



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
1027 N. Randolph Ave.
Elkins, WV 26241

Earl Ray Tomblin
Governor

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

April 6, 2012

Dear -----:

Attached is a copy of the Findings of Fact and Conclusions of Law on your son's hearing held April 4, 2012. Your hearing request was based on the Department of Health and Human Resources' action to deny your son's 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 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 during the hearing reveals that your son does not meet 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 son's benefits and services through the Medicaid I/DD Waiver Program.

Sincerely,

Pamela L. Hinzman
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-727

**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 telephonically on April 4, 2012 on a timely appeal filed February 21, 2012.

All persons giving testimony were placed under oath.

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 mother

---- ----, Claimant's father

Jennifer Eva, I/DD Service Support Facilitator, APS Healthcare

Richard Workman, Psychologist Consultant, Bureau for Medical Services

Presiding at the hearing was Pamela L. Hinzman, 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 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 West Virginia Medicaid Regulations, Chapter 513 – Applicant Eligibility and Enrollment Process for I/DD Waiver Program

D-2 Notice of Denial/Termination dated February 8, 2012

D-3 Independent Psychological Evaluation completed by [REDACTED] dated December 15, 2011

VII. FINDINGS OF FACT:

- 1) The Claimant, currently age six, was an applicant for Medicaid I/DD Waiver Program services and was notified in a Notice of Denial/Termination dated February 8, 2012 (D-2) that his Waiver services had been denied. This notice states, in pertinent part:

Your Waiver Application is hereby denied.

Your application was denied/terminated because:

DOCUMENTATION SUBMITTED DOES NOT SUPPORT THE NEED FOR ICF/MR LEVEL OF CARE OR THE NEED FOR ACTIVE

TREATMENT.

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. Specifically, the documentation failed to demonstrate substantial limitations in the following major life areas: Self-Care, Learning, Self-Direction, Receptive or Expressive Language, Mobility, and Capacity for Independent Living.

- 2) Richard Workman, Psychologist Consultant with the Bureau for Medical Services, provided testimony concerning Exhibit D-3, an Independent Psychological Evaluation completed by Licensed Psychologist [REDACTED] on December 15, 2011. The Psychologist Consultant testified that the Claimant has a potentially eligible diagnosis of Autistic Disorder, but does not exhibit the concurrent substantial deficits required for eligibility. Mr. Workman stated that the Claimant must have received standard scores of 55 and below on the WISC-IV testing instrument in order for a substantial deficit to be identified. The Claimant's scores were as follows: verbal comprehension, 87; perceptual reasoning, 88; working memory, 77; processing speed, 75; and full scale IQ, 78. The Department can consider scores of 1 and 2 on subtests of the WISC-IV, however, the Claimant received only one (1) potentially eligible score, a 2 in letter-number sequencing.

The Claimant received no program qualifying scores on the ABAS-2 Parent testing instrument, but received two (2) potentially eligible scores in self-care (score of 2) and self-direction (score of 2) on the ABAS-2 Teacher testing instrument. It should be noted that the Claimant received a score of 6 in self-direction and a score of 4 in self-care on the ABAS-2 Parent instrument. The Claimant received standard scores ranging from 75 to 103 on the WRAT-4 test, which measured the areas of word reading, sentence comprehension, spelling, math computation and reading.

Narrative information on the Psychological Evaluation states that the Claimant is mobile and has only mild delays in motor skills. He was toilet trained by age two and is able to participate in self-care, however, it was noted that he has some difficulty due to obsessive compulsive behaviors. The Claimant is able to speak, although he often talks off topic. Narrative information states that the Claimant has learning difficulties, however, his overall test scores do not indicate substantial deficiencies. The Claimant can initiate activity, but becomes fixated, has difficulty interacting with peers, and prefers to play alone. He can be a "flight risk" at times and does not understand danger.

On Page 7 of 8 of the Evaluation, the evaluating psychologist indicated that the Claimant does not have substantial adaptive deficits, does not require active treatment and does not require an ICF/MR institutional level of care.

- 3) The Claimant's parents, ---- and ---- ----, testified that the Claimant is not doing as well as expected with his various therapies, has had to be restrained at school and has been expelled at

times. They indicated that the Claimant has been placed with a special education teacher and aide, and is not in a normal class setting at school. The Claimant's parents indicated that some of the Claimant's functioning has decreased and that he must be watched at all times. ---- ---- stated that the Claimant's first Psychological Evaluation had indicated that he did have substantial delays, required active treatment and required the level of care provided in an ICF/MR facility. However, the Psychologist Consultant explained that some evaluators received subsequent retraining concerning the manner in which the evaluations were completed. He stated that the test scores on the Claimant's original and current Psychological Evaluations are identical.

- 4) 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. It should be noted that the Claimant has a potentially eligible diagnosis of Autistic Disorder, however, the Department determined that his level of autism is not severe and the Claimant was deemed to have no substantial adaptive deficits.

- 2) No evidence was presented during the hearing to confirm that the Claimant's level of autism meets severity criteria and no substantial adaptive deficits could be identified based on test scores/narratives recorded during the Claimant's Psychological Evaluation.
- 3) Whereas the Claimant does not meet the functionality requirements in the medical eligibility criterion, medical eligibility for participation in the Medicaid I/DD Waiver Program cannot be established.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the action of the Department to deny the Claimant's 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 6th Day of April, 2012.

Pamela L. Hinzman
State Hearing Officer