



STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
OFFICE OF INSPECTOR GENERAL

Earl Ray Tomblin
Governor

BOARD OF REVIEW
1400 Virginia Street
Oak Hill, WV 25901

Karen L. Bowling
Cabinet Secretary

December 21, 2016

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

RE: [REDACTED] v. WV DHHR
ACTION NO.: 16-BOR-2167

Dear [REDACTED]:

Enclosed is a copy of the decision resulting from the hearing held in the above-referenced matter.

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.

You will find attached an explanation of possible actions you may take if you disagree with the decision reached in this matter.

Sincerely,

Kristi Logan
State Hearing Officer
Member, State Board of Review

Encl: Appellant's Recourse to Hearing Decision
Form IG-BR-29

cc: Mary McQuain, Assistant Attorney General

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

██████████,

Appellant,

v.

Action Number: 16-BOR-2167

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

Respondent.

DECISION OF STATE HEARING OFFICER

INTRODUCTION

This is the decision 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 November 30, 2016, on an appeal filed June 23, 2016.

The matter before the Hearing Officer arises from the May 19, 2016 decision by the Respondent to deny medical eligibility for services for the Appellant under the I/DD Waiver Program.

At the hearing, the Respondent appeared by Mary McQuain, Assistant Attorney General. Appearing as a witness for the Respondent was Linda Workman, consulting psychologist for the Bureau for Medical Services. The Appellant appeared by counsel, ██████████. Appearing as witnesses for the Appellant were ██████████ and ██████████, the Appellant's sisters and legal guardians. All witnesses were sworn and the following documents were admitted into evidence.

Department's Exhibits:

- DD-1 Scheduling Order dated October 5, 2016
- DD-2 Email Correspondence to ██████████ dated September 8, 2016
- DD-3 Scheduling Order dated August 16, 2016
- DD-4 Correspondence to Taniua Hardy dated July 14, 2016
- DD-5 Scheduling Order dated July 5, 2016
- DD-6 Hearing Request Notification and Hearing Request received June 23, 2016
- D-1 Notice of Denial dated May 19, 2016
- D-1a Certified Mail Receipt dated May 23, 2016

- D-2 Bureau for Medical Services Medicaid Provider Manual §513.6, West Virginia Application for a §1915(c) Home and Community-Based Services Waiver and Approval Notice from Centers for Medicare and Medicaid Services
- D-3 Independent Psychological Evaluation dated April 13, 2016
- D-4 Decision of State Hearing Officer dated April 29, 2015
- D-5 Notice of Denial dated September 22, 2014
- D-6 Independent Psychological Evaluation dated September 10, 2014
- D-7 [REDACTED] Records dated March 19, 2012
- D-8 Report of Consultation dated March 20, 2012
- D-9 [REDACTED] Records dated March 20, 2012
- D-10 [REDACTED] Records dated March 21, 2012
- D-11 Medical Records from [REDACTED] dated July 14, 2009
- D-12 Progress Notes from [REDACTED] dated May 9, 2002
- D-13 Progress Notes from [REDACTED] dated March 19, 2001
- D-14 I/DD Waiver Program Application Packet dated January 15, 2016
- D-15 I/DD Waiver Program Application Packet dated March 17, 2016
- D-16 Independent Psychologist Network Response Form dated March 20, 2016
- D-17 I/DD Waiver Program Application dated January 12, 2016

Appellant’s Exhibits:

- A-1 Correspondence from [REDACTED] dated July 14, 2016

After a review of the record, including testimony, exhibits, and stipulations admitted into evidence at the hearing, and after assessing the credibility of all witnesses and weighing the evidence in consideration of the same, the Hearing Officer sets forth the following Findings of Fact.

FINDINGS OF FACT

- 1) The Appellant applied for services under the I/DD Waiver Program.
- 2) The Respondent issued a Notice of Denial (D-1) on May 19, 2016, advising the Appellant that his application had been denied as he did not meet the functionality criteria required for I/DD Waiver services.
- 3) The Respondent did not dispute that the Appellant had an eligible diagnosis of Intellectual Disability, meeting the diagnostic criteria for program eligibility.
- 4) The Respondent conceded that the Appellant most likely had substantial adaptive deficits in the major life areas of functional academics and capacity for independent living prior to age 22, however, the Respondent did not find a third substantial adaptive deficit that manifested prior to age 22 based on the documentation submitted.

APPLICABLE POLICY

Bureau for Medical Services Provider Manual §513.6.2 states that to be medically eligible, the applicant must require the level of care and services provided in an ICF/IID 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/IID provides services in an institutional setting for persons with intellectual disability or a related condition. An ICF/IID 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/IID.

The MECA determines the qualification for an ICF/IID level of care (medical eligibility) based on the IPE that verifies that the applicant has intellectual disability 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 IDDW 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 IDDW Program Services, an applicant must meet the medical eligibility criteria in each of the following categories:

- Diagnosis;
- Functionality;
- Need for active treatment; and
- Requirement of ICF/IID Level of Care.

Diagnosis

The applicant must have a diagnosis of intellectual disability 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, may 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 intellectual disability because this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of intellectually disabled persons, and requires services similar to those required for persons with intellectual disability.

Additionally, the applicant who has a diagnosis of intellectual disability 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 513.6.2.2.

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 which includes the following six sub-domains: home living, social skills, employment, health and safety, community and leisure activities. At a minimum, three of these sub-domains must be substantially limited to meet the criteria in this major life area.

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.

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.

Code of Federal Regulations 42 CFR §435.1009 defines a person with a related condition as an individual who has a severe, chronic disability that meets all of the following conditions:

- It is attributable to –
 - Cerebral palsy or epilepsy; or
 - Any other condition, other than mental illness, found to be closely related to mental retardation because general intellectual functioning or adaptive behavior similar to that of mentally retarded persons, and requires treatment or services similar to those required for these persons.
- It is manifested before the person reaches age 22.

- It is likely to continue indefinitely.
- It results in substantial functional limitations in three or more of the following areas of major life activity:
 - Self-care,
 - Understanding and use of language
 - Learning
 - Mobility
 - Self-direction
 - Capacity for independent living.

DISCUSSION

Pursuant to West Virginia Medicaid Policy an individual must meet the medical eligibility criteria of a diagnosis of Intellectual Disability or related condition that manifested prior to age 22, the functionality criteria of at least three (3) substantial adaptive deficits of the six (6) major life areas that manifested prior to age 22, the need for active treatment and a requirement of ICF/IID level of care.

The Respondent's expert witness conceded that the Appellant had a diagnosis of Intellectual Disability that manifested prior to age 22 and was demonstrating substantial adaptive deficits in the major life areas of learning and capacity for independent living prior to age 22. The Respondent contended that there was no documentation to support a third substantial adaptive deficit that manifested prior to the Appellant turning 22 or that he would benefit from continuous active treatment.

The Appellant applied for I/DD Waiver services in 2014. An Independent Psychological Evaluation (IPE) conducted on September 10, 2014, that was submitted with the Appellant's application tested the Appellant's adaptive behaviors by using the Adaptive Behavior Assessment System, Second Edition (ABAS-II). This test showed that the Appellant was demonstrating substantial adaptive deficits in the major life areas of learning (functional academics) and capacity for independent living.

The narrative portion of the September 2014 IPE indicated that regarding the major life area of self-care, the Appellant could feed himself, required supervision with bathing and could dress independently with limited help and occasional reminders to choose appropriate clothing. In the area of receptive or expressive language (communication), the Appellant was found to express his wants, needs and feelings; speak in simple but complete sentences, follow simple directions and respond to direct questions and was noted to be easily understandable despite articulation errors. The Appellant was able to walk and traverse stairs without mechanical devices. The Appellant was noted to make choices and initiate activities, remain passive or choose to be active.

The Appellant's 2014 application for I/DD Waiver services was denied as he did not meet the functionality criteria of demonstrating at least three (3) substantial adaptive deficits.

The April 2016 IPE submitted with the Appellant's application under appeal documented that the Appellant was demonstrating substantial adaptive deficits in all six (6) major life areas. The

narrative portions of the IPE indicated that the Appellant required full care with self-care needs, was very difficult to understand, was fully dependent on a wheelchair for ambulation and was able to make choices regarding food, clothing and leisure activities.

The decline in the Appellant's abilities has been attributed to a fall that occurred in December 2015. The Respondent argued that the Appellant, now age 53, was not demonstrating at least three (3) substantial adaptive deficits when he was evaluated in 2014, and pursuant to West Virginia Medicaid policy, documentation that at least substantial adaptive deficits manifested prior to age 22 is required to meet program eligibility.

Counsel for the Appellant argued that West Virginia Medicaid policy contradicts federal policy 42 CFR §435.1009 in that federal policy does not stipulate that the substantial adaptive deficits must have manifested prior to age 22, only that the substantial adaptive deficits must be attributed to a diagnosis of Intellectual Disability that manifested prior to age 22. The Respondent's expert witness testified that based on the Appellant's history of attending a specialized school that not only taught academics but life skills, the Appellant most likely had an Intellectual Disability prior to age 22. Therefore, counsel for the Appellant contended that the Appellant, who is now demonstrating substantial adaptive deficits in all six (6) major life areas, which are attributed to his Intellectual Disability, meets program eligibility.

The Appellant's sister, [REDACTED], testified that the Appellant was always clumsy and fell often due to his gait issues, and always required assistance with transferring and walking. Although he has a history of employment, [REDACTED] testified that he was only able to keep one job for any length of time because of his mobility issues, and this job was not only supported employment but was more of a social outlet for the Appellant as opposed to actual work. She further stated that the Appellant's speech always has been difficult to understand and he always has made inappropriate choices consistent with that of a four-year old child.

The Appellant's sister, [REDACTED], testified that the Appellant did not sustain any injuries from his fall in December 2015. She has attributed his decline to his seizure disorder, which has been present since birth.

The federal policy referenced by the Appellant's counsel defines the criteria that must be present for an individual to be considered as having a related condition to that of Intellectual Disability. This policy does not specify that an individual, who has been diagnosed with Intellectual Disability, must have demonstrated substantial adaptive deficits prior to age 22, and therefore does not apply to this appeal. Furthermore, testimony regarding the Appellant's decline has been attributed to his seizure disorder, and not his Intellectual Disability.

West Virginia Medicaid Policy requires documentation of at least three (3) substantial adaptive deficits to have manifested in an individual prior to age 22. The Respondent conceded that the Appellant most likely had substantial adaptive deficits in learning and capacity for independent living prior to age 22, but based on the testimony and documentation submitted, a third substantial adaptive deficit of the remaining major life areas could not be identified.

CONCLUSIONS OF LAW

- 1) Pursuant to policy, an individual must meet the diagnostic, functionality, need for active treatment, and ICF/IID level of care criteria to be eligible for services under the I/DD Waiver Program.
- 2) The Appellant met the diagnostic criteria as set forth in policy.
- 3) To meet the functionality criteria, an individual must have at least three (3) substantial adaptive deficits of the six (6) major life areas of learning, communication, self-care, self-direction, mobility and capacity for independent living that manifested prior to age 22.
- 4) There was no documentation submitted to establish that the Appellant's adaptive deficits manifested prior to age 22.
- 5) The Appellant does not meet the functionality criteria as set forth in policy to meet medical eligibility for the I/DD Waiver Program.

DECISION

It is the decision of the State Hearing Officer to **uphold** the Respondent's denial of the Appellant's application for services under the I/DD Waiver program.

ENTERED this 21st day of December 2016

**Kristi Logan
State Hearing Officer**