



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
9083 Middletown Mall
White Hall, WV 26554

Earl Ray Tomblin
Governor

Rocco S. Fucillo
Cabinet Secretary

August 17, 2012

Dear -----:

Attached is a copy of the Findings of Fact and Conclusions of Law on your hearing held August 15, 2012. Your hearing request was based on the Department of Health and Human Resources' action to deny your 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 manifested prior to the age of 22 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 at the hearing fails to 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 your application for benefits and services through the Medicaid I/DD Waiver Program.

Sincerely,

Thomas E. Arnett
State Hearing Officer
Member, State Board of Review

cc: Chairman, Board of Review

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

IN RE: -----,

Claimant,

vs.

Action No.: 12-BOR-1494

**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 the Common Chapters Manual, Chapter 700, of the West Virginia Department of Health and Human Resources. This fair hearing convened on August 15, 2012, on a timely appeal filed June 13, 2012.

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:

-----, Claimant's foster mother/guardian
Kerri Linton, Psychologist Consultant, Bureau for Medical Services
Linda Workman, Psychologist Consultant, Bureau for Medical Services

Presiding at the hearing was Thomas E. Arnett, 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 March 26, 2012

D-2 Independent Psychological Evaluation (IPE) – dated March 6, 2012

VII. FINDINGS OF FACT:

- 1) On or about March 26, 2012, the Claimant was notified via a Notice of Denial/Termination (D-1) that her application for Medicaid I/DD Waiver Program benefits was denied. The notice indicates that the documentation submitted does not support the need for active treatment or the need for an ICF/MR Level of Care. This notice goes on to state that the documentation does not support the presence of substantial adaptive deficits in three or more of the six major life areas identified for waiver eligibility.
- 2) The Department, represented Kerri Linton, a psychologist consultant employed by Psychological Consultation & Assessment (PC&A), contracted by the Department of Health and Human Resources' (Department) Bureau for Medical Services (BMS), contends that while the Claimant may require prompting, oversight and supervision, she does not require the level of active treatment, or care, that is provided in an institutional setting. Ms. Linton contends that this finding is supported by the fact that the Claimant is not demonstrating a substantial adaptive deficit in any of the six major life areas.
- 3) The Claimant's representative, -----, contends that her foster daughter is demonstrating substantial adaptive deficits in self-care, leaning, receptive and expressive language, self-direction and capacity for independent living. ----- contends that this indicates she is demonstrating the need for active treatment and an ICF/MR level of care.

- 4) The following will address the major life areas in which the Claimant contends a substantial adaptive deficit should have been identified:

Self-care: Testimony and documentation submitted at the hearing reveals that the Claimant possesses the skills to perform self-care activities (bathing, dressing and grooming), however, she must be prompted to complete these tasks. Pursuant to testimony proffered by Ms. Linton, this level of care does not indicate the need for aggressive training to learn how to complete self-care tasks. Narrative documentation included in the Independent Psychological Evaluation (IPE), Exhibit D-2, is consistent with testimony provided on behalf of the Claimant and indicates she requires oversight and supervision, not active treatment. In addition, Ms. Linton cited the ABAS (Adaptive Behavior Assessment System II) scores and noted that an eligible score is a “1” or “2” (three standard deviations below the mean). Ms. Linton cited the results of the ABAS scores completed by the Claimant’s guardian and teacher, and noted that the Claimant received a “7” on the ABAS-II PARENT form and a “9” on the ABAS-II TEACHER form – both of which are well outside the range of eligibility. Based on the evidence, the Claimant is not demonstrating a substantial adaptive deficit in self-care.

Learning: (Functional Academics) – The Claimant’s representative contends that because the Claimant’s achievement is in the third to fourth grade level, she is demonstrating a substantial adaptive deficit in learning. Documentation found in Exhibit D-2 reveals that the Claimant was administered a Woodcock Johnson-III achievement test in June 2011, and a WRAT 4 achievement test during the March 2012 evaluation (D-2). Because the mean (average) for both of these tests is 100, a standard score of 55 and below demonstrates a substantial adaptive deficit (three standard deviations below the mean) in learning. A review of the achievement testing results from June 2011 and March 2012 fails to yield any scores at or below 55. Based on the clinical data, the Claimant is not demonstrating a substantial adaptive deficit in learning.

Receptive and Expressive Language (Communication): The evaluating psychologist notes on in Exhibit D-2, page 2, that “She has some simplistic receptive skills. She is able to express herself but is more passive in her attempts.” On page 3 (Mental Status Examination) the evaluator states - “She does speak in a clear fashion and was understandable.” The ABAS-II PARENT form reveals an eligible ABAS score of “1” in communication; however, ABAS-II TEACHER form provides an ABAS score “4.” The evidence indicates that the Claimant has some communication barriers; however, there is insufficient evidence to confirm she is demonstrating a substantial adaptive deficit.

Self-direction: Self-direction is assessed based on the individual’s ability to make choices, initiate activities, choose an active lifestyle or remain passive, and the ability to engage in, or demonstrate an interest in preferred activities. The Claimant’s representative testified that the Claimant would not initiate activities, or express an interest in horses, if she did not prompt her. Documentation found in Exhibit D-2, page 3, reveals that the Claimant enjoys reading and watching television. Information found on page 2 reveals that the Claimant has been demonstrating behavioral issues that include lying, stealing and breaking rules. While self-

direction skills do not always result in desirable behaviors, the Claimant's reported actions demonstrate the ability to initiate activities and make choices. Self-direction ABAS scores further confirm the Claimant is not demonstrating a substantial adaptive deficit, as the Claimant was assigned an "8" on the ABAS-II PARENT form and a "9" on the ABAS-II TEACHER form (ABAS-II Scaled Score of "1" or "2" demonstrates a substantial adaptive deficit). Based on the evidence, the Claimant is not demonstrating a substantial adaptive deficit in self-direction.

Capacity for Independent Living: This major life area encompasses several components, which include - home living, socialization, leisure skills, community use, health and safety, as well as employment. According to documentation found in Exhibit D-2, the Claimant is reported to read books about horses in her leisure time, and she will engage in some socialization activities. She does not engage in activities that place her in danger, but is reported to have poor judgment. There is no information to indicate whether or not she participates in household chores, and she is not expected to maintain employment at her age. The ABAS-II assessment completed by the Claimant's guardian (ABAS-II PARENT) includes an eligible ABAS scores in community use and leisure, however, the ABAS-II TEACHER does not demonstrate any eligible ABAS scores. While the Claimant's capacity for independent living has some limitations, there is insufficient evidence to indicate she is demonstrating a substantial adaptive deficit.

- 5) West Virginia Medicaid Regulations, Chapter 513 - Applicant Eligibility and Enrollment Process for I/DD Waiver Services (D-1), 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 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.

- 2) Evidence submitted at the hearing reveals that while the Claimant meets diagnostic criteria, there is insufficient evidence to demonstrate she requires the level of care and services provided in an ICF/MR facility, or that she is demonstrating substantial adaptive deficits in three (3) of the six (6) major life areas.
- 3) Whereas the evidence fails to demonstrate the Claimant meets medical eligibility criteria, participation in the Medicaid I/DD Waiver Program was correctly denied.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the action of the Department to deny the Claimant's application for 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 ____ Day of August 2012.

**Thomas E. Arnett
State Hearing Officer**