



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
203 East Third Avenue
Williamson, WV 25661

Earl Ray Tomblin
Governor

Rocco S. Fucillo
Cabinet Secretary

August 20, 2012

Dear -----:

Attached is a copy of the Findings of Fact and Conclusions of Law on your Fair Hearing held August 16, 2012. The hearing request was based on the Department of Health and Human Resources' denial of your daughter -----'s application for the Title XIX 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 Waiver Program is based on current policy and regulations. Policy states that an applicant must demonstrate a requirement for the level of care and services provided in an Intermediate Care Facility for Persons with Mental Retardation (ICF/MR) (West Virginia Medicaid Provider Manual, Chapter 513, §513.3.2), must demonstrate a benefit from continuous active treatment (West Virginia Medicaid Provider Manual, Chapter 513, §513.3.2.3), and must demonstrate the presence of substantial deficits in at least three of six major life areas (including self-care, receptive or expressive language, learning, mobility, self-direction, and capacity for independent living) supported not only by relevant test scores, but also the narrative descriptions of the applicant's functioning in these areas (West Virginia Medicaid Provider Manual, Chapter 513, §513.3.2.2).

Information submitted at the hearing established that your daughter's application for the Title XIX I/DD Waiver Program does not demonstrate substantial deficits in at least three of the six major life areas listed above.

It is the decision of the State Hearing Officer to **uphold** the Department's denial of your daughter's eligibility for the Title XIX I/DD Waiver Program.

Sincerely,

Stephen M. Baisden
State Hearing Officer
Member, State Board of Review

cc: Erika H. Young, Chairman, WV Board of Review
Tiffany Angel, APS Healthcare

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

IN RE: -----,

Claimant,

v.

ACTION NO.: 12-BOR-1278

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

Respondent.

DECISION OF 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 was convened on August 16, 2012, on a timely appeal filed May 2, 2012. This hearing originally was scheduled for July 11, 2012, but was rescheduled at the request of the Department.

II. PROGRAM PURPOSE:

The Medicaid Home and Community-Based I/DD Waiver Program (authorized under Title XIX, Section 1915(c) of the Social Security Act) provides an alternative to services available in Intermediate Care Facilities for individuals with Mental Retardation or related conditions (ICF/MR). The primary purpose of an ICF/MR facility is to provide health and rehabilitative services. An ICF/MR facility provides services to persons who are in need of and who are receiving active treatment.

West Virginia's I/DD Waiver Program provides for individuals who require an ICF/MR level of care, and who are otherwise eligible for participation in the program, to receive certain services in a home and/or community-based setting for the purpose of attaining independence, personal growth, and community inclusion.

III. PARTICIPANTS:

-----, Claimant's Representative and Mother

Linda Workman, Psychological Consultant to the WV Bureau of Medical Services,
Department's Representative

Presiding at the Hearing was Stephen M. Baisden, State Hearing Officer and a member of the
State Board of Review.

The hearing was convened by telephone conference call.

The Hearing Officer placed both participants under oath at the beginning of the hearing.

IV. QUESTION TO BE DECIDED:

The question to be decided is whether or not the Department was correct in its decision to deny
Claimant's application for the Title XIX I/DD Waiver Program.

V. APPLICABLE POLICY:

I/DD Waiver Manual, Chapter 513 – *Covered Services, Limitations, and Exclusions for I/DD
Waiver Services*, effective October 1, 2011

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 I/DD Waiver Manual, Chapter 513 – *Applicant Eligibility and Enrollment Process*,
§513.3
- D-2 Notice of denial of Title XIX I/DD Waiver Services, dated April 11, 2012
- D-3 Independent Psychological Evaluation from ----- Psychological Services, -----, WV,
conducted on March 26, 2012
- D-4 Evaluation Report from ----- Rehabilitation Center, ----- Children's Hospital, dated
August 10, 2011
- D-5 Developmental Assessment Annual Update from -----, BSN/DS, -----, WV,
conducted on September 14, 2011

VII. FINDINGS OF FACT:

- 1) West Virginia Medicaid Regulations, Chapter 513 - *Applicant Eligibility and
Enrollment Process for I/DD Waiver Services* (Exhibit D-1), states as follows:

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 as evidenced by required

evaluations and other information requested by the IP [Independent Psychologist] or the MECA [Medical Eligibility Contracted Agency] 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 [Independent Psychological Evaluation] 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.

- 2) Claimant's mother submitted an application to determine Claimant's eligibility for benefits and services through the Title XIX I/DD Waiver program. The Department evaluated this request and sent a notice of denial to Claimant on April 11, 2012. (Exhibit D-2.) The notice explained that the reason for denial, in pertinent part, was:

Documentation submitted for review 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, learning, mobility, self direction and the capacity for independent living.

- 3) Department's Representative testified that she was the psychologist consultant who evaluated Claimant's application. She testified that the reason for the denial of Claimant's application was that it did not document the presence of substantial adaptive deficits, as indicated in the denial letter. She testified that the documentation demonstrated a substantial adaptive deficit in the area of receptive or expressive language only.
- 4) Department's Representative testified that in order for an applicant to receive an adaptive deficit in a major life area as identified by the I/DD Waiver Program, the submitted documentation must show testing results that are at least three standard

deviations below the mean or in the lowest one percentile rank compared to a normative sample of the general population. She testified that the presence of a deficit in any of the six major life areas must be supported not only by relevant test scores, but also by the narrative descriptions of the deficits contained in the submitted documentation.

- 5) Claimant's application for the I/DD Waiver program included an Independent Psychological Evaluation (IPE) conducted by ----- Psychological Services of -----, WV, on March 26, 2012. (Exhibit D-3.) Department's Representative noted that the IPE indicates Claimant was two years, nine months old at the time of the assessment and that the IPE indicates she "always slept poorly, crawled late, and other milestones were slightly delayed." She submitted into evidence the IPE, which contains the following pertinent information:

Self-Care

Department's Representative stated that on page 2 of the IPE, in the section labeled "Current Behaviors," the evaluator wrote "[Claimant] is working on toilet training; she will use a toilet sometimes. She has begun to pull at a diaper that needs changed. She does not feed herself using utensils (though she will spoon-feed others); she does finger-feed. In the bathtub, she will use a washcloth to help scrub. She will dump water over her hair to rinse shampoo . . . [Claimant] will offer her limbs to assist her parents with dressing her. She does not fasten clothing." The IPE reported the results of the Adaptive Behavior Assessment System, Second Edition (ABAS-2). Department's Representative testified that the ABAS-2 lists scores of one to ten, with a standard deviation of three, therefore, three standard deviations below the mean would be a score of one in each of the skill areas the test measures. She added that if an applicant scores a two in any skill area, he or she may be awarded a substantial deficit if the narrative information supports this. The IPE reports that the ABAS-2 rated Claimant with a score of four in the area of self-care.

Receptive or Expressive Language

The Department assessed an adaptive deficit in this major life area.

Learning

Department's Representative stated that on the section labeled "Current Behaviors," the evaluator wrote "[Claimant] can do matching color and number games on her iPad. She can count to five by rote using her fingers, with prompting. She can match pictures of animals, and point to animals on command. She can point to her body parts. She can indicate her age using her fingers." In the section labeled "Current Evaluation: Intellectual/Cognitive," the evaluator has written, "The examiner attempted to administer the nonverbal subtests of [a pre-academic functioning test]. [Claimant] cried, and would not look at or point to the test materials, or follow the examiner's directions. No formal cognitive evaluation could be completed." The IPE reports that the ABAS-2 rated Claimant with a score of six in the area of functional pre-academics.

Mobility

Department's Representative stated that on the section labeled "Current Behaviors," the evaluator wrote "[Claimant] is fully mobile. She walks well, and can run. She can navigate stairs holding a rail. She can step up and down from curbs, and can navigate slopes." The IPE reports that the ABAS-2 rated Claimant with a score of twelve in the area of mobility.

Self-Direction

Department's Representative stated that on the section labeled "Current Behaviors," the evaluator wrote "[Claimant] will point to things she wants. She eats only five foods, but will point to the foods she wants . . . She clearly recognizes her family members and avoids strangers . . . She will pick out favorite shoes." The IPE reports that the ABAS-2 rated Claimant with a score of eight in the area of self-direction.

Capacity for Independent Living

Department's Representative testified that the major life area of capacity for independent living is comprised of six sub-categories. She pointed out that I/DD policy (Exhibit D-1) identifies these sub-categories as home living, social skills, employment, health and safety, community use and leisure activities. She testified that in order to receive an adaptive deficit for this major life area, the applicant must demonstrate adaptive deficits in three of the six sub-categories. The IPE reports that the ABAS-2 rated Claimant with a score of seven in the area of home living, a five in the area of social skills, a six in the area of health and safety, a five in the area of community use, and a six in the area of leisure activities. The IPE did not evaluate Claimant in the sub-category of employment.

- 6) Claimant's Representative, her mother, testified that Claimant has substantial deficits in life areas other than expressive or receptive language. She stated that Claimant cannot feed herself with a fork or spoon, she uses her fingers to eat. She stated Claimant does not give herself a bath, she just dumps water on her head. She stated her daughter will use a washcloth to mimic her behavior and rub the washcloth around on her body, but she does not clean herself. She stated her daughter was improving in tooth brushing at the time of the evaluation, but that has deteriorated now and her daughter has to be physically restrained in order for someone to brush her teeth. She stated her daughter will not allow anyone to cut her hair or trim her finger- or toenails. She stated her daughter can mimic someone counting from one to five but she cannot recognize a numeral "one" or "five." She stated her daughter can recognize and name certain body parts, but it is usually just her facial body parts such as her eyes, nose or mouth. She stated Claimant can work puzzles, and can perform hand gestures to children's songs such as "The Wheels on the Bus." She stated that in the area of self-direction, her daughter only eats a small selection of foods and she hates to have her diaper changed. Claimant's mother did not dispute that her daughter should not have received a substantial deficit in the major life area of mobility.

VIII. CONCLUSIONS OF LAW:

- 1) An applicant for the Title XIX I/DD Waiver Program must demonstrate substantial adaptive deficits in at least three out of six major life areas, which are self-care, receptive or expressive language, learning, mobility, self-direction, and capacity for independent living.
- 2) The Department assessed a substantial adaptive deficit only in the major life area of receptive or expressive language.
- 3) The documentation submitted for review with the Claimant's I/DD application did not demonstrate substantial adaptive deficits in the areas of self-care, learning, mobility, self-direction or the capacity for independent living. The results of the ABAS-2 indicated Claimant did not meet the policy requirement of three standard deviations below the mean for each of these areas.
- 4) Because Claimant's application did not contain documentation of substantial adaptive deficits in at least three of the six major life areas of self-care, language, learning, mobility, self-direction, and capacity for independent living, the Department was correct to deny Claimant's application to the Title XIX I/DD Waiver Program.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the decision of the Department to deny Claimant's application for the Title XIX 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 20th Day of August, 2012.

**Stephen M. Baisden
State Hearing Officer**