



STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
OFFICE OF INSPECTOR GENERAL
BOARD OF REVIEW
4190 Washington Street, West
Charleston, West Virginia 25313
(304) 746-2360, ext. 2227

Earl Ray Tomblin
Governor

Karen L. Bowling
Cabinet Secretary

March 19, 2015

[REDACTED]

RE: [REDACTED] V. WV DHHR
ACTION NO.: 14-BOR-3362

Dear Ms. [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,

Donna L. Toler
State Hearing Officer
Member, State Board of Review

Encl: Claimant'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**

██████████,

Claimant,

v.

Action Number: 14-BOR-3362

**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 February 25, 2015, on an appeal filed October 7, 2014.

The matter before the Hearing Officer arises from the September 10, 2014 decision by the Respondent to deny Claimant's application for the Title XIX I/DD Waiver Program.

At the hearing, the Respondent appeared by counsel, Mary McQuain, Assistant Attorney General. Appearing as witnesses for the Respondent were Pat Nisbet, Department of Health and Human Resources Program Manager, ██████████ and ██████████, Licensed Psychologist-consultants to the WV DHHR, Bureau for Medical Services. The Claimant appeared by counsel, ██████████, Esquire. Appearing as witnesses for the Claimant were ██████████, M.D., ██████████, Licensed Psychologist, ██████████, Claimant's mother and appointed guardian and ██████████. All witnesses were sworn and the following documents were admitted into evidence.

Department's Exhibits:

- D-1 E-mail dated December 10, 2014 declining 2nd psychological evaluation
- D-2 E-mail dated November 25, 2014 denying Motion to Continue
- D-3 Form IG-BR-29 (Hearing/Grievance Request Notification)
- D-4 Request for Hearing

- D-5 (a) Additional Documentation submitted with hearing request (Dr. [REDACTED])
- (b) Social Security Administration documents
- (c) [REDACTED] Schools Health Service, dated October 31, 1985
- (d) Speech Pathologist Report, dated January 7, 1982
- (e) Letter from Dr. [REDACTED] to SSA, dated September 11, 1986
- (f) [REDACTED] Schools Re-Evaluation Report, dated September 27, 1984
- (g) Order of Appointment of Guardian, dated December 5, 2006, with attached Recommended Decision of Mental Hygiene Commissioner
- (h) Order of Dismissal, dated February 29, 2012, with attachments/notes
- (i) West Virginia Code §44A-1-1
- (j) Paragraph 13 of West Virginia Code §44A-1-1
- D-6 Denial letter, dated September 10, 2014
- D-7 Independent Psychological Evaluation, dated July 16, 2014
- D-8 Letter from [REDACTED], dated July 11, 2014
- D-9 Denial letter, dated January 9, 2012
- D-10 Independent Psychological Evaluation, dated December 20, 2011
- D-11 Letter from [REDACTED], dated March 1, 2012
- D-12 Denial letter, dated April 6, 2012
- D-13 Independent Psychological Evaluation, dated March 20, 2012
- D-14 Letter from [REDACTED], dated December 7, 2011
- D-15 WV Medicaid I/DD Waiver Policy Manual (excerpt)
- D-16 West Virginia Code §27-1-10
- D-17 42 C.F.R (excerpts)

Claimant's Exhibits:

- C-1 Immunization Record and medical notes for Claimant, dated March 7, 1980 through December 14, 1982
- C-2 [REDACTED] Schools Health Service Physician Order, dated October 31, 1985Rating Summary, dated October 14, 2014
- C-3 Social Security Administration correspondence regarding Claimant, dated December 9, 2011
- C-4 High School Diploma issued to Claimant, dated May 29, 1999
- C-5 Report by Dr. [REDACTED], dated May 19, 2000
- C-6 Recommended Decision of [REDACTED], Mental Hygiene Commissioner for Appointment of [REDACTED] as Guardian for Claimant, dated July 31, 2000
- C-7 Order of Appointment of [REDACTED] as Guardian for Claimant, dated December 5, 2000
- C-8 West Virginia Code § 44A-1-1, et. Seq., West Virginia Guardianship and Conservator Act
- C-9 Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), p. 41-48 ("Mental Retardation")
- C-10 Psychological Evaluation by [REDACTED], PsyD, dated July 16, 2014
- C-11 Psychological Evaluation by [REDACTED], PsyD, amended January 15, 2015

- C-12 Diagnosis of Dr. [REDACTED], dated September 30, 2014
- C-13 Notice of Denial, dated September 10, 2014
- C-14 WV Medicaid I/DD Waiver Policy Manual (excerpts)
- C-15 Adaptive Behavior Assessment Systems, Second Edition, Adult Form, Ages 16-89
- C-16 Resume of Dr. [REDACTED], PsyD

Joint Exhibits:

- J-1 [REDACTED] Medical Records (enumerated pages 1 through 818)
- J-2 Affidavit of [REDACTED], notarized January 30, 2015
- J-3 Contact Log PC&A

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) An application for the Title XIX I/DD Waiver Program (I/DD Waiver Program) was completed on the Claimant's behalf and denied by the Department on September 10, 2014. The denial letter indicated the Claimant's application was denied because the Claimant did not have an eligible diagnosis of intellectual disability or a related condition which was severe. (Exhibit D-6)
- 2) The Department's witness, [REDACTED] (Ms. [REDACTED] is a licensed psychologist contracted with the Bureau for Medical Services to complete assessments for the I/DD Waiver Program. Ms. [REDACTED] testified that while a review of medical records provided in support of the Claimant's application included references to diagnoses of Mild Mental Retardation, Pervasive Development Disorder (PDD), and autism, the medical reports, testing scores and narratives did not reflect any eligible diagnoses.
- 3) The Claimant's attorney argued that because the Claimant was defined as a Protected Person in the Circuit Court of [REDACTED], pursuant to West Virginia Code 44A-2-9, he should be eligible for the I/DD Waiver Program. (Exhibits C-6, C-7 and C-8). The Respondent explained that the legal definition for a protected person does not involve the same eligibility process required by policy to be determined eligible for the I/DD Waiver Program. (Exhibit D-15)
- 4) The Claimant's IPE includes the results of the June 16, 2014, Wechsler Adult Intelligence Scale – Fourth Edition administered by Dr. [REDACTED] (Dr. [REDACTED] with the Claimant. (Exhibits C-10 and D-7) The Claimant's full scale score of 74 was identified as being "borderline" by Ms. [REDACTED] Ms. [REDACTED] stated that in order to be considered an eligible score, the scale score must be three (3) standard deviations below the mean. The Claimant would have to scored 55 or below on the scale to meet the

I/DD Waiver Program criteria. Medical records documented several IQ scores, all of which were identified as being “borderline intellectual functioning” by Ms. [REDACTED] (Exhibits D-7, D-10 and D-13)

- 5) The Claimant’s attorney referred to Exhibit J-1, page 702, which indicated a performance IQ of 31, a Verbal IQ of 32 and a “Full Scale IQ” of 63. The information was recorded on an assessment conducted on October 12, 1988. The document was entitled “Subtest Score Sheet”. The Claimant’s attorney argued that the IQ score contained on the document supported the diagnosis of mild mental retardation. Physician notes contained on J-1, Page 134, indicate that a diagnosis of mild mental retardation was established as a result of the “Full Scale IQ 63 on 10/12/88”. Ms. [REDACTED] testified that the score of 63 was not the full scale IQ score, but was the total of raw data scores which were then interpreted into a full scale IQ score of 74, documented on Exhibit J-1, Page 704. (Exhibit J-1, Pages 134, 702 and 704)
- 6) Dr. [REDACTED] (Dr. [REDACTED] testified he was unable to recall any other test results on which he based his diagnosis of mild mental retardation besides the full scale IQ score documented on Exhibit J-1, Pages 702 and 704. (Exhibit J-1, Pages 702 and 704) Dr. [REDACTED] acknowledged that the Claimant was treated primarily for Obsessive Compulsive Disorder (OCD), a mental disorder. Dr. [REDACTED] reported that the treatment included counseling and medication. (Exhibit J-1)
- 7) The Respondent reviewed the June 2014 IPE completed by Dr. [REDACTED] (Dr. [REDACTED] and requested additional clarifying information, due to conflicting and missing information. Some of the information requested included whether Ms. [REDACTED] had any records to support a diagnosis of autism during the developmental period and if the Claimant was served by the school system based on an intellectual disability such as Asperger’s or autism. (Exhibit J-3)
- 8) Dr. [REDACTED] responded that she had no documentation of autism other than her clinical judgment. She reported that her diagnosis was based on her clinical expertise and due to the Claimant’s significant delay in speech. The IPE completed by Dr. [REDACTED] documented that “[Claimant] has a past diagnosis of Pervasive Development Disorder but the extent of his symptoms, coupled with his absence of speech until age three, is considered to warrant a more specific diagnosis of Autistic Disorder”. (Exhibits D-7 and J-3)
- 9) The June 16, 2014 IPE completed by Dr. [REDACTED] made no reference to previous IPEs conducted on December 20, 2011 and March 20, 2012. Neither the December 2011 nor the March 2012 IPEs indicated that the Claimant had an eligible diagnosis for the I/DD Waiver Program. Additionally, the history section of the IPE contained information that contradicted information contained in previously conducted IPEs and medical records. The June 14, 2014 IPE indicated that the Claimant engaged in no speech at all until 30 months. The 2012 IPE indicated that the Claimant was saying a few words by age 2, speaking well by age 3 and reading Little Golden Books by age 3. Medical records indicated that at the Claimant was verbal at 15 months and was able to verbalize two to

three 2-syllable words, and at 23 months he was combining words into simple sentences, consistently using ten or more true words. (Exhibits D-7, D-10, D-13 and J-1, Pages 13, 18 and 24)

- 10) In June 2014, Dr. [REDACTED] conducted the Gilliam Asperger's Disorder Scale (GADS). The IPE identified GADS as "an assessment to assess the presence of behaviors often associated with Asperger's Symptoms". The Claimant was assessed an Asperger's Disorder quotient of 110, highly probable for Asperger's Disorder. (Exhibit D-7)
- 11) Ms. [REDACTED] testified that the scores obtained on the GADS are used to establish a diagnosis for Asperger's Syndrome and not autism. When the Respondent inquired as to why Dr. [REDACTED] used a tool designed to establish a diagnosis of Asperger's, which is not considered a severe condition on the autism spectrum, instead of a tool designed for the diagnosis of autism, Dr. [REDACTED] testified that she did not think the Claimant's disability rose to that level when she initially chose which test to administer.
- 12) The Claimant's attorney argued that an eligible diagnosis prior to age 22 was established because the Claimant graduated with an Individualized Education Program diploma. Ms. [REDACTED] pointed out that there was no evidence provided indicating why the Claimant received the Individualized Education Program diploma. Ms. [REDACTED] speculated that it could have been because of mental health issues such as his OCD behaviors. (Exhibit C-4)
- 13) Counsel for the Claimant argued that the Claimant should be eligible for the I/DD Waiver Program because the Social Security Administration determined the Claimant was disabled, defined as being unable to obtain substantial gainful activity, based upon a disability diagnosis of autism and other Pervasive Disorders, retroactive to May 1997. However, the Claimant failed to provide documentation or relevant test scores used by the Social Security Administration which supported the diagnosis of autism. The Respondent did not dispute that the Claimant was unable to be substantially and gainfully employed, adding that employability was only one of six sub-categories for the functional deficit of independent living. (Exhibit C-3)
- 14) The Claimant's mother, [REDACTED] (Ms. [REDACTED]) testified that the Claimant is unable to understand dangers, which puts his health and safety at risk. Ms. [REDACTED] described an incident when the Claimant stood in the railroad tracks waving his arms in front of an oncoming train. Ms. [REDACTED] expressed concern about what would happen to her son in the event of her passing.

APPLICABLE POLICY

West Virginia Medicaid Regulations, Chapter 513- *Applicant Eligibility and Enrollment Process for I/DD Waiver Services*, §513.3 states that an applicant must have a written determination that they meet medical eligibility criteria. Initial medical eligibility is determined through review of

an Independent Psychological Evaluation (IPE) report completed by a member of the Independent Psychologist Network (IPN).

West Virginia Medicaid Regulations, Chapter 513 - *Applicant Eligibility and Enrollment Process for I/DD Waiver Services*, §513.3.2.1, lists examples of related conditions which may, if severe and chronic in nature, be program eligible diagnoses, include but are not limited to autism, Traumatic brain injury, Cerebral Palsy; Spine Bifida, and any condition, other than mental illness, closely related to mental retardation because the 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.

West Virginia Medicaid Regulations, Chapter 513 - *Applicant Eligibility and Enrollment Process for I/DD Waiver Services*, §513.3.2, states that an individual who applies for I/DD Waiver Services must substantiate the presence of substantial adaptive deficits in three out of six major life areas, which are self-care, receptive or expressive language, learning, mobility, self-direction and the capacity for independent living.

West Virginia Medicaid Regulations, Chapter 513 - *Applicant Eligibility and Enrollment Process for I/DD Waiver Services*, §513.3.2.2 reads, “Substantial deficits are defined as standardized scores of 3 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 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.”

DISCUSSION

The Medical Eligibility Contracted Agency (MECA) determines the qualification for an IDD level-of-care based on an IPE that verifies the applicant has mental retardation or a related condition which is severe and chronic in nature. Policy requires the MECA to rely on test scores derived from IPE’s, along with narratives and notes which support the scores. **Narratives and notes are not a substitute for eligible scores and cannot be used alone to confirm medical eligibility.** (*Emphasis added*)

In order to establish medical eligibility for participation in the Medicaid I/DD Waiver Program, an individual must meet the three criteria of diagnosis, functionality, and the need for active treatment. Initial medical eligibility is determined through review of an Independent Psychological Evaluation (IPE) report completed by a member of the Independent Psychologist Network (IPN). If the medical criteria of diagnosis is not met, the individual cannot be determined eligible for the IDD/Waiver Program.

Evidence established that the Claimant failed to meet the criteria of an eligible diagnosis of mental retardation or that of a related condition which is severe in nature. While Dr. [REDACTED]

indicated that the Claimant had a diagnosis of mild mental retardation, the Claimant failed to provide any evidence of valid test scores which established the diagnosis. The Claimant, through his representatives, referred to a document in which they indicated the Claimant had a score of 63. However, Ms. [REDACTED] reviewed the documentation and presented credible testimony that the score was not a full scale IQ score, but a testing total used to determine the full scale IQ of 74, not 63. In fact, a history of IQ tests consistently indicated the Claimant's IQ scores fell into the borderline intellectual functioning range.

A copy of a Social Security Administration letter indicated that the Claimant had been found disabled due to autism and other Pervasive Disorders retroactive to May 1997. However, policy requires an eligible diagnosis be supported by relevant test scores. There was no supporting documentation provided by the Claimant which revealed what the Social Security Administration relied upon in making its determination of disability.

Dr. [REDACTED] indicated that she administered the Gilliam Asperger Scale to determine if the Claimant had autism. Dr. [REDACTED] provided testimony that the Gilliam Asperger Scale is not used for rating autism but is used to determine if an individual has Asperger's syndrome. Test results indicated the Claimant had a high probability of Asperger's, but did not confirm a diagnosis of autism. Dr. [REDACTED] notes revealed that given the Claimant's significant delay in speech skills (after age 3), in addition to symptoms indicated and observed, she felt a diagnosis of autism was more appropriate than one of Asperger's. When questioned by Dr. [REDACTED] as to why a test designed to evaluate for autism was not used, Dr. [REDACTED] testified that she did not think his disability rose to that level when she initially chose which test to administer. It should be noted that the Dr. [REDACTED] was provided with a history indicating the Claimant did not speak at all before 30 months of age. However, medical records reveal he was using ten or more true words prior to age two and reading Little Golden Books by age three. Because Dr. [REDACTED] diagnosis was based on inaccurate information regarding when the Claimant began to speak, there is not sufficient evidence to support a diagnosis of autism.

The Claimant was identified as a protected person in a guardianship matter conducted in Circuit Court. Being identified as a protected person does not meet the eligibility requirement for the I/DD Waiver Program.

The Claimant received his diploma based on an Individualized Education Plan (IPE), but it unknown if the IPE was established for a mental health disorder or learning disability.

The Claimant failed to provide evidence of a diagnosis of mental retardation or a related condition which is severe. The Claimant's IQ scores were consistently measured in the borderline status.

CONCLUSIONS OF LAW

Claimant's application for the Title XIX I/DD Waiver Program did not meet the policy requirement of a diagnosis of mental retardation or a related condition which is severe in nature as defined by policy. Therefore, the Claimant does not meet the medical component of eligibility.

DECISION

It is the decision of the State Hearing Officer to **uphold** the Department's decision to deny Claimant's application for the Title XIX I/DD Waiver Program.

ENTERED this _____ Day of March 2015.

Donna L. Toler
State Hearing Officer