



November 21, 2024

[REDACTED]

RE: [REDACTED] A PROTECTED INDIVIDUAL v. WVDOHS  
ACTION NO.: 24-BOR-3230

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,

Todd Thornton  
State Hearing Officer  
Member, State Board of Review

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

cc: Stacy Broce, Department Representative  
Janice Brown, Department Representative  
Kerri Linton, Department Representative

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

■ A PROTECTED INDIVIDUAL,

**Appellant,**

v.

**Action Number: 24-BOR-3230**

**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 November 7, 2024, upon a timely appeal filed on September 17, 2024.

The matter before the Hearing Officer arises from the July 17, 2024 decision by the Respondent to deny participation in the Intellectual and Developmental Disabilities (I/DD) Waiver Program based on medical eligibility findings.

At the hearing, the Respondent appeared by Charley Bowen. The Appellant appeared pro se. Appearing as a witness was the Appellant's mother, ■. All witnesses were sworn and the following documents were admitted into evidence.

**Department's Exhibits:**

- D-1 BMS Provider Manual, Chapter 513 (excerpts)
- D-2 Notice of decision, dated July 17, 2024
- D-3 Independent Psychological Evaluation (IPE) dated June 10, 2024
- D-4 Individualized Education Program (IEP)  
■  
Meeting Date: May 22, 2023

- D-5 IEP, [REDACTED]  
Meeting Date: May 3, 2023
- D-6 Unspecified, undated notes
- D-7 IEP, [REDACTED]  
Meeting Date: May 6, 2024
- D-8 Eligibility Committee Report  
[REDACTED]  
Date: May 22, 2023
- D-9 Autism Evaluation  
[REDACTED]  
Date of Report: May 8, 2023
- D-10 Student Summary Report, 08/08/2018 – 05/18/2023  
Discipline Incident Report, 08/08/2018 – 05/18/2023
- D-11 Parent Information Report, dated March 16, 2023
- D-12 Psychological Evaluation  
Report date: February 20, 2023  
Date of Visits: February 3, 2023

**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 the Intellectual and Developmental Disabilities (I/DD) Waiver Program.
- 2) The Respondent, through its Bureau for Medical Services, contracts with Psychological Consultation & Assessment (PC&A) to perform functions related to the I/DD Waiver Program, including eligibility determination.

- 3) Charlie Bowen, a licensed psychologist employed by PC&A, reviewed the eligibility determination regarding the Appellant.
- 4) The Respondent issued a notice (Exhibit D-2), dated July 17, 2024, denying the Appellant's I/DD Waiver Program application.
- 5) This notice (Exhibit D-2) provided the basis for denial as, "Documentation submitted for review does not indicate an eligible diagnosis of Intellectual Disability or a Related Condition which is severe. Further, the need for an ICF level of care is not indicated based upon the documentation submitted for review," and, "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..."
- 6) The notice (Exhibit D-2) further detailed that the Appellant did not meet the deficit criteria in any of the six major life areas referenced.
- 7) An independent psychological evaluation (IPE) of the Appellant was conducted on June 10, 2024 (Exhibit D-3).
- 8) The Appellant was diagnosed (Exhibit D-3) with Autism Spectrum Disorder, Level 1; ADHD Combined Type; and Unspecified behavioral and emotional disorder.
- 9) Of these diagnoses, only Autism Spectrum Disorder is a potentially eligible diagnosis.
- 10) To be a related condition which is severe, Autism Spectrum Disorder must be diagnosed at Level 3.
- 11) A psychological evaluation of the Appellant was conducted on February 3, 2023. (Exhibit D-12)
- 12) The Appellant was diagnosed (Exhibit D-12) with Autism Spectrum Disorder, Level 2; and Attention-Deficit/Hyperactivity Disorder, combined presentation.
- 13) The Appellant does not have an eligible diagnosis for the I/DD Waiver Program.
- 14) The evaluating psychologist noted (Exhibit D-12) (emphasis in original), "Based on the results of the ADI-R and CARS-2, in-session observations, parent and teacher report on the ASRS, and information provided in the clinical interview, [REDACTED] **meets criteria for a diagnosis of Autism Spectrum Disorder, with accompanying language impairment requiring (Level 2) substantial support...**"
- 15) The Appellant was assessed in June 2024 (Exhibit D-3) utilizing the Wechsler Intelligence Scale, Children, 5<sup>th</sup> Edition (WISC-V), the Wide Range Achievement Test, 5<sup>th</sup> Edition (WRAT-5), the Adaptive Behavior Assessment System, 3<sup>rd</sup> Edition (ABAS-III), and the Childhood Autism Rating Scale (CARS).

- 16) The WISC-V is a test with a mean of 100, a standard deviation of 15, and results below 70 indicating intellectual disability.
- 17) The Appellant obtained a WISC-V Full Scale IQ result of 94. (Exhibit D-3)
- 18) The WRAT-5 is a test of academic achievement, or functional academics, with a mean of 100, a standard deviation of 15, and results below 55 indicating substantial delays in functional academics.
- 19) The Appellant obtained WRAT-5 scores greater than 100 in all subdomains. (Exhibit D-3)
- 20) The ABAS-III is a measure of adaptive behavior, with a mean of 10, a standard deviation of 3, and 'eligible' scores of 1 or 2 indicative of substantial delays.
- 21) The Appellant obtained no eligible scores on any skill area, or subdomain of the ABAS-III. (Exhibit D-3)
- 22) The CARS was completed by the Appellant's mother, and the Appellant obtained a 'raw score' of 44.5. (Exhibit D-3)
- 23) The evaluating psychologist (Exhibit D-3) noted, regarding the Appellant's CARS score, "Based off my interactions and observations with [REDACTED] on 6/10/24 this appears to be an invalid and unreliable measure."
- 24) On or about May 2, 2023, the Appellant received school services (Exhibit D-5) in a special education environment 23% of the time.
- 25) On or about May 22, 2023, the Appellant received school services (Exhibit D-4) in a special education environment 12% of the time.
- 26) On or about May 6, 2024, the Appellant received school services (Exhibit D-7) in a special education environment 12% of the time.
- 27) Mr. Bowen testified that individuals with an Autism Spectrum Disorder diagnosis at Level 3 are typically receiving school services in a special education environment 100% of the time.
- 28) The Appellant was administered the Autism Diagnostic Observation Schedule, Second Edition (ADOS-2), as part of a school autism evaluation. (Exhibit D-9)
- 29) The evaluating psychologist noted, regarding the Appellant's ADOS-2 results, "Upon review of this ADOS administration, current classroom observation, as well as previous interactions and observations with [REDACTED], results remain consistent with previously reported results (i.e., Non-Spectrum/Non-Autistic)." (Exhibit D-9)

## APPLICABLE POLICY

**Code of Federal Regulations 42 CFR § 440.150(a)(2) *Intermediate Care Facility (ICF/IID) services*** provided that *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***:

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***:

The Medicaid agency or its designee must evaluate each applicant's need for admission by reviewing and assessing the evaluations required by § 456.370.

**Bureau for Medical Services Provider Manual Chapter 513 explains medical eligibility for the I/DD Waiver program:**

**513.6.2 Initial Medical Eligibility**

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 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 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.

**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 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.

#### **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.

#### **513.6.2.3 Active Treatment**

Documentation must support 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

The Appellant is contesting the decision of the Respondent to deny the Appellant's application for I/DD Waiver Program Services based on medical eligibility findings. The Respondent must show, by a preponderance of the evidence that it correctly denied the Appellant's I/DD Waiver application on this basis.

I/DD policy requires medical eligibility for the I/DD Waiver Program to be established in four areas: diagnosis, functionality, a need for active treatment, and a requirement for an ICF/IID Level of Care. The Respondent issued a notice to the Appellant denying his application based on unmet medical eligibility in the diagnostic, functionality, and level of care requirements.

The psychological evaluations of the Appellant do not provide an eligible diagnosis for the I/DD Waiver Program. The Appellant has been diagnosed twice with Autism Spectrum Disorder (ASD). ASD can be an eligible, related condition diagnosis, if severe. To be severe, ASD must be diagnosed at Level 3. The Appellant was diagnosed with ASD at Level 1 and Level 2 and received ADOS-2 test results that suggested he is "non-spectrum/non-autistic." No other eligible or potentially eligible diagnoses were offered. Intelligence testing produced average results and were not indicative of an intellectual disability.

The Appellant's functionality was tested with the ABAS-III and WRAT-5 instruments. The Appellant obtained WRAT-5 results above the mean in every category. The Appellant does not demonstrate substantial delays in functional academics. The Appellant did not obtain any eligible scores on the ABAS-III. There was no evidence of substantial delays in three of the six major life areas defined in I/DD policy.

The Appellant receives services through the school system. The percentage of time the Appellant spends in a special education environment has fluctuated, with no evidence indicating it was greater than 23% of the time. The Appellant was designated as receiving school services for an 'other health impairment' initially, and later for this as well as autism. Testimony from the Respondent's expert witness noted that when ASD is diagnosed as Level 3, those individuals typically spend 100% of their time in a special education environment. The Appellant's required services in a school setting, in addition to unmet diagnostic and functionality requirements, do not support a need for the level of care provided in an ICF/IID facility.

The Appellant's mother did not agree with the diagnoses offered by the evaluating psychologists and believes the report is incomplete, but did not offer alternatives or additional evidence. The Appellant has documented behavioral problems at school. The Appellant's mother believes the Appellant met functionality requirements, even in functional academics where he obtained scores greater than the test average. The diagnostic tools and testing instruments used in the assessments of the Appellant produce reliable, quantifiable results and are given greater weight.

Based on the reliable information and testimony from the hearing, the Respondent has shown that it correctly denied the Appellant's I/DD application for unmet medical eligibility requirements.

**CONCLUSIONS OF LAW**

- 1) Because the Appellant did not have a diagnosis of a related condition which is severe, the Appellant did not meet the I/DD medical eligibility diagnostic component.
- 2) Because the Appellant did not have testing results indicating substantial adaptive deficits in at least three (3) of the six (6) major life areas identified by I/DD Waiver policy, the Appellant did not meet the functionality component of medical eligibility for I/DD.
- 3) Because the Appellant lacked evidence of a need for an ICF/IID level of care, the Appellant did not meet this medical eligibility requirement for I/DD.
- 4) Because I/DD policy requires each component for medical eligibility as a whole, the Appellant did not meet the medical eligibility requirements for the I/DD Waiver Program.
- 5) Because the Appellant did not meet medical eligibility for the I/DD Waiver Program, the Respondent must deny the Appellant’s application for the I/DD Waiver Program.

**DECISION**

It is the decision of the State Hearing Officer to **UPHOLD** the decision of the Respondent to deny participation in the I/DD Waiver Program based on medical eligibility findings.

**ENTERED this \_\_\_\_\_ day of November 2024.**

\_\_\_\_\_  
**Todd Thornton**  
**State Hearing Officer**