



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
1400 Virginia Street
Oak Hill, WV 25901

Earl Ray Tomblin
Governor

Michael J. Lewis, M.D., Ph.D.
Cabinet Secretary

February 14, 2012

-----for -----

Dear -----:

Attached is a copy of the Findings of Fact and Conclusions of Law on your hearing held February 8, 2012. Your hearing request was based on the Department of Health and Human Resources' decision to deny -----
-- I/DD Waiver services.

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 is based on current policy and regulations. These regulations provide 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 that require the level of care and services provided in an Intermediate Care Facility for individuals with Mental Retardation and /or related conditions (West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations, and Exclusions, for I/DD Waiver Services).

The information submitted at your hearing revealed that ----- does not meet the medical criteria to receive I/DD Waiver services.

It is the decision of the State Hearing Officer to **Uphold** the action of the Department to deny ----- I/DD Waiver services.

Sincerely,

Kristi Logan
State Hearing Officer
Member, State Board of Review

cc: Chairman, Board of Review
APS Healthcare

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

IN RE: -----,

Claimant

v.

ACTION NO.: 11-BOR-2435

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

Respondents

DECISION OF STATE HEARING OFFICER

I. INTRODUCTION:

This is a report of the State Hearing Officer resulting from a fair hearing concluded on February 8, 2012 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 was convened on a timely appeal, filed November 22, 2011.

II. PROGRAM PURPOSE:

The program entitled I/DD Waiver is administered by the West Virginia Department of Health and Human Resources.

The *Medicaid Home and Community-Based I/DD Waiver* (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 Legal Guardian

Jen Eva, APS Healthcare
Rick Workman, Consulting Psychologist, Bureau of Medical Services
Carrie Litton, Psychologist (observing)

Presiding at the Hearing was Kristi Logan, State Hearing Officer and a member of the Board of Review.

All participants testified by phone.

IV. QUESTION TO BE DECIDED:

The question to be decided is whether or not the Department's decision to deny Claimant I/DD Waiver services.

V. APPLICABLE POLICY:

West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations and Exclusions, For I/DD Waiver Services

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations and Exclusions, For MR/DD Waiver Services
- D-2 Notice of Denial dated November 9, 2011
- D-3 ICF/MR Level of Care Evaluation (DD-2A) dated September 13, 2011
- D-4 Psychological Evaluation (DD3) dated September 21, 2011

VII. FINDINGS OF FACT:

- 1) Claimant was evaluated for medical eligibility for the I/DD Waiver program. A denial notification letter was issued by the Department on November 9, 2011 which reads in pertinent parts (D-2):

Your application was denied/terminated because: The physician has not offered an eligible diagnosis for the I/DD Waiver program on the DD-2A. Documentation submitted does not support the presence of substantial adaptive deficits in three or more of the six major life areas identified for Waiver eligibility.

- 2) There are four (4) components to establishing medical eligibility. The applicant must have a diagnosis of mental retardation or related condition, have a recommendation of

ICF/MR level of care by a physician and the need for active treatment and at least three (3) substantial deficits in the six (6) major life areas: self-care, learning, self-direction, receptive or expressive language, mobility and capacity for independent living.

- 3) Rick Workman, consulting psychologist with the Bureau of Medical Services testified to the documentation that was used in determining Claimant's eligibility for I/DD Waiver services. According to the Level of Care Evaluation, Claimant has a diagnosis of developmental delay. Mr. Workman noted there was a notation that was illegible under the axis I diagnoses that appeared to read "qualities of syndrome". Mr. Workman testified developmental delay is not an eligible diagnosis for the I/DD Waiver program (D-3).
- 4) In addition to not having an eligible diagnosis for services, Mr. Workman stated Claimant did not have at least three (3) substantial adaptive deficits in the major life areas. The psychological evaluation reported Claimant was non-ambulatory, able to speak several words, played appropriately and had good concentration (D-4).

The Early Learning Profile (E-LAP) was administered during the psychological evaluation and Claimant scored above average in all areas except gross motor skills (D-4).

The Adaptive Behavior Assessment System (ABAS-II) was also given and Claimant received eligible scores in motor (mobility), home living, community use and health and safety (capacity for independent living) (D-4).

- 5) Mr. Workman stated the psychologist who performed the evaluation diagnosed Claimant with mental retardation. However, Mr. Workman stated Claimant's results on the E-LAP contradict a diagnosis of mental retardation. Mr. Workman stated Claimant was not approved for I/DD Waiver services due to no eligible diagnosis and only two (2) substantial adaptive deficits in the major life areas.
- 6) -----, Claimant's legal guardian, testified he cannot walk and moves around by scooting on his bottom. ----- stated Claimant cannot dress or bath himself and was advised by his physician to apply for I/DD Waiver services. -----stated she no longer works to care for Claimant.
- 7) West Virginia Medicaid Regulations, Chapter 513, – Covered Services, Limitations, and Exclusions, for I/DD Waiver Services include the following pertinent medical eligibility criteria:

Medical Eligibility Criteria

The I/DD State Waiver Office determines the medical eligibility for an applicant in the I/DD Waiver Program. In order to be eligible to receive I/DD Waiver Program Services, an applicant must meet the following medical eligibility criteria:

- Have a diagnosis of mental retardation and/or a related condition,
- Require the level of care and services provided in an ICF/MR (Intermediate Care Facility for the Mentally Retarded) as evidenced by required evaluations and corroborated by narrative descriptions of functioning and reported history. An ICF/MR provides services in an institutional setting for persons with mental retardation or related condition. An ICF/MR facility provides monitoring, supervision, training, and supports.

I/DD State Waiver Office determines the level of care (medical eligibility) based on the Annual Medical Evaluation (DD-2A), the Psychological Evaluation (DD-3) and verification if not indicated in the DD-2A and DD-3, that documents that the mental retardation and/or related conditions with associated concurrent adaptive deficits were manifested prior to the age of 22, and are likely to continue indefinitely. Other documents, if applicable and available, that can be utilized include the Social History, IEP for school age children, Birth to Three assessments, and other related assessments.

The evaluations must demonstrate that an applicant has a diagnosis of mental retardation and/or a related developmental condition, which constitutes a severe and chronic disability. For this program individuals must meet the diagnostic criteria for medical eligibility not only by the relevant test scores, but also the narrative descriptions contained in the documentation. To be eligible, the member:

- Must have a diagnosis of mental retardation, with concurrent substantial deficits (substantial limitations associated with the presence of mental retardation), and/or
- Must have a related developmental condition which constitutes a severe and chronic disability with concurrent substantial deficits.

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:

- 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.
- Autism
- Traumatic brain injury

- Cerebral Palsy
- Spina Bifida
- Tuberos Sclerosis

Additionally, the member who has a diagnosis of mental retardation and/or related conditions and associated concurrent adaptive deficits must have the following:

- Manifested prior to the age of 22, and
- Likely to continue indefinitely.
- Must have the presence of a least three (3) substantial deficits out of five of the major life areas (term is defined in Title 42, Chapter IV, Part 435.1009 of the Code of Federal Regulations or CFR.

Refer to 503.1, Functionality section for a list of the major life areas.

Functionality

- Substantially limited functioning in three (3) or more of the following major life areas; (“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, i.e., psychological, the IEP, Occupational Therapy evaluation, etc.). Applicable categories regarding general functioning include:
 - Self-care
 - Receptive or expressive language (communication)
 - Learning (functional academics)
 - Mobility
 - Self-direction
 - Capacity for independent living (home living, social skills, employment, health and safety, community and leisure activities).

For applicable major life functioning areas, refer to Code of Federal Regulation (CFR): 42 CFR435.1009.

Active Treatment

- Requires and would benefit from continuous active treatment.

Medical Eligibility Criteria: Level of Care

- To qualify for ICF/MR level of care, 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 increase independence in activities of daily living,
 - A need for the same level of care and services that is provided in an ICF/MR institutional setting.

The applicant or legal representative will be informed of the right to choose between ICF/MR services and home and community-based services under the I/DD Waiver Program and informed of his/her right to a fair hearing at the time of application (Informed Consent, DD-7).

Conditions Ineligible

- Substantial deficits associated with a diagnosis other than mental retardation or a related diagnosis do not meet eligibility criteria.
- Additionally, any individual needing only personal care services does not meet the eligibility criteria.
- Individuals diagnosed with mental illness whose evaluations submitted for medical eligibility determination indicate no previous history of co-occurring mental retardation or developmental disability prior to age 22. The member's clinical evaluators must provide clinical verification through the appropriate eligibility documentation that their mental illness is not the primary cause of the substantial deficits and the mental retardation or developmental disability occurred prior to the age of twenty-two (22).

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 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) The documentation submitted failed to establish an eligible diagnosis or at least three (3) substantial adaptive deficits in the six (6) major life areas. Claimant does not meet the medical criteria to receive I/DD Waiver services.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the decision of the Department to deny Claimant services under 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 14th day of February 2012

Kristi Logan
State Hearing Officer