirmed.

CONCLUSIONS OF LAW

- 1) Because the Appellant does not have an eligible diagnosis for the I/DD Waiver Program, the diagnostic component of medical eligibility is unmet.
- 2) Because the diagnostic component is not met, the Appellant did not meet medical eligibility for the I/DD Waiver program.
- 3) Because the Appellant did not meet the medical eligibility requirements, the Respondent correctly denied the Appellant's application 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 17th day of January 2024.

Lori Woodward, Certified State Hearing Officer