



April 17, 2024

[REDACTED]

Re: [REDACTED] A PROTECTED INDIVIDUAL v WV DoHS
ACTION NO.: 23-BOR-1153

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,

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

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

cc: Gary Michels, Assistant AG, Bureau for Medical Services
Kerri Linton, Psychologist, Psychological Consultation & Assessment
Stacy Broce, Bureau for Medical Services

BEFORE THE WEST VIRGINIA OFFICE OF INSPECTOR GENERAL
BOARD OF REVIEW

IN THE MATTER OF:

█ A PROTECTED INDIVIDUAL,

Appellant,

v.

ACTION NO.: 24-BOR-1153

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 Office of Inspector General Common Chapters Manual. This fair hearing was convened on April 08, 2024 on an appeal filed January 18, 2024.

The matter before the Hearing Officer arises from the November 03, 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 Gary Michels, Assistant Attorney General, Bureau for Medical Services (BMS) and Jason Wible, Assistant Attorney General, BMS. Appearing as witnesses for the Respondent were Kerri Linton, Consulting Psychologist for the Bureau for Medical Services (BMS), and Charlie Bowen, Consulting Psychologist for the Bureau for Medical Services. The Appellant was present and was represented by █ Attorney. Appearing as witnesses for the Appellant were his mother, █, the Appellant's father. All witnesses were sworn and the following documents were admitted into evidence.

Department's Exhibits:

- D-1 Hearing Packet Cover Letter, Dated January 22, 2024; Hearing Checklist; IG-BR-29 for █; Request for Hearing, dated December 20, 2023; and Bureau for Medical Services (BMS) Manual § 513.6- 513.6.4
- D-2 BMS Notice, dated November 03, 2023
- D-3 Independent Psychological Evaluation (IPE), dated October 17, 2023

- D-4 [REDACTED] Schools Individualized Education Program (IEP), dated March 20, 2014
- D-5 Eligibility Committee Report, dated November 06, 2013
- D-6 [REDACTED] Schools Confidential Psychoeducational Report, dated August 14, 2010

*Exhibits A, B, C, and D were included with D-1

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) An application was made on behalf of the Appellant for services under the I/DD Waiver Program (IDDW).
- 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)
- 3) On October 17, 2023, [REDACTED] MA, a Licensed Psychologist, completed an Independent Psychological Evaluation (IPE) on the Appellant. (Exhibit D-3)
- 4) The October 17, 2023, IPE lists diagnoses of Autism Spectrum Disorder, Level 2, Borderline Intellectual Functioning, and Attention Deficit Hyperactivity Disorder, Combined Presentation, by history. (Exhibit D-3)
- 5) On March 20, 2014, an Individualized Education Program (IEP) was completed on the Appellant. (Exhibit D-4)
- 6) The March 20, 2014, IEP reflected that the Appellant will participate in a special education environment for 80% of his academic instruction time. (Exhibit D-4)
- 7) On November 06, 2013, a [REDACTED] Schools Eligibility Committee Report determined that the Appellant was not eligible for special education services. (D-5)
- 8) On August 14, 2010, a Psychoeducational Evaluation was completed by [REDACTED] Schools. (D-6)
- 9) The August 14, 2010 Psychoeducational Evaluation diagnosed the Appellant as Moderately Delayed, and "does not meet the requirements within Policy 2419 for Autism."

- 10) On November 03, 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)
- 11) The Respondent’s November 03, 2023, determination was based on the review of “10/17/23 IPE; 3/20/14 [REDACTED] IEP; 11/6/13 [REDACTED] Eligibility Committee Report; 8/14/10 [REDACTED] Confidential Psychoeducational 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.

Code of Federal Regulations 42 CFR § 435.1010(a)(2)-(6) provides, in part:

Persons with related conditions means individuals who have a severe, chronic disability that meets all the following conditions:

- Attributable to any other conditions, 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 like that of mentally retarded persons, and requires treatment or services like those required for these persons,
- Manifested before the person reaches age 22,
- Is likely to continue indefinitely,
- Results in substantial functional limitations in three or more of the following areas of major life activity:
 - o Self-care
 - o Understanding and use of language
 - o Learning
 - o Mobility
 - o Self-direction
 - o Capacity for independent living

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). Criteria in each of the following categories must be met in order 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 then 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 an October 17, 2023, medical 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. At the time of the October 2023 assessment, 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 76 in *word reading*, a 72 in *spelling*, and a total of 67 in *math computation*. A Childhood Autism Rating Scale - Second Edition (CARS-2) evaluation was also completed. The Respondent testified that the Appellant was assessed with a Total Raw Score of 31.0 – falling within the minimal symptoms of an autism spectrum disorder range. Based on this assessment, the Appellant was diagnosed with Autism Spectrum Disorder, Level 2, Borderline Intellectual Functioning, and Attention Deficit Hyperactivity, Combined Presentation, by history.

On March 20, 2014, when the Appellant was still attending the public school system, an Individualized Education Program (IEP) evaluation was completed by ██████████ Schools. The Respondent testified that the findings in the IEP conclude the primary result of the disability is global delays both developmentally and educationally. The Respondent further testified that when compared with the Appellant’s August 14, 2010, a Psychoeducational Evaluation completed by ██████████ County Schools, the Appellant, in the span of four (4) years has made substantial progress with respect to academics. The Respondent reported that the August 2014 evaluation notes that the Appellant had age appropriate gross motor skills, age appropriate self help skills, improved social skills, and mostly interacts well with others.

When reviewing the Appellant’s August 14, 2010, Psychoeducational Evaluation, an Autism Diagnostic Observation Schedule (ADOS) was administered. The Respondent testified that though the ADOS did not provide scoring, the assessment notes the Appellant’s communication score places him at the autism cut off, while the Reciprocal Social Interaction was above the autism cut off. The administering Psychologist notes that the combined scores for both communication and social interaction fall within the autism cut off score. The Appellant’s Stanford-Binet Intelligence Scale, Fifth Edition (SB5) provided a full scale Intelligence Quotient (IQ) of 47, reflecting the moderate range for an Intellectual Disability. When compared to the present testing completed on October 17, 2023, by ██████████ MA, with ██████████, the Appellant’s scores increased to 72 - placing him at the Borderline Intellectual Functioning range, with some scores being significantly higher.

The Appellant’s parents testified that the Appellant has a twin sibling who has been diagnosed with Autism and was approved for the IDDW Program. The Appellant’s mother further testified that there is utmost concern for how the Appellant would be capable of taking care of himself should “something happen” to her [his mother]. She reasoned that, because the Appellant lacks the capacity to complete tasks and perform self-care without consistent prompting and direction from an adult, he’s incapable of ever living alone. The Appellant’s mother testified that while improvement is being made regarding his present symptoms, it is due to the result of her hard work and commitment. While the Appellant’s parents offered narrative descriptions of the Appellant’s activities of daily living in their testimony,

their testimony was more directed at the functionality component of medical eligibility, rather than diagnostic. While medical eligibility for the IDDW Program does require the functionality component, the Respondent's specific basis for denial was due to the lack of an eligible diagnosis. Further, the policy requires the Respondent to rely on the information contained within the IPE and the submitted documentation.

The Appellant's attorney, [REDACTED], argued that a Level 2 diagnosis is severe and claimed there was nothing in policy explicitly requiring an Autism Spectrum Disorder, Level 3 diagnosis. She argued that the policy reads "severe and chronic in nature," but it does not provide detail of who makes the severity determination. She further argued that because the Appellant has significant functioning impairments related to his Autism diagnosis, he would benefit from IDDW services, and should be determined eligible. Additionally, the Appellant's representative argued that portions of the Appellant's previous assessments do not accurately reflect the Appellant's need level and questioned the expertise of those who have assessed the Appellant to date. However, policy stipulates that it is up to the applicant to choose their own Independent Psychologist from the provided Independent Psychologist Network.

As established by the policy, in order 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. While policy lists Autism as a related condition that could potentially qualify an applicant for IDDW services, the Appellant had to have a *diagnosis* [emphasis added] of Autism Spectrum Disorder, Level 3 [emphasis added]. 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.

There is no question that the Appellant experiences substantial limitations in many of the life areas assessed for the IDDW Program. However, because the Appellant did not meet the diagnostic criteria of program eligibility by presenting an eligible diagnosis of an Intellectual Disability or a related condition which is severe [emphasis added], the Respondent's decision to deny Medicaid IDDW Program benefits is affirmed.

CONCLUSIONS OF LAW

- 1) To be medically eligible for the Medicaid IDDW 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 IDDW Program, the Appellant must have an intellectual disability or a chronic and severe related condition.
- 3) To be eligible for the Medicaid Medicaid IDDW 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 IDDW 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 IDDW Program.

ENTERED this 17th day of April 2024.

Angela D. Signore
State Hearing Officer