



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

October 3, 2012

---- For: ----

Dear Mr. ----:

Attached is a copy of the Findings of Fact and Conclusions of Law on your Fair Hearing held September 19, 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's application for the Title XIX I/DD Waiver Program demonstrates substantial adaptive deficits in three of the six major life areas listed above.

It is the decision of the State Hearing Officer to **reverse** 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-1653

**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 September 19, 2012, on a timely appeal filed June 28, 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 Father

Kerri Linton, Psychological Consultant to the WV Bureau of Medical Services, Department's Representative

----, Psychological Consultant to the WV Bureau of Medical Services, Department's Witness

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 all 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 June 20, 2012
- D-3 Independent Psychological Evaluation from [REDACTED] [REDACTED] conducted on May 22 and May 29, 2012
- D-4 Evaluation Report from ----, Division of Endocrinology, dated May 17, 2012

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 that an individual who applies for I/DD Waiver Services must demonstrate that he or she requires the level of care and services provided in an ICF/MR as evidenced by required evaluations and other information. 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. These related conditions may include autism, traumatic brain injury, cerebral palsy, spina bifida, or 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 must demonstrate that the condition is likely to continue indefinitely and he or she must substantiate the presence of substantial adaptive deficits in three out of six major life areas as listed in §513.3.2.2. That section states as follows:

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.

- 2) Claimant's father 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 June 20, 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: receptive or expressive language, learning, 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 substantial adaptive deficits only in the areas of self-care and mobility.
- 4) Claimant's application for the I/DD Waiver program included an Independent Psychological Evaluation (IPE) conducted by ----, WV, on May 22 and May 29, 2012. (Exhibit D-3.) Department's Representative noted that the IPE indicates Claimant was twelve years old at the time of the assessment and that he was diagnosed with Duchenne muscular dystrophy in 2006. The IPE states as follows regarding the diagnosis of Duchenne muscular dystrophy in the section labeled, "Medical History":

His father indicated [Claimant] was diagnosed with Duchenne muscular dystrophy in 2006. ([Claimant's father] indicated this type is progressive and ultimately terminal). He indicated that since 2006 his son has had continuous degeneration of his muscle functioning.

Department's Representative submitted into evidence the IPE, which she argued demonstrates that Claimant has substantial adaptive deficits in the major life areas of self-care and mobility, and documents that Claimant does not have substantial adaptive deficits in the major life areas of receptive or expressive language, learning and capacity for independent living.

- 5) Claimant's Representative, his father, conceded that his son did not have substantial adaptive deficits in the major life areas of expressive or receptive language and learning. However, he argued that his son is substantially limited in his capacity for independent living. He testified that his son will never be able to live independently. He stated that Duchenne muscular dystrophy is a progressive disease, so his son's health condition will deteriorate as he gets older. He stated that this deterioration is so progressive that he could tell his son has worsened since the IPE was conducted in May 2012. Department's Witness stated that the Department must evaluate the applicant as

- 6) Department's Representative testified that the major life area of capacity for independent living is comprised of six sub-categories. I/DD policy (Exhibit D-1) identifies these sub-categories as home living, social skills, employment, health and safety, community use and leisure activities. The "Current Behaviors" section of the IPE contains the following narrative descriptions of each of the sub-categories:

Community Use – [Claimant] is reported to use the sidewalk appropriately. He is able to maneuver his wheelchair well. He doesn't like to go shopping. ("He really isn't one to leave the house too often.") His father helps him with sizes when shopping for clothing but he shows his father what he likes. He is reported to understand the function and value of money. He has made simple purchases. He can make phone calls independently "but doesn't."

Home Living – [Claimant] is reported to have no household chores due to his physical limitations. ("He really can't. He wouldn't be able to lift dishes up to the sink. As far as dusting, he really can't do that stuff.") Last year he helped his father plant flowers [by] putting them in the hole.

Health and Safety – [Claimant] is reported to show appropriate caution. He will report when he doesn't feel well. He is able to take his medications.

Leisure – It is reported that [Claimant] plays games on his computer and on his gaming systems. He chooses his own recreational activities. He plays board games with his father; he keeps score, takes turns and understands the rules.

Social – [Claimant's father] reports that [Claimant] gets along with others his age but is more comfortable interacting with adults. He has had friends in the past [but] now his inability to "run and do things makes him get lost in the shuffle." He is described as "very laid back." He uses manners in an age-appropriate way.

Employment – Not applicable.

The IPE reports that the ABAS-2 rated Claimant with a score of one in the area of home living, a ten in the area of social skills, a one in the area of health and safety, a three in the area of community use, and an eight in the area of leisure activities. The IPE did not evaluate Claimant in the sub-category of employment.

- 7) The final section of the IPE, the section labeled "Prognosis/Recommendation," contains the following pertinent information concerning Duchenne muscular dystrophy:

[Claimant's father] reports that [Claimant's] disease is progressive and terminal. An internet search by the examiner found the following: "The prognosis of Duchenne muscular dystrophy is confinement to a wheelchair by the age of 12 years, and usually death by the late teens or early twenties." Therefore, the prognosis is poor as it is likely that [Claimant's] level of adaptive functioning will decrease over time as his physical condition weakens.

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 substantial adaptive deficits only in the major life areas of self-care and mobility.
- 3) The area of capacity for independent living contains six sub-categories. Policy does not state that an applicant must demonstrate substantial adaptive deficits in three out of six of these sub-categories, as the Department's Witness testified. Claimant's scores on the ABAS-2 as reported in the IPE indicated Claimant had substantial adaptive deficits in two out of the six subcategories, home living and health and safety. Narrative information in the IPE concerning Duchenne muscular dystrophy supports the position of Claimant's Representative that Claimant should have received a substantial adaptive deficit in the area of capacity for independent living.
- 4) Because Claimant's application contained documentation of substantial adaptive deficits in three of the six major life areas of self-care, language, learning, mobility, self-direction, and capacity for independent living, the Department was incorrect 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 **reverse** 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 3rd Day of October, 2012.

**Stephen M. Baisden
State Hearing Officer**