



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

July 27, 2012

Dear -----:

Attached is a copy of the Findings of Fact and Conclusions of Law on your Fair Hearing held July 19, 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 (West Virginia Medicaid Provider Manual, Chapter 513, §513.3.2.2).

Information submitted at the hearing established that the psychological evaluation portion of Claimant's application did not support the presence of substantial adaptive deficits in at least three major life areas identified for Title XIX I/DD Waiver Program eligibility.

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-1279

**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 July 19, 2012, on a timely appeal filed May 2, 2012.

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

Rick 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 Hearings 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 12, 2012
- D-3 Independent Psychological Evaluation from ----- Psychological Services, WV,
conducted on March 21, 2012

Claimant's Exhibits

- C-1 Letter from -----, Ed.D., School Psychologist, -----, --, undated
- C-2 Letter from -----, MD, dated November 5, 2010

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 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.

- 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 12, 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, receptive or expressive language, learning, mobility and the capacity for independent living.

- 3) Department's Representative testified that he was the psychologist consultant who evaluated Claimant's application. He testified that the primary 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. He testified that the documentation demonstrated a substantial adaptive deficit in the area of self-direction 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 application 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. He 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 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) completed by ----- Psychological Services of -----, WV. (Exhibit D-3.) Department's Representative submitted this document into evidence and stated that this document provided the Department with the information which led to Claimant's denial.

Self-Direction

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

Receptive or Expressive Language

Department's Representative stated that on page 3 of the IPE, in the section labeled "Current Status," the evaluator indicated that under "Receptive/Expressive Language," Claimant ". . . is verbal, and uses short sentences. She is able to follow simple commands and answer basic questions."

Mobility

Department's Representative stated that on page 3 of the IPE, in the section labeled "Current Status," the evaluator wrote "[Claimant] is ambulatory, with a slow, lumbering gait. She drags her feet. She can navigate curbs, steps, and slopes independently."

Learning

The IPE reported the results of the Wide-Range Achievement Test, Fourth Edition (WRAT4), administered to Claimant as part of her evaluation. The IPE indicates the WRAT4 is a "standardized screener of academic scores with a mean of 100 and a standard deviation of 15." The IPE reports that on the WRAT4, Claimant scored a 72 in *Word Reading*, a 70 in *Spelling* and a 65 in *Math Computation*. With a mean score of 100 and a standard deviation of 15, Claimant would have had to score 55 or lower in each of these three areas in order to score three standard deviations below the mean.

Self-Care

The IPE reported the results of the Adaptive Behavior Assessment System, Second Edition (ABAS-2). The IPE indicates the ABAS-2 is "a standardized comprehensive norm reference measure of adaptive behavior for individuals from birth to 89 years old." 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. He added that if an applicant scores a two in any skill area, he may award a substantial deficit if the narrative information supports this. The IPE reports that the ABAS-2 rated Claimant with a score of three in the area of self-care.

Capacity for Independent Living

Department's Representative testified that the major life area of capacity for independent living is comprised of six sub-categories. He 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. He 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 two in the area of social skills, a four in the area of health and safety, a one in the area of community use, and a six in the area of leisure activities. He added that even though she scored a two in the sub-category of social skills, he awarded Claimant an adaptive deficit for this sub-category, but this was not enough to award Claimant with an adaptive deficit for capacity for independent living.

- 6) Claimant's Representative, her mother, testified that the ABAS-2 scores were the result of a questionnaire she completed at Synergy. She stated that she was not focused on the questionnaire, and "hurried through" it. Therefore, she stated, the results are not accurate. She testified that Claimant is not capable of living independently or functioning without the benefit of a level of care to be found in an institutional setting. She submitted into evidence a letter she stated was written in 1974 by a school psychologist in --. (Exhibit C-1.) The letter states that at that time, Claimant was "operating at the bottom one or two percent of the population" in her school. She also submitted a letter from Claimant's physician, -----, M.D., dated November 5, 2010. (Exhibit C-2.) The letter states, "[Claimant] has been under my care for diabetes for the past 2 months . . . In my professional opinion she is not capable of living alone and is not capable of managing her diabetes medications." Claimant's Representative stated that Claimant currently is living in a nursing home, and that Claimant needs to live in a setting that provides some degree of normalcy and independence, but still provides the level of supervision that she requires. She stated that she is the only family member Claimant can rely upon for assistance and supervision, and she is facing many serious health challenges. She added that she needed to make arrangements for Claimant's long-term care while she is able to do so.

VIII. CONCLUSIONS OF LAW:

- 1) An application 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 self-direction.
- 3) Claimant's I/DD application did not demonstrate substantial adaptive deficits in the areas of self-care or the capacity for independent living. The results of the ABAS-2 did not demonstrate scores that were three standard deviations below the mean in either of these areas.

- 4) Claimant's I/DD application did not demonstrate substantial adaptive deficits in the areas of receptive or expressive language or mobility. The IPE clearly stated that Claimant was able to speak in short sentences, follow basic commands and answer simple questions. The IPE clearly stated Claimant was ambulatory and could negotiate stairs, curbs and sloped surfaces.
- 5) Claimant's I/DD application did not demonstrate a substantial adaptive deficit in the area of learning. The results of the WRAT4 indicated Claimant scored low in the areas of word reading, spelling and math computation, but not low enough to meet the policy requirement of three standard deviations below the mean.
- 6) 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 27th Day of July, 2012.

**Stephen M. Baisden
State Hearing Officer**