



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 2, 2012

Dear -----:

Attached is a copy of the Findings of Fact and Conclusions of Law on your Fair Hearing held July 26, 2012. The hearing request was based on the Department of Health and Human Resources' denial of your son -----' 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 son does not meet the medical eligibility criteria for the Title XIX I/DD Waiver Program.

It is the decision of the State Hearing Officer to **uphold** the Department's denial of your son'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-1340

**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 26, 2012, on a timely appeal filed May 11, 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 February 10, 2012
- D-3 Independent Psychological Evaluation from -----, MA, conducted on February 1, 2012
- D-4 School Psychological Evaluation from ----- County Schools, -----, WV, conducted on
November 9, 2011
- D-5 WV Birth to Three Speech Language Pathology Annual Evaluation, dated March 12,
2011
- D-6 Individualized Education Program (IEP) for Claimant from ----- County Schools, dated
November 16, 2011
- D-7 WV Birth to Three Annual Psychological Update, conducted on April 4, 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 February 10, 2012. (Exhibit D-2.) The notice explained that the reason for denial, in pertinent part, was:

The autism diagnosis is in question because there is such a disparity between the ----- County School's assessment and that performed for the IPE. The difference is of such magnitude as to be irreconcilable. It is also noted that [Claimant] does not receive special education intervention on the basis of autism and narrative descriptions contained in the IEP are inconsistent with the presence of autism.

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 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 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. 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) conducted by -----, MA, on February 1, 2012. (Exhibit D-3.) Department's Representative noted that the IPE indicates Claimant was three years old at the time of the assessment and that the IPE indicates he achieved the developmental milestones of walking at eleven months of age, talking at fifteen months, and talking at two years. He added that this was a high level of achievement for a person requiring an ICF/MR level of care. He submitted into evidence the IPE, which contains the following pertinent information:

Self-Care

Department's Representative stated that on page 3 of the IPE, in the section labeled "Current Behaviors," the evaluator wrote "[Claimant] is able to feed himself with a fork and spoon. He can drink from a sippy cup. He is continent with weekly accidents. He requires physical assistance with dressing, bathing and tooth brushing." 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. He 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 six 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] will scribble with a crayon or pencil. He will sometimes point to pictures. He will sometimes indicate his age by holding up three fingers. He does not identify colors or draw figures." In the section labeled "Current Evaluation: Intellectual/Cognitive," the evaluator has written, "Due to his generalized cognitive, communicative and developmental delays, [Claimant] was unable to respond to standardized tests of intellectual abilities."

Mobility

Department's Representative stated that on the section labeled "Current Behaviors," the evaluator wrote "[Claimant] is able to walk, run and climb stairs. He can reach, grasp, hold and manipulate objects. He does not require mechanical assistance." The IPE reports that the ABAS-2 rated Claimant with a score of ten in the area of mobility.

Self-Direction

Department's Representative stated that on the section labeled "Current Behaviors," the evaluator wrote "[Claimant] is able to indicate choices. He engages in activities of his choosing. He demonstrates an interest in preferred activities. He lacks responsibility and self-control. He does not initiate activities necessary for daily living. He does not respond to instruction or direction." The IPE reports that the ABAS-2 rated Claimant with a score of four 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. 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 four in the area of home living, a two in the area of social skills, a three in the area of health and safety, a three in the area of community use, and a five in the area of leisure activities. He added that Claimant scored a two in the sub-category of social skills and 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) Department's Representative stated that the denial letter (Exhibit D-2) indicates another problem with Claimant's application for the I/DD program, which was the great disparity between other assessments of the Claimant and the IPE. He pointed out that on page 4 of the IPE (Exhibit D-3), on the section labeled, "Autism Screening," the evaluator has written, "Instrument used: *Childhood Autism Rating Scale (CARS)*; Results: CARS Score – 54; Discussion: The . . . reported CARS score is in the severe range." He submitted into evidence a WV Birth to Three Annual Psychological Update

conducted on April 4, 2011. (Exhibit D-7.) He stated that on page 4 of this document, the evaluator who conducted this assessment reports the results of the CARS test given at that time. The document states as follows: “[CARS] was used as a measure of [Claimant’s] behavior in comparison to autistic spectrum behaviors . . . Total scores range from 15 to 60. Scores from 15 to 29.5 fall in the non-autistic range. Scores from 37 to 60 fall in the severely autistic range . . . On the CARS, [Claimant] obtained a score of 30.” He explained that although this report was conducted ten months before the IPE, he still found it significant that the CARS results were very different.

- 7) Department’s Representative stated that another indicator of the disparity between the IPE and other assessments of Claimant’s functioning level could be found in the narrative descriptions of Claimant’s behavior as the assessments were being conducted. He pointed out that on page 2 of the IPE (Exhibit D-3), the evaluator has written, “During the evaluation today, [Claimant] was observed to be extremely hyperactive, scream almost constantly, hit his sister, wrote on furniture, bit his mother, tried to leave the room, overturned chairs, yelled ‘no,’ climbed on furniture, and did not respond to instructions.” Department’s Representative submitted into evidence a psychological evaluation from ----- County Schools conducted on November 8, 2011. (Exhibit D-4.) This report describes Claimant’s behavior during the assessment as follows: “[Claimant] was evaluated at ----- Grade [School] and was accompanied by his biological mother. He was ambulatory with an appropriate gait and posture. Upon introductions with this evaluator, [Claimant] demonstrated good eye contact and was smiling holding onto his mother’s hand. He did not want to leave his mother . . . [Claimant] did demonstrate good eye contact, social smile and adjusted well to examiners.” Department’s Representative stated that the disparity between the narrative descriptions of Claimant’s behavior during the assessments created a challenge for him to make an accurate assessment of the level of Claimant’s autism severity.
- 8) Claimant’s Representative, his mother, testified that Claimant’s behavior is escalating to the point where he cannot be left alone. She testified that he is exhibiting more autistic behaviors as he grows older. She stated that in the area of self-care, Claimant is not able to turn on the water in a sink or bathtub to clean himself. She stated that he can splash and play in the water, but he is unable to take a bath by himself. She stated that in the area of learning, Claimant is “dreadfully behind” other children of his age group. She testified that Claimant is mobile, but he cannot step one foot over the other and has to walk up and down stairs one at a time while holding onto the handrail. She stated that in the area of self-direction, Claimant is able to feed himself but only after the food has been cut up and placed in front of him. She added that he cannot “go and get things to eat on his own.” She stated that in the area of the capacity for independent living, she did not think he could take care of himself nearly as well as her daughter did when she was his age. Claimant’s Representative stated that she believed the assessment done by ----- County Schools was “sugar-coated” and that she disagreed with their findings.

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 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.
- 4) The documentation submitted for review with the Claimant's I/DD application contained a great disparity between the IPE which was conducted on February 1, 2012, and other evaluations. The difference in CARS scores as reported on the IPE and the scores on the WV Birth to Three Annual Psychological Update, and the difference in the narrative descriptions of Claimant's behavior between the IPE and the ----- County Schools evaluation are so disparate that it would be difficult for an evaluator to reasonably assess the level of severity of Claimant's autism.
- 5) 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, and because the disparity between the IPE and other evaluations make it difficult to gauge the severity of Claimant's autism, 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 2nd Day of August, 2012.

**Stephen M. Baisden
State Hearing Officer**