



August 7, 2024

[REDACTED]

RE: [REDACTED] v. DoHS/BMS  
ACTION NO.: 24-BOR-2658

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 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,

Kristi Logan  
Certified State Hearing Officer  
Member, State Board of Review

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

cc: Bureau for Medical Services  
PC&A  
Ascentra

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

████████████████████,

**Appellant,**

v.

**Action Number: 24-BOR-2658**

**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 ██████████. 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 August 7, 2024, on an appeal filed on July 10, 2024.

The matter before the Hearing Officer arises from the May 13, 2024, decision by the Respondent to deny the Appellant's application for services under the I/DD Waiver Program.

At the hearing, the Respondent appeared by Charley Bowen, consulting psychologist for the Bureau for Medical Services. The Appellant appeared and was represented by his mother, ██████████. The 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
- D-2 Notice of Denial dated May 13, 2024
- D-3 Independent Psychological Evaluation dated April 8, 2024
- D-4 Independent Psychological Evaluation dated January 17, 2024
- D-5 Notice of Denial dated March 13, 2024
- D-6 Comprehensive Neuropsychological Evaluation dated July 8-9, 2013
- D-7 Psychological Evaluation dated December 12, 2011
- D-8 Letter from ██████████ dated December 17, 1997
- D-9 Annual Psychological Evaluation Update dated February 23, 2005
- D-10 Comprehensive Psychological Evaluation dated April 16, 2007

D-11 Testing Report dated February 20, 2012

D-12 Comprehensive Psychological Evaluation dated November 19, 2002

**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) The Appellant applied for services under the I/DD Waiver Program.
- 2) The Respondent issued a notice of denial on March 13, 2024, advising the Appellant that his application had been denied as the documentation provided did not indicate an eligible diagnosis of Intellectual Disability or a related condition which is severe, did not indicate the need for an ICF level of care and the presence of at least three substantial adaptive deficits of the six major life areas could not be established (Exhibit D-5).
- 3) The Appellant requested a second psychological evaluation to be considered for his application which was conducted on April 8, 2024.
- 4) The Respondent issued a notice of denial on May 13, 2024, advising the Appellant that his application had been denied as the documentation provided did not indicate an eligible diagnosis of Intellectual Disability or a related condition which is severe, did not indicate the need for an ICF level of care and the presence of at least three substantial adaptive deficits of the six major life areas could not be established (Exhibit D-2).
- 5) The Appellant was given diagnoses of Autism Spectrum Disorder, Level 1, Borderline Intellectual Functioning, and Attention Deficit Hyperactivity Disorder by the administering psychologists of the January and April 2024 independent psychological evaluations (Exhibit D-3 and D-4).

**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.

**Code of Federal Regulations 42 CFR §440.150(a)(2) Intermediate Care Facility (ICF/IID) services** provides in relevant sections: *ICF/IID services* means health or rehabilitative services furnished to persons with Intellectual Disability or persons with related conditions in an intermediate care facility for individuals with Intellectual Disabilities.

**Code of Federal Regulations 42 CFR §435.1010 Definitions relating to institutional status** provides in relevant sections:

*Active Treatment in intermediate care facilities for individuals with intellectual disabilities* means treatment that meets the requirements specified in the standard concerning active treatment for intermediate care facilities for persons with Intellectual Disability under § 483.440(a) of this subchapter.

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

- (a) It is attributable to –
  - (1) Cerebral palsy or epilepsy; or
  - (2) Any other condition, other than mental illness, found to be closely related to Intellectual Disability because this condition results in impairment of general intellectual functioning similar to that of mentally retarded persons, and requires treatment or services similar to those required for these persons.
- (b) It is manifested before the person reaches age 22.
- (c) It is likely to continue indefinitely.

**Code of Federal Regulations 42 CFR § 456.70(b) Medical, psychological, and social evaluations** provides in relevant sections: A psychological evaluation, not older than three months, is required to establish eligibility for Medicaid ICF/IID admission or authorization of payment. The psychological evaluation is required to include a diagnosis; summary of present medical, social, and developmental findings; medical and social family history; mental and physical functional capacity; prognoses; types of services needed; an assessment of the Appellant's home, family, and community resources; and a recommendation for ICF admission.

**Code of Federal Regulations 42 CFR § 456.372 Medicaid agency review of need for admission** provides in relevant sections: The Medicaid agency or its designee must evaluate each applicant's need for admission by reviewing and assessing the evaluations required by §456.370.

### DISCUSSION

Pursuant to policy, 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, the functionality criteria of at least three substantial adaptive deficits out of the six major life areas that manifested prior to age 22, the need for active treatment and a requirement of ICF/IID level of care to receive services under the I/DD Waiver Program.

The Respondent denied the Appellant's application as he did not meet the diagnostic criteria of an eligible diagnosis of an Intellectual Disability, or related condition, which is severe. Charley Bowen, witness for the Respondent, testified that the Appellant's diagnosis of Autism Spectrum Disorder, Level 1, does not meet the severity criteria for a qualifying related condition. Mr. Bowen contended that a rating of a level 3 for Autism Spectrum Disorder would meet severity criteria as a related condition for I/DD Waiver eligibility.

The Appellant was administered the Weschler Adult Intelligence Scale (WAIS) during the January and April 2024 independent psychological evaluations. The Appellant received a full-scale intelligence quotient (IQ) score of 65 and 72 respectively as derived from the WAIS. Mr. Bowen testified that when determining the presence of an Intellectual Disability, scores from the administered intelligence test must be two standard deviations below the average. The average score for the WAIS is 100, and two standard deviations below the average would be scores of 69 or lower. Mr. Bowen referred to the administering psychologist's comments from the January 2024 independent psychological evaluation who opined that based on the Appellant's overall abilities, the Appellant is functioning in the borderline range of intellectual ability (Exhibit D-4). Based on a historical review of the psychological evaluations submitted with the Appellant's application for I/DD Waiver services, Mr. Bowen contended that the Appellant, whose IQ scores range from 65 to 72, does not have an Intellectual Disability (Exhibits D-6, D-7, D-9, D-1, D-11 and D-12).

The Appellant's mother, [REDACTED], testified that while the Appellant is highly functioning in some areas of daily living, he will be unable to live independently. [REDACTED] stated the Appellant cannot manage money or make decisions, and he does not recognize safety issues. [REDACTED] contended that it is through continuous training and support from his family that has enabled the Appellant to be independent. [REDACTED] felt the Appellant was presenting with adaptive deficits in all of the major life areas and purported that the Appellant was not accepted into [REDACTED] autism program due to his Intellectual Disability.

The Board of Review cannot judge policy and can only determine if the Respondent followed policy when deciding the Appellant's I/DD Waiver program eligibility. Furthermore, the Board of Review cannot draw clinical conclusions regarding the Appellant's diagnosis and severity beyond what is identified by the independent psychological evaluations and corroborated by the submitted information. The Hearing Officer can only decide whether the Respondent correctly denied the

Appellant's eligibility based on the diagnosis and condition severity indicated on the independent psychological evaluations and corroborated by the submitted information.

Pursuant to policy, an I/DD Waiver applicant must first meet the diagnostic criteria of an Intellectual Disability, or related condition if severe and chronic in nature, to be eligible for services. The evidence provided failed to establish that the Appellant has an Intellectual Disability or a related condition which is severe. The Appellant's diagnoses of Autism Spectrum Disorder, Level 1 and Borderline Intellectual Functioning does not meet the severity criteria for I/DD Waiver eligibility.

Whereas the preponderance of evidence failed to establish that the Appellant had an eligible diagnosis for I/DD Waiver Program eligibility, the Respondent acted in accordance with policy in the denial of the Appellant's application for I/DD Waiver Program services.

### **CONCLUSIONS OF LAW**

- 1) Pursuant to policy, an individual must meet the diagnostic 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 1, which does not meet the severity criteria in policy.
- 3) The Appellant was diagnosed with Borderline Intellectual Functioning, which does not meet the severity criteria in policy.
- 3) The Appellant does not meet the diagnostic criteria for services under the I/DD Waiver Program.

### **DECISION**

It is the decision of the State Hearing Officer to **uphold** the decision of the Respondent to deny the Appellant's application for services under the I/DD Waiver Program.

**ENTERED this 7<sup>th</sup> day of August 2024.**

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**Kristi Logan**  
**Certified State Hearing Officer**