



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
4190 Washington Street, West
Charleston, WV 25313

Earl Ray Tomblin
Governor

Michael J. Lewis, M.D., Ph.D.
Cabinet Secretary

May 11, 2012

Dear -----:

Attached is a copy of the Findings of Fact and Conclusions of Law on -----hearing held May 3, 2012. His hearing request was based on the Department of Health and Human Resources' action to deny his application for benefits and services through the Medicaid I/DD Waiver Program.

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 Health and Human Resources. These same laws and regulations are used in all cases to assure that all persons are treated alike.

Eligibility for the I/DD Home and Community-Based Waiver Program is based on current policy and regulations. Policy states that in order to be eligible for the Title XIX I/DD Home & Community-Based Waiver Program, an individual must have a diagnosis of mental retardation and/or a related condition. The condition must be severe and chronic with concurrent substantial deficits that require the level of care and services provided in an Intermediate Care Facility for individuals with Mental Retardation and /or related conditions (ICF/MR Facility). [West Virginia Medicaid Regulations, Chapter 513 – Applicant Eligibility and Enrollment Process for I/DD Waiver Program]

Information provided during the hearing reveals that ----- does not meet the medical eligibility criteria required for participation in the Medicaid I/DD Waiver Program.

It is the decision of the State Hearing Officer to **uphold** the Department's action to deny ----- application for benefits and services through the Medicaid I/DD Waiver Program.

Sincerely,

Cheryl Henson
State Hearing Officer
Member, State Board of Review

cc: Chairman, Board of Review
Jennifer Eva, APS Healthcare / Kimberly Stitzenger-Jones, Asst. Atty. General / -----

**WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES
BOARD OF REVIEW**

IN RE: -----,

Claimant,

v.

Action No.: 12-BOR-1033

**WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,**

Respondent.

DECISION OF THE STATE HEARING OFFICER

I. INTRODUCTION

This is a report 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 West Virginia Department of Health and Human Resources' Common Chapters Manual. This fair hearing convened on May 3, 2012. The record was left open until May 7, 2012, to allow time for the Claimant's counsel to present a written closing statement.

All persons giving testimony were placed under oath.

II. PROGRAM PURPOSE:

The Intellectual and Developmental Disabilities (I/DD) Waiver Program is West Virginia's home and community-based services program for individuals with intellectual and/or developmental disabilities. It is administered by the Bureau for Medical Services pursuant to a Medicaid waiver option approved by the Centers for Medicare and Medicaid (CMS). The I/DD Waiver Program reimburses for services to instruct, train, support, supervise, and assist individuals who have intellectual and/or developmental disabilities in achieving the highest level of independence and self-sufficiency as possible. The I/DD Waiver Program provides services in natural settings, homes and communities where the individual resides, works and shops.

III. PARTICIPANTS:

-----, Counsel for Claimant

-----, Claimant

-----, Claimant's witness
-----, Claimant's witness
-----, Claimant's witness – by telephone
-----, Claimant's witness

Kimberly Stitzinger Jones, Counsel for Department
Jennifer Eva, Department's witness
Linda Workman, Department's witness

Presiding at the hearing was Cheryl Henson, State Hearing Officer and a member of the State Board of Review.

IV. QUESTION TO BE DECIDED:

The question to be decided is whether or not the Department was correct in its action to deny the Claimant's application for benefits and services through the Medicaid I/DD Waiver Program.

V. APPLICABLE POLICY:

West Virginia Medicaid Regulations, Chapter 513 – Applicant Eligibility and Enrollment Process for I/DD Waiver Program

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 Notice of Denial/Termination dated February 17, 2012
- D-2 Notice of Denial/Termination dated February 17, 2012, revised April 25, 2012
- D-3 Independent Psychological Evaluation dated February 2, 2012
- D-4 West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations, and Exclusions for I/DD Waiver Services
- D-5 Copies of pertinent provisions of Federal Medicaid Regulations: 42 CFR §§430.0, 435.1010 (2006), 483.440(a), 440.140 and 440.150

Claimant's Exhibits:

- C-1 Untitled Exhibit (Normal or Bell Shaped Curve) demonstrating how scores are viewed in comparison
- C-2 Psychometric Conversion Table

Vouched Exhibits:

- V-1 Federal Regulations, Subpart B – General Requirements §35.130, General prohibitions against

discrimination

VII. FINDINGS OF FACT:

- 1) On or about February 17, 2012, the Claimant was notified via a Notice of Denial/Termination (D-1) that his application for Medicaid I/DD Waiver Program benefits had been denied. This notice states, in pertinent part:

Your Waiver Application is hereby denied.

Your application was denied/terminated because:

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.

Specifically, the documentation failed to demonstrate substantial limitations in the following major life areas: Self-Care, Self-Direction, Mobility and Capacity for Independent Living.

Reviewer relied on the following fact: 2/2/12 IPE

It should be noted that the Claimant was awarded substantial adaptive deficits in the areas of Learning, and Receptive or Expressive Language.

- 2) On or about April 25, 2012, the Department sent the Claimant an “amended” Notice of Denial/Termination (D-2) which states in pertinent part:

Your Waiver Application is hereby denied.

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.

Specifically, the documentation failed to demonstrate substantial limitations in the following major life areas: Self-Care, Self-Direction, Receptive or Expressive Language, Mobility, and Capacity for Independent Living.

Reviewer relied on the following facts: 2/12/12 [2/2/12] IPE, 11/30/12 Notice of Denial

It should be noted that the Claimant was awarded a substantial adaptive deficit in the area of Learning. Receptive or Expressive Language was not awarded on this new “amended”

determination notice. The Claimant raised issue with the timeliness of the Department's second amended notice in relation to the May 3, 2012 hearing date. The Claimant was provided an opportunity for continuance of the May 3, 2012 hearing in order to allow preparation time for the hearing; the Claimant declined and communicated that he wished to continue with the hearing as scheduled. The Department clarified that the amended Notice of Denial/Termination (D-2) was not the result of a new evaluation, but was merely issued to correct a clerical error in the earlier notice.

- 3) The Claimant requested that the Hearing Officer take judicial notice of a portion of the "A.D.A." Federal Regulations (V-1) of which he purports the Department to be in violation. The Claimant purports that the Department is violating the law by artificially restricting the pool of people that is eligible for the I/DD Waiver Program based on an overly narrow interpretation of what is or is not a substantial limitation. The Department objected to the regulations being accepted as evidence, reasoning that the regulations are not relevant to the issue before the Board of Review - that being whether the Department has acted according to current policy in its decision to deny the Claimant's February 2012 application for I/DD Waiver Program services. The Claimant was allowed to vouch the record with the policy and judicial notice was not taken.
- 4) The Department's psychological consultant, Linda Workman, has been a licensed psychologist since 1981. She stated that as part of her job responsibilities as the Department's psychological consultant, she routinely reviews medical evidence and determines medical eligibility for the I/DD Waiver program. She stated that there are several parts to the eligibility process, the first being whether the individual has an eligible diagnosis. She added that the Claimant has an eligible diagnosis of Moderate Mental Retardation with an estimated IQ [Intelligence Quotient] of forty-five (45); however, he has historically established an IQ of fifty-two (52). She clarified that the Claimant had previously applied for the program and was denied during a November 2011 application process, and that this most recent denial involved a second medical opinion – new evaluation during February 2012.

Ms. Workman testified that the second part of the eligibility process involves determining whether the individual has substantial delays in three (3) of six (6) major life areas of functioning – Self-Care, Learning, Self-Direction, Receptive or Expressive Language, Mobility, and Capacity for Independent Living.

Ms. Workman stated that the area of Self-Care involves the ability to bathe, dress, feed one's self and basically taking care of your "person." For Self-Direction, she stated that this involves whether the individual can choose activities, adding that many individuals in institutions are unable to choose an activity because it never occurs to them. She simplified by saying this is the ability to express a preference. For Receptive or Expressive Language, she stated that this involves whether the individual has the ability to express his or her wants and needs and whether they can follow simple directions. For Mobility, she stated this involves whether the person can move from one place to another either on foot or with the use of a walker or other assistive device. For Capacity for Independent Living, she stated that this category is broken up into subcategories, including Home Living [can the individual perform simple household chores], Leisure Skills [whether the individual has activities they enjoy],

Social [can the individual interact with others in a socially appropriate manner], Employment [is the individual capable of working at a job], and Health and Safety [understanding dangers such as stepping out into traffic]. Community Use is another category shown on the Psychological Evaluation as a subcategory for Capacity for Independent Living. There are six (6) subcategories considered in determining substantial deficits in Capacity for Independent Living.

Ms. Workman added that in determining whether an individual meets the requirements in the area of Capacity for Independently Living, the Department looks for evidence that the individual has substantial delays in at least three (3) of the six (6) subcategories. She explained that this particular category of eligibility is not specifically addressed in the Department's policy manual in terms of how to determine if an individual has substantial deficits in the area – because the manual was written before the currently recommended and widely used ABAS II (Adaptive Behavior Assessment System –Second Edition) test was utilized. She further explained that before this test was widely utilized for the Department's evaluations, the ABS-S: 2 (Adaptive Behavior Scale – School, Second Edition) and the ABS-RC: 2 (Adaptive Behavior Scales – Residential and Community) were primarily used, and that neither of these two (2) tests addressed all the subcategories that are considered in the category of Capacity for Independent Living. Further, she stated that these two (2) tests went out of print and is no longer being used. She added that the Department's "Medical Review Team" came to a conclusion that a way to uniformly determine if individuals have substantial deficits in this area is to require that individuals show substantial deficits in three (3) of the six (6) subcategories in order to establish a substantial deficit for the category. She added that the reasoning was that since you must show three (3) substantial deficits in the six (6) major life areas to establish eligibility, it is reasonable to require the same ratio for Capacity for Independent Living.

Ms. Workman, in reviewing the February 2, 2012 Psychological Evaluation (D-3), stated that she found listed test scores from the November 7, 2011 ABAS II test. She added that the Claimant's mother is noted to have been the respondent from which (based on her responses to specific questions) the test was scored. She added that this is a test in which the "mean" is 100, and the "standard deviation" is three (3). She added, "...in other words, if you scored a score of ten (10) on this test, you would be average in comparison with other people your age. As you get farther away from ten (10), you are now becoming more and more different from the average population. The Waiver criteria states that individuals – on standardized tests of adaptive behavior – must score three (3) standard deviations below the mean in order to satisfy the eligibility requirement for substantial delay." She added that on this particular test, the standard deviation of three (3) equals a score of one (1). She added, "...however, the manual also says that on tests that are reported in percentile ranks – because the lowest score you can get on a test like that is less than one (1) percentile, and because less than one (1) percentile also extends into the score area of two (2) – we use two (2) as well as an eligible score, and when we use two (2) as an eligible score, we are capturing individuals who score less than one (1) percentile and we are also capturing individuals who score above that, so we are getting a false positive on that, but we are erring on the side of eligibility."

In reviewing the November 2011 test scores, Ms. Workman found that under Functional

Academics the Claimant had a scaled score a two (2), which she determined relates to the major life area of Learning. He also scored a one (1) under Self-Care. She stated that the Claimant was awarded these two (2) areas during the November 2011 application decision.

In discussing which areas of the ABAS II test were considered for determining whether the Claimant met the Capacity for Independent Living criteria, Ms. Workman stated that she looked at the provided scores under the categories of Community Use, Home Living, Health and Safety, Leisure, and Social. Ms. Workman explained that on the November 2011 ABAS II test the Claimant met the criteria for Capacity for Independent Living in only one subcategory and he was not awarded this category during his November 2011 application process. She added that scores were not provided for the employment category.

Ms. Workman, in addressing the Claimant's test scores for the ABAS II test completed during February 2011, stated that those scores were overall lower. She added that, in actuality, there is not a good reason for this to happen within such a short time span. Further, she added, even though this occurred, the only area where the Claimant met the eligibility criteria was the area of Functional Academics (Learning) where the Claimant scored one (1).

Ms. Workman stated that the third area of eligibility involves whether the individual would benefit from continuous active treatment. She stated that the evaluating psychologist noted that the Claimant requires active treatment; specifically, that the Claimant requires active treatment in regard to prompting and monitoring him in performing most personal care tasks.

Ms. Workman testified that prompting and monitoring are not considered active treatment. She stated that active treatment is an organized plan of aggressive and consistent treatment to teach people the most basic of skills. Ms. Workman stated that the psychologist's narrative suggests that she believes the Claimant needs a plan of supervision and monitoring and not active treatment.

On cross-examination, Ms. Workman stated that she has done thousands of psychological evaluations throughout her career, but added that as she has gotten older she has shifted away from that work and now the bulk of her time is taken up as a psychological consultant for the Department, reviewing approximately fifty (50) psychological evaluations monthly completed by other psychologists and determining eligibility for the Waiver program from that and other submitted information. Ms. Workman stated that she reviewed submitted information and determined Waiver eligibility for the Claimant during November 2011 as well as February 2012. When asked if she saw a wide range between test scores in comparing the November 2011 to 2002 test scores, Ms. Workman stated that there is a significant difference in several areas.

In discussing her private company's involvement in training, Ms. Workman stated that once a psychologist makes known their interest to become a participating psychologist for the purposes of the Waiver program, she and two other psychologists from her company are responsible for training those psychologists in the policy requirements for the program. She stated that the psychologist receives a training certificate and is then eligible to provide psychological evaluations for purposes of the Waiver program. She added that she does not know who trained the psychologist who completed the Claimant's evaluations. She stated

that the decision to use the ABAS II test was made by the Department and not by her company, but was then incorporated into the entire procedure for evaluating individuals for the program as a recommended test. She added that when the policy manual was printed other tests were in use (ABS-S:2, ABS-RC:2), but those tests went out of print, and the Department was faced with determining which available test might be an acceptable substitute, and ultimately decided that the ABAS II was most compatible with the Waiver program needs. She stated that she conducted research to determine which test or tests would best provide the information needed when assessing an individual for the Waiver program, and that the Department had access to her research which found the ABAS II to be the best tool for those purposes; however, she stated she was not present when the Department made its decision. When asked whether the “Vineland” test went out of print, Ms. Workman stated that the Vineland was still available but was rejected for several reasons as a recommended instrument. She also stated she does not train the psychologists on how to instruct the test participants in completion of the tests.

In discussing the Claimant’s Exhibit C-1, Ms. Workman stated that the Normal or Bell Shaped Curve is a theoretical concept of how attributes are distributed. In explaining the diagram, she stated that in the middle or highest point of the “curve” is the “mean,” which shows a divide or middle and half the people would fall above and half would fall below this “mean” point for the attribute you are trying to measure, whether it be IQ, adaptive behavior, height, weight, etc. She added that it is broken into three (3) standard deviations, both negative and positive, and the concept is that most people (approximately 68%) will fall in the middle of the curve where it is the “biggest,” and as you move away from the mean, there are fewer and fewer people in the population. She added that 98% of the population falls between two (2) standard deviations below and two (2) standard deviations above the mean. She stated that everyone else (the few that are left) would be past that point which extends to infinity. She added that this concept becomes relevant when looking at adaptive behavior scores.

When asked about the section of policy that specifies different ways to determine a substantial deficit – specifically, the policy that defines a substantial deficit in one way as, “...or the average range or equal to or below the 75th percentile when derived from MR [Mental Retardation] normative populations when mental retardation has been diagnosed and the scores are derived from a standardized measure of adaptive behavior” – Ms. Workman stated that there is no test currently used that would provide those types of scores. She reiterated her earlier testimony that, “those tests went out of print” – referring to the ABS-S: 2 and the ABS-RC: 2 tests which she stated provided a set of standard scores for individuals diagnosed with mental retardation and a set of scores for individuals who were not, “so the less than one (1) percentile scores related to that population, and the 75th percentile relates to the MR population. She stated that the psychologists are free to provide any tests that they feel are relevant in addition to the ABAS II (of which scores are derived from a general norms population) for consideration, and that they often do. She further stated that there are no tests used now where scores are reported in percentiles using an MR population as a normative sample. When asked specifically about the Vineland test, Ms. Workman stated that this test is still available and could potentially be used by a psychologist and submitted for consideration; however, the Vineland was not utilized in this instance.

When asked to explain the Claimant's Exhibit C-2 – Psychometric Conversion Table, Ms. Workman stated that she would attempt to explain the table, but added that it is a very complicated table which involves, “a semester's worth of material.” She stated that the column labeled “Z-Score” is a measurement where the mean is zero (0), and the standard deviation is one (1). She stated that all the other columns are based on this and they report in different formats the concept of how far a score is from the mean. As an example, she referred to the “Standard Score” column and the score of 100, and explained that if you look at the “Percentile Rank” column you will see that it equates to a Percentile Score of fifty (50), and looking further in the Scaled Score column it equates to a Scaled Score of ten (10). She simplified that these scores are “in the middle,” and added that the table can be utilized as a way to compare scores to determine if they are compatible. She also explained that in comparing the Percentile Rank column with the Scaled Score column, it becomes clear that when the Department accepts a Scaled Score of two (2), that it is including individuals with Percentile Rank scores of between .4 and one (1); a score of one (1) percentile typically is not an eligible score according to policy which requires a score of less than one (1) percentile, but the Department is including some of those individuals if they show a Scaled Score of two (2).

When asked a hypothetical question regarding if she would have concerns regarding the reliability of test results if a parent who has dementia completed the ABAS II assessment questionnaire, Ms. Workman stated that it would depend on the degree of dementia and other factors. When asked a hypothetical question regarding if she would have concerns if a psychologist was filling in information regarding the individual, the Department objected to the line of questioning as no evidence had been presented as a foundation for this line of questioning; the objection was sustained.

When asked to explain why the employment subcategory for Capacity for Independent Living was not evaluated, Ms. Workman stated that neither of the psychologists who administered the ABAS II tests for this Claimant submitted employment scores for him and she is unable to explain why that occurred.

When asked why she did not consider the General Adaptive Composite (GAC) score or the Social or Practical adaptive domain scores that are available through the ABAS II test, Ms. Workman responded that she did not use those scores because they do not apply to the six (6) major life areas. She stated that, to her knowledge, she has never met the Claimant prior to the hearing and she has never conducted an assessment on him.

- 5) The first of the Claimant's witnesses, -----, is the Claimant's father. ----- stated that the Claimant lives with him and his wife. He added that he has been retired for seventeen (17) years. He was not clear on whether he has answered questions regarding the Claimant's adaptive behavior for the assessing psychologist. He stated that he does remember answering questions for the psychologist. He stated that his son was in “Special Ed” while in school. He added that his wife bore most of the responsibility for teaching the Claimant and keeping him in school. He added that he now needs help taking care of the Claimant because his wife has dementia and, “it is just about all I can handle.” He stated that the Claimant knows what

the bus schedule is and can ride the bus, but if something happens to upset the schedule he would not know what to do. He stated that his son can tell time, but cannot read the bus schedule. He added that he cannot make change for a dollar. He stated that he sets up the Claimant's medication in a pill planner, and reminds him when to take his medication. He added that the Claimant does not know what the medication is for. He stated that the Claimant can sometimes take himself to the doctor, but other times he cannot. He stated that his wife took the Claimant to the bus pickup site, and showed him how to "catch the bus." He stated that he worries about his son because he cannot live by himself.

- 6) The Claimant's next witness, -----, is the Claimant's friend and former care provider. He testified by telephone. -----stated that he has known the Claimant for eleven (11) years, having met him while he was the Program Director at [REDACTED]. He stated that the Claimant was in ISS [Individualized Support Setting] for several years, and that he was the Claimant's Treatment Coordinator in early 2001 and that he has also worked with him as an Advocate and has known him since that time. He stated that he has seen the Claimant within the last month and added that his condition has not improved. He stated that he has discussed with the Claimant his living situation, and believes that he meets the criteria for the Waiver program, and that he requires 24/7 staffing to address his personal living skills, his self-direction skills, and his capacity for independent living. He added that from his memory of the Claimant, he is dependent on his family for making and keeping medical appointments, planning his days, keeping him safe, helping with personal hygiene. He stated that he believes that anyone who has a diagnosis of mild to moderate mental retardation who desires to be more independent and live in a supported apartment setting can benefit from the Waiver program. When asked on cross-examination if he is a licensed psychologist, he replied that he is not, and added that he is a Therapeutic Consultant through the Waiver program. He stated that as a Therapeutic Consultant he receives ongoing training of working with individuals with developmental disabilities

- 7) The Claimant's next witness, -----, is the Claimant's friend and previous provider. He stated that he is a licensed clinical psychologist. He stated that he is the Executive Director for [REDACTED] and that generally the company provides psychological services and Title XIX Waiver services. He added that the letters [REDACTED] do not represent anything in particular. He stated that he has known the Claimant since 1991, and that he has maintained contact with the Claimant. He added that the Claimant sometimes comes to his home to do "odd jobs." He stated that the Claimant requires constant supervision in order to perform the odd jobs, and if he is left alone he will not be able to perform small tasks properly. He stated that he essentially does the activity with him and that a task that would take him two (2) hours to perform, it would take eight (8) hours for him to do the activity with the Claimant. He estimated that the Claimant's social behavior is average when compared to other like individuals, but his intellectual ability to do things is probably a little less than average. He stated that he believes the Claimant is not able to take care of himself, and tends to befriend people with whom he should not be interacting. He stated that he has observed the Claimant's mother telling him to do simple tasks, and that although the Claimant will stay on task he needs constant supervision in order to do the task properly. He stated that the Claimant likes to please people. He stated that he believes the Claimant needs Waiver services as he is comparable to many of the Waiver eligible individuals with which he works.

He clarified by saying that the Claimant does not have the behavioral issues many of the Waiver eligible individuals have, but on a social level and cognitively he has more needs. He stated that although his company has done a formal psychological evaluation for the Claimant, he has not done one personally.

- 8) The Claimant's next witness, -----, is the Claimant's sister and guardian. She stated that she is an [REDACTED]. She stated that when the Claimant was younger that she always spoke up for him because she could understand what he was trying to say. She stated that her mother always took the Claimant to school every day and that he never went to the appropriate school where he lived because her mother always took him to the best school. She added there was very little integration during his school years. She stated that she completed the questionnaire during the November 2011 evaluation, and that she was given no instructions by the psychologist in how to complete the questionnaire. She stated that she did not have difficulty and felt she answered the questions appropriately. She stated that the Claimant is not able to dress himself appropriately and he will put on shirts inside out, wrinkled, and that his belt is applied inappropriately. She stated that she had to take him to be groomed prior to the hearing because his hair was a mess, and whiskers everywhere. She stated that he can take an electric razor across his face but he cannot do this appropriately. She stated that he will dress inappropriately for the weather, wearing a coat in the summer, thermal socks in July, etc. She stated that he can get into the shower independently, but still reeks of body odor afterwards. She stated that he was very unkempt when she arrived from [REDACTED] for this hearing, and attributed this to the fact that her mother now has dementia and is unable to care for him. She stated that her mother used to do those things for him. She stated that the Claimant is able to put a sandwich together if the items are there for him, but he has no clue about purchasing the food. She stated that the Claimant is able to buy a shirt by himself but he will purchase the wrong size. She stated that she believes that he is taken advantage of with his money because he does not understand. She stated that he has the physical ability to perform housecleaning, but he does not recognize that something needs to be done. She stated that as a child he participated in Special Olympics. She stated that the Claimant can ride a bus, but he often misses the bus, and when the bus schedule changes he is not able to compensate. She stated that the Claimant has one friend and sometimes he eats lunch with him along with his parents, but that there is no interaction between them. She expressed frustration with her experiences in trying to find resources for the Claimant, and stated that every contact she made resulted in her being told that the person had to be receiving Waiver services. She stated that the Claimant has worked some, but every job he has had he has lost because there was no assistance. She stated that the Claimant will eat the same thing repetitively for meals unless offered something different. She added that the Claimant is not able to live alone, and that if something happens to her parents she does not know what will happen to him. She expressed frustration with comments made by the psychologist who evaluated the Claimant during February 2012 and stated that she believed the psychologist made assumptions about the Claimant's abilities in error, and that she believed the psychologist relied too heavily on answers provided by the Claimant's mother who has dementia, which may have affected the accuracy of the evaluation results.
- 9) The Department contends that its decision to find that the Claimant has an eligible diagnosis

of Moderate Mental Retardation – but not substantial deficits in at least three (3) of the six (6) major life areas, is correct based on the information provided for review. The Department contends the evidence supports a substantial deficit in the area of Learning only.

- 10) The Claimant contends that the Department did not make the correct decision in denying that the Claimant has substantial deficits in at least three (3) of the six (6) major life areas. The Claimant contends that the evidence shows that he has substantial deficits as defined by policy in the major life areas of Self-Care, Self-Direction, Receptive or Expressive Language, and Capacity for Independent Living.

The Claimant contends that the Claimant’s scaled scores of three (3) in the areas of Communication, Self-Direction, Functional Academics, and Self-Care indicate that he has three (3) or more substantial deficiencies in four (4) major life areas because, “it is an average score (at or below the 75th percentile) for persons with mental retardation. The Claimant adds that the Department’s practice to include only and scaled score of one (1) or two (2) is unreasonably restrictive for a person with ID/MR [Intellectual Disability/Mental Retardation.

The Claimant contends that the Department’s procedure for determining whether applicants have substantial limitations in the major life area of Capacity for Independent Living is arbitrary and capricious where it is not discernible or scientifically valid.

The Claimant contends that the Department was not correct in not considering the Claimant’s Practical Composite score and contends that this score assesses Community Use, home Living, Health and Safety, and Self-Care; Claimant also contends that the Social Composite score was ignored by the Department and should have been considered because it purportedly assesses Social and Leisure Skills. The Claimant contends the scores in these areas meet the policy requirements for a substantial deficit.

- 11) West Virginia Medicaid Regulations, Chapter 513 - Applicant Eligibility and Enrollment Process for I/DD Waiver Services (D-4), includes the following pertinent medical eligibility criteria:

513.3.2 Initial Medical Eligibility

To be medically eligible, the applicant must require the level of care and services provided in an ICF/MR [Intermediate Care Facility/Mental Retardation] 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/MR provides services in an institutional setting for persons with intellectual disability or a related condition. An ICF/MR 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/MR.

The MECA determines the qualification for an ICF/MR level of care (medical eligibility) based on the IPE that verifies that the applicant has mental retardation 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 I/DD Waiver 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:

- a. Diagnosis;
- b. Functionality
- c. Need for active treatment.

513.3.2.1 Diagnosis

The applicant must have a diagnosis of mental retardation 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 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 mental retardation because this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons, and requires services similar to those required for persons with mental retardation.

Additionally, the applicant who has a diagnosis of mental retardation and/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 513.3.2.2.

513.3.2.2 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 (home living, social skills, employment, health and safety, community and leisure activities).

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 percentile when derived from MR normative populations when mental retardation 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.

513.3.2.3 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.

VIII. CONCLUSIONS OF LAW:

- 1) Regulations that govern the I/DD Waiver Program require eligible individuals to have a diagnosis of mental retardation (and/or a related condition), which must be severe and chronic, in conjunction with substantial deficits in three (3) or more of the major life areas which manifested prior to age 22. “Substantially limited” is defined on standardized measures of adaptive behavior scores as three (3) standard deviations below the mean or less than one (1) percentile when derived from Non-MR normative populations, or in the average range or equal to or below the seventy-fifth (75) percentile when derived from MR normative populations. 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. This means there must first be eligible scores and that only if there are eligible scores is the information in the narrative considered.

For the purposes of this hearing, the test scores submitted for review were derived from a “general norms” population from the ABAS II test administered by the psychologist; therefore, the policy which requires a score to be three (3) standard deviations below the mean or less than one (1) percentile is applicable. Testimony from the Department’s psychological consultant was clear in this area, which provided that those tests that provide scores derived from MR normative populations were not provided as evidence for this Claimant. The psychological consultant’s testimony that a scaled score of one (1) or two (2) is needed to show a substantial deficit in this instance is reasonable and supported by the Claimant’s Exhibit-2 which shows that a scaled score of one (1) or two (2) equates to including all individuals who score less than one (1) percentile, and also some of those individuals who score one (1) percentile – who are by policy normally precluded from being eligible for a substantial deficit.

- 2) Clinical evidence submitted at the hearing fails to confirm that the Claimant is demonstrating substantial adaptive deficits in three (3) or more of the major life areas. While the Department conceded that the Claimant is demonstrating a substantial adaptive deficit in Learning, the standardized measures of adaptive behavior scores fail to confirm substantial adaptive deficits in any of the other functional areas reviewed for eligibility.

The Claimant’s contention that the evidence shows he has substantial deficits in the major life areas of Self-Care, Self-Direction, Receptive or Expressive Language, and Capacity for Independent Living is not supported by the evidence. The Claimant’s contention that his scaled scores of three (3) in the areas of Communication, Self-Direction, Functional Academics, and Self-Care qualify as evidence of substantial deficits is not supported by policy.

The Claimant contends that the Department’s procedure for determining whether applicants have substantial limitations in the major life area of Capacity for Independent Living is arbitrary and capricious where it is not discernible or scientifically valid. The evidence is not

sufficient to support this claim. The Department determined – in the absence of specific policy addressing the issue – that it would establish a procedure that requires an individual to show substantial deficits in three (3) of six (6) subcategories that are relevant and measured in assessing an individual’s capacity for independent living. The Department’s reasoning for this procedure was that it is a comparable requirement to the Department’s listed policy for establishing overall medical eligibility for the program which calls for an individual to show three (3) substantial deficits out of six (6) major life areas. This procedure is found to be a reasonable one.

The Claimant’s contention that the Department was not correct in declining to consider the Claimant’s Practical Composite score and Social Composite score is not supported by policy.

- 3) Whereas the Claimant does not meet the functionality requirements in the medical eligibility criterion, medical eligibility for participation in the Medicaid I/DD Waiver Program cannot be established.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the action of the Department to deny the Claimant’s benefits and services through the I/DD Waiver Program.

X. RIGHT OF APPEAL:

See Attachment.

XI. ATTACHMENTS:

The Claimant’s Recourse to Hearing Decision.

Form IG-BR-29.

ENTERED this 11th Day of May, 2012.

**Cheryl Henson
State Hearing Officer**