



State of West Virginia  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
Office of Inspector General  
Board of Review  
4190 Washington Street, West  
Charleston, WV 25313

Earl Ray Tomblin  
Governor

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

December 8, 2010

----for

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Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held November 17, 2010. Your hearing request was based on the Department of Health and Human Resources' action to deny your son's application for continued benefits and services through the Medicaid MR/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 MR/DD Home and Community-Based Waiver Program is based on current policy and regulations. The Title XIX MR/DD Home & Community-Based Waiver Program policy provides that, among other eligibility requirements, an individual must be substantially limited in functioning. To meet the program's functionality requirements, the individual must be substantially limited in three (3) or more of the following major life areas; self-care, receptive or expressive language, learning, mobility, self-direction and capacity for independent living. 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 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. (West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations, and Exclusions, For MR/DD Waiver Services).

Information submitted at your hearing fails to demonstrate that you meet the criteria necessary to continue your son's medical eligibility for participation in the MR/DD Waiver Program. The evidence shows your son's test scores did not meet the policy requirements for eligibility in the program.

It is the decision of the State Hearing Officer to **uphold** the Department's action in denying your application for continued benefits and services through the Medicaid, Title XIX, MR/DD Waiver Program.

Sincerely,

Cheryl Henson  
State Hearing Officer  
Member, State Board of Review

cc: Chairman, Board of Review  
Jennifer Eva, APS Health Care

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

-----,

**Claimant,**

vs.

**Action Number: 10-BOR-1682**

**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 was convened on November 17, 2010 on a timely appeal filed August 3, 2010.

All persons giving testimony were placed under oath.

**II. PROGRAM PURPOSE:**

The *Medicaid Home and Community-Based MR/DD Waiver* (authorized under Title XIX, Section 1915(c) of the Social Security Act) provides an alternative to services available in Intermediate Care Facilities for individuals with Mental Retardation or related conditions (ICF/MR). The primary purpose of an ICF/MR facility is to provide health and rehabilitative services. An ICF/MR facility provides services to persons who are in need of and who are receiving active treatment.

West Virginia's MR/DD Waiver Program provides for individuals who require an ICF/MR level of care, and who are otherwise eligible for participation in the program, to receive certain services in a home and/or community-based setting for the purpose of attaining independence, personal growth, and community inclusion.

**III. PARTICIPANTS**

-----, Claimant's father/representative  
Jennifer Eva, APS Health Care  
Richard Workman, Psychologist Consultant, PC&A, Inc.

Presiding at the hearing was Cheryl Henson, 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 continued benefits and services through the MR/DD Waiver Program.

#### **V. APPLICABLE POLICY**

West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations, and Exclusions, For MR/DD Waiver Services.

#### **VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED**

##### **Exhibits:**

D-1 and C-4 Joint Exhibit – Eligibility criteria for MR/DD program – summarized  
D-2 and C-3 Joint Exhibit – Notification letter dated July 19, 2010  
D-3 and C-1 Joint Exhibit – DD-2A form dated April 6, 2010  
D-4 and C-2 Joint Exhibit – Psychological evaluation Dated May 27, 2010  
D-5 and C-5 Joint Exhibit – Chapter 513 MR/DD Waiver Services Policy  
C-6 Claimant Exhibit – Confidential Habilitation Objective Pages  
C-7 Claimant Exhibit – Confidential Individual Program Plan dated July 16, 2010

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

- 1) Prior to the onset of this hearing, an objection was made by the Claimant as to whether the Board of Review has the authority to rule on the Department's July 19, 2010 decision to deny continued medical eligibility for the MR/DD Waiver program for ----- . He cited a September 15, 2008 Order, Civil Action Number 08-AA-114, issued in the Circuit Court of ██████████ County, West Virginia, in which the Court granted a stay of a prior decision dated September 9, 2008 that terminated the Claimant's medical eligibility for MR/DD Waiver benefits and services at that time.

West Virginia Medicaid Regulations, Chapter 513, - RE-DETERMINATION OF MEDICAL ELIGIBILITY, effective 11/01/07, provides that a re-determination of medical

eligibility must be completed annually for each member. Pursuant to federal law, an individual must qualify for recertification at least annually.

As such, the Board of Review finds that the MR/DD Waiver program is a term limited program in which medical eligibility is re-determined yearly by means of a reapplication process. Since the Claimant reapplied for continued eligibility for those benefits and services, and a new re-determination decision has been issued by the Department more than one year after the previous Order was issued, the Board of Review has authority to rule on this issue. Prior eligibility will not be addressed.

- (2) In response to a re-application completed for benefits and services through the Medicaid MR/DD Waiver Program, on or about July 19, 2010 the Claimant was notified via a Notice of Denial/Termination (D-2, C-3) that Waiver services were being terminated. This notice states, in pertinent part:

Your Waiver services have been terminated.

Your application was denied/terminated because:

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: Learning, Self-Direction, Receptive or Expressive Language, Mobility and Capacity for Independent Living.

- 3) West Virginia Medicaid Regulations, Chapter 513, – Covered Services, Limitations, and Exclusions, For MR/DD Waiver Services, effective 11/1/07, include the following pertinent medical eligibility criteria:

**Medical Eligibility Criteria**

The MR/DD State Waiver Office determines the medical eligibility for an applicant in the MR/DD Waiver Program. In order to be eligible to receive MR/DD Waiver Program Services, an applicant must meet the following medical eligibility criteria:

- Have a diagnosis of mental retardation and/or a related condition,
- Require the level of care and services provided in an ICF/MR (Intermediate Care Facility for the Mentally Retarded) as evidenced by required evaluations and corroborated by narrative descriptions of functioning and reported history. An ICF/MR provides services in an institutional setting for persons with mental retardation or related condition. An ICF/MR facility provides monitoring,

supervision, training, and supports.

MR/DD State Waiver Office determines the level of care (medical eligibility) based on the Annual Medical Evaluation (DD-2A), the Psychological Evaluation (DD-3) and verification if not indicated in the DD-2A and DD-3, that documents that the mental retardation and/or related conditions with associated concurrent adaptive deficits were manifested prior to the age of 22, and are likely to continue indefinitely. Other documents, if applicable and available, that can be utilized include the Social History, IEP for school age children, Birth to Three assessments, and other related assessments.

The evaluations must demonstrate that an applicant has a diagnosis of mental retardation and/or a related developmental condition, which constitutes a severe and chronic disability. For this program individuals must meet the diagnostic criteria for medical eligibility not only by the relevant test scores, but also the narrative descriptions contained in the documentation. To be eligible, the member:

- Must have a diagnosis of mental retardation, with concurrent substantial deficits (substantial limitations associated with the presence of mental retardation), and/or
- Must have a related developmental condition which constitutes a severe and chronic disability with concurrent substantial deficits.

Examples of related conditions which may, if severe and chronic in nature, make an individual eligible for the MR/DD Waiver Program include but are not limited to, the following:

- 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.
- Autism
- Traumatic brain injury
- Cerebral Palsy
- Spina Bifida
- Tuberous Sclerosis

Additionally, the member who has a diagnosis of mental retardation and/or

related conditions and associated concurrent adaptive deficits must have the following:

- Manifested prior to the age of 22, and
- Likely to continue indefinitely.
- Must have the presence of a least three (3) substantial deficits out of five of the major life areas (term is defined in Title 42, Chapter IV, Part 435.1009 of the Code of Federal Regulations or CFR. Refer to 503.1, Functionality section for a list of the major life areas.

### **Functionality**

• Substantially limited functioning in three (3) or more of the following major life areas; (“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, i.e., psychological, the IEP, Occupational Therapy evaluation, etc.). Applicable categories regarding general functioning include:

- Self-care
- Receptive or expressive language (communication)
- Learning (functional academics)
- Mobility
- Self-direction
- Capacity for independent living (home living, social skills, employment, health and safety, community and leisure activities).

For applicable major life functioning areas, refer to Code of Federal Regulation (CFR): 42 CFR435.1009.

### **Active Treatment**

- Requires and would benefit from continuous active treatment.

### Medical Eligibility Criteria: Level of Care

- To qualify for ICF/MR level of care, evaluations of the applicant must demonstrate:
  - o A need for intensive instruction, services, assistance, and supervision in order to learn new skills, maintain current level of skills, and increase independence in activities of daily living,
  - o A need for the same level of care and services that is provided in an ICF/MR institutional setting.

The applicant or legal representative will be informed of the right to choose between ICF/MR services and home and community-based services under the MR/DD Waiver Program and informed of his/her right to a fair hearing at the time of application (Informed Consent, DD-7).

### **Conditions Ineligible**

- Substantial deficits associated with a diagnosis other than mental retardation or a related diagnosis do not meet eligibility criteria.
- Additionally, any individual needing only personal care services does not meet the eligibility criteria.
- Individuals diagnosed with mental illness whose evaluations submitted for medical eligibility determination indicate no previous history of co-occurring mental retardation or developmental disability prior to age 22. The member's clinical evaluators must provide clinical verification through the appropriate eligibility documentation that their mental illness is not the primary cause of the substantial deficits and the mental retardation or developmental disability occurred prior to the age of twenty-two (22).

- 4) The particular area in dispute for this hearing involves the functionality of the Claimant, and whether his functional abilities are considered to be “substantially limited” in three (3) or more of the six (6) major life areas.

The Department contends that, although the Claimant was determined to have an eligible diagnosis of autism, he was found to be substantially limited in only one area, which is the area of self-care, based on his test scores and the narrative evidence provided for review. The Department contends that, in order to meet the policy requirements for substantially limited function, an individual must not only have narrative evidence of a substantial limitation, but also have test scores that fall within a certain range. For this Claimant, the test scores were compared to other non-mentally retarded individuals in order to determine his rank in each category, and his percentile rank would need to be less than one (1) percentile in order to meet the policy requirements. Based on this criterion, the Claimant

only met the policy requirements for one area of functionality. He must have three (3) or more substantially limiting areas of functionality in order to be determined medically eligible.

The Claimant contends that the Department did not consider the evidence submitted for review in its entirety, and denied his medical eligibility based only on the test scores. He contends that the medical evidence submitted supports that the Claimant is eligible for the program.

- 5) The Department's witness, Rick Workman, is a licensed psychologist, and has been involved with the Title XIX MR/DD Waiver program since 1985. He testified that he conducts eligibility determinations for the Department. He testified that he reviewed the eligibility packet submitted on behalf of the Claimant. He noted that the Claimant has an eligible diagnosis of Autism, and that both his physician and psychologist indicated that he requires ICF-MR (Intermediate Care Facility for the Mentally Retarded) level of care. He stated that he reviewed, and considered, all the medical evidence submitted for review for the nine (9) year old Claimant, including the DD-2A and DD-3 forms (D-3, C-1, D-4 and C-2). He testified that the critical area for this evaluation was in the area of test scores. He testified that, although he did find evidence of delays in functioning in both the narrative and test scores for the Claimant, the delays are required by policy to fall within a specific criterion in order to meet the eligibility requirements for the MR/DD program. He noted that since there is no diagnosis of mental retardation, the Claimant's test scores were compared to the Non-Mental Retardation norms, and by policy must fall below the one (1) percentile rank in order to qualify as substantially limiting. He testified that he reviewed the Claimant's ABS-S: 2 test scores from his psychological evaluation (D-4, C-2) and found that he only met these requirements in one area, that being the area of self-care. He testified that the test showed the Claimant received a percentile rank of less than one (1) percentile under the Independent Functioning category, which is considered when evaluating self-care. He also mentioned that the Claimant also ranked at less than one (1) percentile under one other category, that being the category of Socialization; however, this by itself did not equate to a substantial deficit in any of the six major life areas. He added that although the Claimant's test scores in some of the other areas assessed were low, they did not fall below the less than one (1) percentile rank and as a result he was unable to assess his functional abilities in those areas as substantially limited. He added that the Claimant was determined ineligible because he did not meet the policy requirements for having substantially limiting functioning in three (3) or more of the six (6) major life areas.
- 6) The Claimant's representative, ----, is the Claimant's father. He testified that he believes the Department did not properly evaluate his son's medical eligibility for the MR/DD program. He took issue with the structure of the Department's DD-2A form, a physician completed form, asserting that the Department did not request more detailed information on this form from the physician regarding all the major life areas of the Claimant's functioning. He pointed out that although the physician indicated on the DD-2A form that the Claimant was ambulatory, he also indicated that he has autonomic nervous system dysfunction and

hypotonia, which involves low muscle tone, and asserts that these impairments interfere with his mobility. He purports that the Department has failed to fully consider both the physician's and the psychologist's recommendations (D-3, C-1, D-4, and C-2) that the Claimant continue in ICF-MR level of care services.

-----submitted as evidence (C-6) documents entitled Habilitation Objective Pages. These documents outline current goals that the Claimant is working on to improve his functional abilities. The goals involve improving on safety skills, dressing skills, grooming skills, communication and socialization skills, and are rated with a daily accomplishment score from zero (0) through ten (10) with ten (10) being considered self sufficient. His daily scores ranged from zero (0) through eight (8) indicating partial accomplishment. Two (2) of the goals dealt with decreasing repetitive and scripting statements. His scores in these two (2) areas indicated he was using these types of statements between ten (10) to more than fifty (50) times daily. -----also submitted a copy of the July 16, 2010 Individual Program Plan for his son (C-7). This form shows the plan developed between Community Services, Inc., and the Claimant in order to improve functioning. Neither the Habilitation Objective Pages (C-6) nor the Individual Program Plan (C-7) was available to the Department at the time of the determination.

- 7) The Claimant's ABS-S: 2 test scores with percentile ranks as listed on the psychological evaluation (D-4 and C-2) are as follows:

SUBTEST	PERCENTILE RANK
Independent Functioning	<1
Physical Development	50
Economic Activity	1
Language Development	2
Numbers and Time	16
Pre-Vocational Activity	5
Self-Direction	1
Responsibility	2
Socialization	<1
FACTOR	
Personal Self-Sufficiency	1
Community Self-Sufficiency	1
Personal Social Responsibilities	1
SUBTEST	
Social Behavior	25
Conformity	1

Trustworthiness	5
Stereotyped and Hyperactive Beh.	1
Self Abusive Behavior	2
Social Engagement	2
Disturbing Interpersonal Beh.	16

FACTOR

Social Adjustment	2
Personal Adjustment	1

The Claimant’s scores reflect that he ranked at less than one (1) percentile in the categories of Independent Functioning and Socialization, and supports the finding of substantially limited functioning in the area of self-care. The test scores are not sufficiently low enough per policy to support that he is substantially limited in any of the other remaining major life areas.

**VIII. CONCLUSIONS OF LAW:**

- 1) The regulations that govern the MR/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. “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 (Emphasis added), 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) The Claimant presents a potentially eligible diagnosis of Autism; however, the clinical evidence fails to indicate the Claimant is demonstrating substantial adaptive deficits in three (3) or more of the major life areas. The standardized measures of adaptive behavior scores, as well as the clinical and narrative documentation found in the evaluations, confirm substantial adaptive deficits in only one (1) of the six (6) major life areas, that being self-care.
- 3) Based on the evidence presented at the hearing, the Department was correct in denying the Claimant’s application for continued participation in the Medicaid MR/DD Waiver Program.

**IX. DECISION:**

It is the decision of the State Hearing Officer to **uphold** the action of the Department in terminating

the Claimant's application for continued benefits and services through the MR/DD Waiver Program.

**X. RIGHT OF APPEAL:**

See Attachment.

**XI. ATTACHMENTS:**

The Claimant's Recourse to Hearing Decision.

Form IG-BR-29.

**ENTERED this 8<sup>th</sup> Day of December, 2010**

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**Cheryl Henson  
State Hearing Officer**