



State of West Virginia  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
Office of Inspector General  
Board of Review  
9083 Middletown Mall  
White Hall, WV 26554

Earl Ray Tomblin  
Governor

Rocco S. Fucillo  
Cabinet Secretary

November 29, 2012

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Dear Mr. ----:

Attached is a copy of the Findings of Fact and Conclusions of Law on your hearing held November 28, 2012. Your hearing request was based on the Department of Health and Human Resources' action to deny your application for 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 manifest prior to the age of 22 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 at the hearing fails to meet the 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 application for benefits and services through the Medicaid I/DD Waiver Program.

Sincerely,

Thomas E. Arnett  
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-2282**

**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 on November 28, 2012, on a timely appeal filed September 13, 2012.

**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

----, Claimant's mother/representative

---- ----, Claimant's sister-in-law, co-Guardian/representative

-----, Claimant's brother

----, Psychologist Consultant, Bureau for Medical Services

Presiding at the hearing was Thomas E. Arnett, 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 application for 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 6/21/12
- D-3 Independent Psychological Evaluation (IPE) dated 4/18/12

##### **Claimant's Exhibits:**

- C-1 Independent Psychological Evaluation (IPE) dated 1/19/12

#### **VII. FINDINGS OF FACT:**

- 1) On or about June 21, 2012, the Claimant was notified via a Notice of Denial/Termination (D-2) that his application for Medicaid I/DD Waiver Program benefits had been denied. The notice states, in pertinent part - "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 notice indicates that documentation does not support the presence of substantial limitations in any of the major life areas – Self-Care, Learning, Self-Direction, Receptive or Expressive Language, Mobility or Capacity for Independent Living.
- 2) Respondent, represented by ----, a psychologist consultant contracted by the Bureau for Medical Services (BMS), reviewed the I/DD Waiver Policy and proffered testimony specific to the medical eligibility determination completed on the Claimant. As a matter of record, Respondent acknowledged the Claimant has a potentially eligible diagnosis of mental retardation, and that his diagnosis was identified prior to the age of 22 years. Respondent contends, however, that the clinical documentation submitted for eligibility fails to demonstrate that the Claimant meets the functionality criteria – substantial adaptive deficits in

at least three (3) of the six (6) major life areas. Respondent noted that the presence of substantial adaptive deficits must be supported not only by the relevant test scores, but also the narrative descriptions contained in the documentation submitted for review.

- 3) As a matter of record, both parties agreed that the Claimant is ambulatory and that he is not demonstrating a deficit in mobility. Respondent cited the pertinent Adaptive Behavior Scale (ABS) scores (D-3, page 6) and noted that a scaled score of ten (10) defines the average (mean), so an eligible score – 3 standard deviations below the mean - is one (1). Respondent noted that a score of two (2) is accepted, as this score is typically below one (1) percentile.

Upon reviewing the Claimant's ABS scores, Respondent noted that the Claimant scored as follows:

Communication – 3

Self-Direction – 5

Self-Care - 4

Respondent noted that these scores are consistent with the narrative documentation and confirm the Claimant is not demonstrating a substantial adaptive deficit in four (4) of the six (6) major life areas: Mobility, Receptive and Expressive Language (Communication), Self-Direction, and Self-Care.

Respondent noted that the Claimant opted for a second medical eligibility determination, and while the first IPE (C-1) established that learning was a substantial adaptive deficit, a more precise measure of learning was recorded in the results of a Wide Range Achievement Test-4 (WRAT-4) conducted during the second IPE (D-3, page 7 & 8). This clinical data indicates that the only area the Claimant falls below one (1) percentile is math computation.

Respondent further noted that an argument could be made that the Claimant is demonstrating a substantial adaptive deficit in his Capacity for Independent Living, however, Respondent noted that the Claimant has maintained employment, so that component is not deficient, and his adaptive behavior scores in two (2) other components (Leisure-4 and Home Living-3) are ineligible. Respondent noted that while the Claimant's "Social" ABS score of two (2) is eligible, the narrative documentation in the IPE does not support substantial social limitations.

- 4) Claimant's representatives noted, however, that in Exhibit C-1, the evaluating psychologist responded "yes" to sections F.3 and F.4 - indicating the Claimant required active treatment and the same level of care provided in an ICF/MR institutional setting.
- 5) Rebuttal testimony provided by Respondent indicates that section "F" has since been removed from the IPE, as this section caused confusion among applicants. While this area previously reflected the evaluating psychologist's finding/conclusion, pursuant to Medicaid I/DD policy, medical eligibility is determined by the Medical Eligibility Contract Agent (MECA).
- 6) 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.
- 2) Evidence submitted at the hearing fails to confirm that the Claimant is demonstrating substantial adaptive deficits in three (3) or more of the major life areas.
- 3) Whereas the Claimant does not meet the functionality requirements, 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 \_\_\_\_ Day of November 2012.**

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**Thomas E. Arnett  
State Hearing Officer  
Member, Board of Review**