



October 16, 2024

[REDACTED]

Re: [REDACTED] A PROTECTED INDIVIDUAL v WV DoHS BMS
ACTION NO.: 24-BOR-3143

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: Appellant's Recourse to Hearing Decision
Form IG-BR-29

cc: Stacy Broce, Bureau for Medical Services
Charley Bowen, PC&A
Sissy Johnson, Acentra

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

■ A PROTECTED INDIVIDUAL,

Appellant,

v.

Action Number: 24-BOR-3143

**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 October 02, 2024.

The matter before the Hearing Officer arises from the August 19, 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 her mother, ■ Both witnesses were sworn and the following documents were admitted into evidence.

** Observing and taking notes for the Respondent was Crystal Dotson, 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 August 19, 2024
- D-3 Independent Psychological Evaluation (IPE), dated July 17, 2024
- D-4 The ■ Assessment Report, dated May 13, 2024
- D-5 WV Birth to Three Intervention Activity Note, dated October 11, 2023
- D-6 WV Birth to Three Evaluation/Assessment Summary Report/Review, dated August 18, 2022

- D-7 [REDACTED] Evaluation/Reevaluation, dated June 06, 2024
- D-8 Occupational Therapy Outpatient Evaluation, dated December 11, 2023
- D-9 [REDACTED] Occupational Therapy Plan of Care, dated June 19, 2024
- D-10 Occupational Therapy Treatment, dated July 03, 2024

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 July 17, 2024, [REDACTED] a Licensed Psychologist, completed an Independent Psychological Evaluation (IPE) on the Appellant. (Exhibit D-3)
- 4) The July 17, 2024, IPE lists a diagnosis of Autism Spectrum Disorder, Level 2, Requiring Substantial Supports, With Language Delays, Without Cognitive Delay. (Exhibit D-3)
- 5) On August 19, 2024, the Respondent issued a notice advising the Appellant that she 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)
- 6) The August 19, 2024, notice reflected that the Appellant was awarded substantial adaptive deficits in the areas of: *Self-Direction* and *Capacity for Independent Living*. (Exhibit D-2)
- 7) The notice further reflected that the Appellant was found to lack substantial adaptive deficits in the areas of: *Self-Care*, *Learning*, *Receptive/Expressive Language*, and *Mobility*. (Exhibit D-2)
- 8) The Respondent’s August 19, 2024, determination was based on the review of “7/17/24 IPE; 5/13/24 The [REDACTED] Assessment Report; 10/11/23 WV BTT Intervention Activity Note; 8/18/22 WV BTT Evaluation/Assessment Summary Report/Review; 6/6/24 Speech Therapy Eval/Re-eval; 12/11/23 Occupational Therapy Outpatient Evaluation; 6/19/24 Occupational Therapy Plan of Care; 7/3/24 Occupational Therapy Treatment.” (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 July 17, 2024, IPE, a Developmental Profile 4 (DP4) was completed that registered delays in the areas of: physical, social-emotional, communication, and general development. The Respondent, Charley Bowen (Mr. Bowen), testified that because the Appellant's DP4 registered her cognitive range as average, her future intellectual abilities may also be in the average range. However, in order to determine it, a more comprehensive intelligence test would be necessary. Mr. Bowen further testified that an Adaptive Behavior Assessment System, Third Edition (ABAS-3) was also administered to evaluate the Appellant's adaptive functioning level.

The Appellant must have a standardized score of one (1) or two (2) to establish a substantial deficit in the six (6) major life areas. In addition to the standardized scores, the narrative descriptions in the IPE must also support the existence of substantial deficits. Mr. Bowen testified that when reviewing the Appellant's IPE, the Appellant's ABAS-3 in the area of *receptive or expressive language (communication)* reflected a scaled score of three (3). In the area of *learning (functional academics)*, the Appellant's ABAS-3 scores reflected a scaled score of six (6). In the area of *self-care*, the Appellant's ABAS-3 reflected a scaled score of three (3). To demonstrate a substantial deficit in the area of *self-direction*, the evidence had to demonstrate that the Appellant was not able to make choices, show preferences, or start and stop activities independently. The Appellant's ABAS-3 reflected a scaled score of two (2), which met the criteria to award a substantial adaptive deficit.

The Respondent testified that when reviewing the area of *capacity for independent living* (which includes the following six sub-domains: *home living, social skills, employment, health and safety, community, and leisure activities*), because the Appellant had substantial deficits in at least three (3) of these areas - *community* (1), *health and safety* (1), and *leisure and activities* (2) – an additional deficit was awarded in the area of *capacity for independent living*. A Peabody Picture Vocabulary Test Fifth Edition (PPVT-5) was also administered to measure the Appellant's receptive language. The results for receptive language indicated a score of 70, which is markedly deficient in regard to receptive language. However, to be awarded a substantial deficit for IDDW program eligibility, the Appellant's score needs to be 61 or below.

In determining the severity of the Appellant's autism, the Respondent considered the Gilliam Autism Rating Scale-3 (GARS-3) Index Score of 97. Mr. Bowen explained that a score of 97 indicates the Appellant is Very Likely for Autism Spectrum Disorder, Requiring Substantial Supports, or Level 2. Additionally, when reviewing the May 13, 2024 assessment report from [REDACTED], the examiner reported that because the Appellant's scores fell within the Mild to Moderate range, a diagnosis of Autism Spectrum Disorder, Level 2, Requiring Substantial Support, was rendered. Mr. Bowen testified that if the Autism is found to be severe, it could be considered a related condition to meet program eligibility. In order to meet the severity level for program eligibility, however, the Autism must be a Level 3. The Appellant was diagnosed as having Autism Level 2, and therefore, does not meet the severity criteria for program eligibility.

The Appellant's mother, [REDACTED] testified that while in school, the Appellant cannot concentrate or sit still and has placed herself in dangerous situations at times. [REDACTED] argued that the Appellant cannot speak, she cannot communicate her needs, and she does not appear to have a sensitivity to pain. She stated that because the Appellant is a danger to herself, she cannot be left unaccompanied. [REDACTED] further testified that she has been advised that the Appellant would benefit greatly from Applied Behavior Analysis (ABA) therapy, however there

are no nearby facility which offer the ABA therapy. 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 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. There is no question that the Appellant experiences substantial limitations in some 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, 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) For a related condition to be considered severe, an individual's Autism Spectrum Disorder diagnosis must be a Level 3.
- 4) The Respondent showed by a preponderance of evidence that the Appellant did not meet the diagnostic criteria for program eligibility.

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 October 2024.

**Angela D. Signore
State Hearing Officer**