

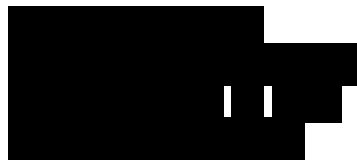


**State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
1027 N. Randolph Ave.
Elkins, WV 26241**

**Earl Ray Tomblin
Governor**

**Karen L. Bowling
Cabinet Secretary**

July 14, 2016



RE: [REDACTED] v. WVDHHR
ACTION NO.: 16-BOR-1545

Dear Mr. [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,

Pamela L. Hinzman
State Hearing Officer
Member, State Board of Review

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

cc: Kimberly Stitzinger Esq., Office of Attorney General
Angela Signore, WVDHHR

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

██████████,

Appellant,

v.

Action Number: 16-BOR-1545

**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 May 12, 2016, on an appeal filed March 23, 2016.

The matter before the Hearing Officer arises from the March 9, 2016 decision by the Respondent to approve the Appellant's Long-Term Care Medicaid benefits without the provision of specialized I/DD Waiver services in the nursing facility.

At the hearing, the Respondent appeared by Kimberly Stitzinger, Esq., Office of Attorney General. Appearing as witnesses for the Appellant were Kelley Johnson, Program Manager for Long-Term Care, Bureau for Medical Services; ██████████, Licensed Psychologist, and Long-Term Care Clinical Consultant, ██████████; and Dr. ██████████, Appellant's attending physician. The Appellant appeared by ██████████, Esq., Legal Aid of West Virginia. Appearing as witnesses for the Appellant were ██████████, Chief Nursing Officer, ██████████; ██████████, Appellant's sister/conservator; and ██████████, Appellant's sister/guardian. Also present were ██████████, Behavioral Health Advocate, Legal Aid of West Virginia; ██████████, Esq., ██████████; and ██████████, Esq., ██████████. Mr. ██████████ and Ms. ██████████ appeared on behalf of ██████████. All witnesses were sworn and the following documents were admitted into evidence.

Department's Exhibits:

- D-1 Nursing Facility Services Manual Sections 514.6.3, 514.6.4, 514.6.5, 514.6.6 and 514.6.7
- D-2 Pre-Admission Screening Form dated March 4, 2016
- D-3 ██████████ Inpatient Progress Note dated March 1, 2016
- D-4 Resume of ██████████, M.A., Licensed Psychologist
- D-5 Level II Evaluation dated March 9, 2016
- D-6 Patient Notes
- D-7 ██████████ Inpatient Progress Note dated February 17, 2016

Appellant's Exhibits:

- A-1 DD-2A Annual Medical Evaluation dated March 18, 2014
- A-2 Individual Service Plan for period of November 1, 2013 to October 31, 2014
- A-3 DD-3 Psychological Evaluation dated May 14, 2014
- A-4 DD-4 Social History dated June 2, 2014
- A-5 DD-3 Psychological Evaluation dated August 19, 2014
- A-6 Independent Psychological Evaluation dated January 28, 2015
- A-7 DD-4 Social History
- A-8 ResCare admission information and assessments
- A-9 Individual Support Plan dated May 26, 2015
- A-10 Behavior Support Protocol: Self Injurious Behavior, dated July 10, 2015
- A-11 Behavior Support Protocol: Aggression, dated July 10, 2015
- A-12 Data Collection Sheets: Tantrums, dated August 2015 to December 2015
- A-13 Quarterly Review of ISP dated August 3, 2015
- A-14 Quarterly Review of ISP dated November 9, 2015
- A-15 Issues/Inaccuracies/Missing Information dated March 8, 2016
- A-16 Information (per "[REDACTED] Behavioral Health Advocate") dated March 8, 2016
- A-17 Curriculum Vitae of Dr. [REDACTED]
- A-18 [REDACTED] Inpatient Progress Notes (pages 44/72, 46/72 and 48/72)
- A-19 Remaining records from [REDACTED]

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, a 57-year-old severely mentally impaired individual who receives benefits through the I/DD Waiver Medicaid Program, filed an appeal to contest the Department's determination that he was eligible for Long-Term Care Medicaid services, but ineligible for specialized services while residing in a nursing facility.
- 2) As a matter of record, Kimberly Stitzinger, legal counsel for the Department, requested that the Appellant's case be dismissed by the Hearing Officer, contending that no adverse action had occurred since the Appellant had applied for and was approved for Long-Term Care Medicaid.

However, policy found at 42 CFR 431.201 states that an adverse action determination is an act wherein the individual does not require the level of services provided by a nursing facility, or the individual does or does not require specialized treatment.

As the Appellant was approved for Long-Term Care Medicaid, but was denied specialized services, the Hearing Officer has determined that adverse action occurred and the request for dismissal is denied.

- 3) The Appellant previously resided in a ResCare Intermediate Care Facility (ICF) home, but was admitted to [REDACTED] on February 14, 2016, with cellulitis of the left thumb. In addition, the Appellant has a history of dysphagia and was also diagnosed with aspiration pneumonia while hospitalized. The Appellant's physician recommended that he have a feeding tube inserted to prevent further instances of aspiration; however, the Appellant's family would not agree to that course of action. As a result, ResCare could no longer provide the required care due to the Appellant's need for 24-hour-per-day registered nursing services and possible suctioning to prevent aspiration.
- 4) The Department contended that the Appellant is currently bedridden and his need for medical care currently outweighs his need for specialized services. The Department purported that had specialized services been warranted, the Appellant would have to be placed in an ICF-MR facility where he could receive the services; however, ResCare could no longer meet his medical needs.
- 5) [REDACTED], the Licensed Psychologist who completed the Appellant's Level II evaluation, testified that - given the Appellant's current level of medical needs - he would not currently benefit from active treatment (specialized services). Ms. [REDACTED] testified that the Appellant had been stable in regard to his behavioral issues, and no new self-harm incidents had occurred during the Appellant's hospitalization. It should be noted that the Appellant has a history of physical aggression and self-injurious behavior (picking at his skin). Ms. [REDACTED] stated that she considered several factors in her decision, including the Appellant's level of medication and how his current medical status would affect his independent functioning.

[REDACTED], Esq., represented the Appellant and referred to Exhibits A-9, A-10, A-11 and A-14, including the Appellant's care plan and instructional directives to address his specialized service needs. Exhibit A-10 addresses self-injurious behavior and the Appellant's need for prompts and redirection. Ms. [REDACTED] testified that, based on the documentation she reviewed, the Appellant had no recent episodes of self-injurious behavior, and that he is currently bedridden and has contractures. In addition, his personal care would be provided by nursing facility staff, as he currently lacks strength and stamina.

- 6) Dr. [REDACTED] the Appellant's attending physician, testified that she recommended a feeding tube be inserted into the Appellant's small intestine in July 2015 to prevent aspiration problems, which could lead to infection and pneumonia. The Appellant's family refused to allow the feeding tube and the Appellant has had several subsequent bouts of aspiration pneumonia (see Exhibit D-3). Dr. [REDACTED] who completed the Appellant's Pre-Admission Screening (D-2) for nursing facility care, testified that the Appellant could not stay at the ResCare facility due to his medical needs, that there had been improvement in the Appellant's behavioral issues while at the hospital, and that the Appellant had not been receiving one-on-one services. Dr. [REDACTED] testified that the

Appellant may require suctioning to clear regurgitated food from his lungs, and ResCare does not offer the required around-the-clock care needed should aspiration occur.

- 7) Dr. [REDACTED], Ph.D., testified on behalf of the Appellant and stated that he reviewed the Appellant's records – including Exhibits A-9, A-11 and A-12 - and believes that the Appellant requires a high level of oversight and significant attention to maintain his current skill level. He stated that the Appellant should not be left alone for long periods of time due to his self-injurious behavior. Dr. [REDACTED] testified that the Appellant needs to be redirected, and without active treatment, he could decompensate. He contended that the Appellant's needs have not changed, and that time and place would have no impact on the Appellant's behavior.
- 8) [REDACTED], Chief Nursing Officer at [REDACTED], testified that the Appellant has received suctioning on only one occasion while at the facility.
- 9) [REDACTED], the Appellant's sister and conservator, testified that the Appellant made significant progress while at ResCare's facility, and his communication skills grew due to the one-on-one care he was receiving. She stated that the family would not agree to the insertion of a feeding tube because the Appellant enjoys food and a feeding tube would affect his quality of life. In addition, she stated that the Appellant would likely pull the tube out of his intestinal wall. Ms. [REDACTED] testified about an incident that occurred at the hospital in which the Appellant became physically aggressive with care providers. She also testified that the Appellant has continued to engage in self-injurious behavior.
- 10) A review of the Appellant's progress notes from [REDACTED] (A-18 and A-19) reveal inconsistent patterns of behavior during his hospitalization. On February 27, 2016, the Appellant was noted to be "pleasantly confused." Notes for the period of March 5, 2016 and March 6, 2016, indicate that the patient showed no signs of distress, but also state that he had been "agitated and violent with staff," but became calm when a ResCare worker provided intervention.

APPLICABLE POLICY

West Virginia Bureau for Medical Services Manual Chapter 514.6.2 states that pre-admission screening for medical necessity of nursing facility services is a two-step process. The first step (Level 1) identifies the medical need for nursing facility services based on evaluation of identified deficits and screens for the possible presence of a major mental illness, mental retardation, and/or developmental disability. The second step (Level II) identifies if the individual needs specialized services for a major mental illness, mental retardation, and/or developmental disability.

Chapter 514.6.7 of the manual addresses specialized services for I/DD Waiver clients, and states:

Specialized services for an individual identified as I/DD are a continuous program for an

individual requiring aggressive, consistent implementation of a program of specialized and generic training, treatment, health and related services developed by an IDT that is directed towards:

- The acquisition of the behaviors necessary for the individual to function with as much self-determination and independence as possible; and
- The prevention or deceleration of regression or loss of their current optimal functional status.

These services are generally provided in an intermediate care facility for persons with I/DD or a related condition. If the resident is presently residing in a nursing facility when the Level II is completed and specialized services for I/DD is indicated, and the responsible party refuses this recommendation, this refusal must be documented in the resident's record and readdressed with the responsible party on a continuing quarterly basis or until a Level II recommends otherwise.

Policy found at 42 CFR 483.116 states:

483.116 Residents and applicants determined to require Nursing Facility (NF) level of services.

- (a) *Individuals needing NF services.* If the State mental health or intellectual disability authority determines that a resident or applicant for admission to a NF requires a NF level of services, the NF may admit or retain the individual.
- (b) *Individuals needing NF services and specialized services.* If the State mental health or intellectual disability authority determines that a resident or applicant for admission requires both a NF level of services and specialized services for the mental illness or intellectual disability—
 - (1) The NF may admit or retain the individual; and
 - (2) The State must provide or arrange for the provision of the specialized services needed by the individual while he or she resides in the NF.

DISCUSSION

Policy states that specialized services for an individual identified as I/DD are a continuous program for an individual requiring aggressive, consistent implementation of a program of specialized and generic training, treatment, health and related services developed by an IDT. The services are directed toward the acquisition of the behaviors necessary for the individual to function with as much self-determination and independence as possible, and the prevention or deceleration of regression or loss of their current optimal functional status. These services are generally provided in an intermediate care facility for persons with I/DD or a related condition. Federal regulations state that specialized services must be provided to an intellectually impaired individual residing in a nursing facility if the services are needed.

While the Department contended that the Appellant could not currently benefit from specialized services due to his medical condition, his mental status has not changed and documentation demonstrates that he continues to exhibit aggressive behaviors at times and responds to behavioral prompts when agitated. While the Appellant's self-care needs can be met by nursing facility staff, it is reasonable to believe that he could participate in his self-care to some degree - with prompts - to prevent the regression of his functional status.

The Department's policy states that specialized services are generally [emphasis added] provided in an ICF; however, there is no language to indicate that the services must be confined to an ICF setting, or that the benefit of specialized services must be weighed against the Appellant's medical care needs. Therefore, the Department's denial of specialized services cannot be affirmed.

CONCLUSIONS OF LAW

The Department's decision to approve Long-Term Care Medicaid benefits without the benefit of specialized I/DD services cannot be affirmed.

DECISION

It is the decision of the State Hearing Officer to reverse the Department's action in denying specialized services.

ENTERED this 14th Day of June 2016

**Pamela L. Hinzman
State Hearing Officer**