



August 22, 2024

[REDACTED]

Re: [REDACTED] A PROTECTED INDIVIDUAL v WV DoHS BMS
ACTION NO.: 24-BOR-2484

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: Stacy Broce, Bureau of Medical Services
Charley Bowen, PC&A

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

■ A PROTECTED INDIVIDUAL,

Appellant,

v.

Action Number: 24-BOR-2484

**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 July 31, 2024.

The matter before the Hearing Officer arises from the March 27, 2024 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 Charley Bowen, Consulting Psychologist for the Bureau for Medical Services (BMS). The Appellant was represented by his mother, ■. ■. Appearing as a witness for the Appellant was his grandfather, ■. All witnesses were sworn and the following documents were admitted into evidence.

** Observing and taking notes 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 DoHS BMS Notice, dated March 27, 2024
- D-3 Independent Psychological Evaluation (IPE), dated February 14, 2024
- D-4 IPE, dated January 04, 2022

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) On an unknown date, an application was made on behalf of the Appellant for services under the Intellectual and Developmental Disabilities Waiver (IDDW) 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)
- 3) On February 14, 2024, [REDACTED] a Licensed Psychologist, completed an Independent Psychological Evaluation (IPE) on the Appellant. (Exhibit D-3)
- 4) The February 14, 2024, IPE lists a diagnosis of Autism Spectrum Disorder, Level 2, Requiring Substantial Supports, with Language Deficits. (Exhibit D-3)
- 5) On January 04, 2022, [REDACTED], a Licensed Psychologist, completed an Intake for Psychological Evaluation on the Appellant. (Exhibit D-4)
- 6) The January 04, 2022, intake lists a diagnosis of Autism Spectrum Disorder, Level 2, Requiring Substantial Supports, with Language Deficits. (Exhibit D-4)
- 7) On March 27, 2024, 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)
- 8) The Respondent’s March 27, 2024, determination was based on the review of “2/14/24 IPE; 1/4/22 Intake for Psychological Evaluation.” (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 IDDW 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 IDDW 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 IDDW 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 a February 14, 2024, medical assessment, a Developmental Profile 4 (DP4) was completed that registered delays in the areas of: social-emotional, cognitive, communication, and general development. The Respondent, Charley Bowen (Mr. Bowen), testified that though the Appellant's DP4 registered delays in the aforementioned areas, because the DP4 is not a standardized intellectual test, the Psychologist is not permitted to use the results in order to diagnose an intellectual disability. Mr. Bowen further testified that an Adaptive Behavior Assessment System, Third Edition (ABAS-3) was also completed. However, because the Appellant's Autism, Level 2 diagnosis did not meet the policy requirement of an eligible diagnosis, the ABAS-3 scores were not considered. In determining the severity of the Appellant's autism, the Respondent considered the Gilliam Autism Rating Scale-3 (GARS-3) Index Score of 81. Mr. Bowen explained that a

score of 81 indicates the probability of Autism Spectrum Disorder, Level 2. Mr. Bowen 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 IDDW Program medical eligibility, the Appellant had to be diagnosed with Autism Spectrum Disorder, Level 3. On January 04, 2022, [REDACTED], a Licensed Psychologist, completed an Intake for Psychological Evaluation on the Appellant. A DP4 was also administered at that time that substantiated delays in all areas. At that time, the Appellant's GARS-3 Index Score was 86; again, resulting in the diagnosis of Autism Spectrum Disorder, Level 2, Requiring Substantial Supports, with Language Deficits.

The Appellant's mother, [REDACTED], argued that she did not understand why the Independent Psychologist scored the Appellant as having a diagnosis of Autism Spectrum Disorder, Level 2, when an individual diagnosed with Autism Spectrum Disorder who is non-verbal, is "automatically a Level 3." [REDACTED] further testified that when reviewing the six (6) major life areas (*self-care, communication, learning, mobility, self-direction, and capacity for independent living*), the Appellant does not have the capacity to complete any without assistance. She further testified that the Appellant is a danger to himself if left unaccompanied. [REDACTED] argued that the Appellant lacks self-awareness, has no self-direction, lacks receptive language, has little mobility, and lacks capacity for independent living. While the Appellant's mother offered narrative descriptions of the Appellant's activities of daily living in her testimony, her testimony was more directed at the functionality component of medical eligibility, rather than diagnostic. Though 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. Additionally, the policy requires the Respondent to rely on the information contained within the IPE and the submitted documentation.

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 of Autism Spectrum Disorder, Level 3 [emphasis added]. It should be noted that the Respondent's policy and/or Federal Regulations do not award an individual diagnosed with Autism Spectrum Disorder and who is non-verbal as a Level 3 diagnosis. 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/Level 3 [emphasis added], the Respondent's decision to deny IDDW Program benefits is affirmed.

CONCLUSIONS OF LAW

- 1) IDDW Program policy requires an applicant to meet medical eligibility criteria in each of the following categories: diagnosis, functionality, need for active treatment, and requirement of an ICF/IID Level of Care.

- 2) To be eligible for the IDDW Program, the Appellant must have a diagnosis of an Intellectual Disability or a related condition which is severe.
- 3) Pursuant to the policy, for a related condition to be considered severe, an individual's Autism Spectrum Disorder diagnosis must be a Level 3.
- 4) The preponderance of evidence failed to establish that the Appellant has an eligible diagnosis of intellectual disability or Autism Spectrum Disorder of 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 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 IDD Waiver Program.

ENTERED this _____ day of August 2024.

**Angela D. Signore
State Hearing Officer**