



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General

Board of Review
P.O. Box 1736
Romney, WV 26757

Earl Ray Tomblin
Governor

Patsy A. Hardy, FACHE, MSN, MBA
Cabinet Secretary

December 6, 2010

Dear -----:

Attached is a copy of the Findings of Fact and Conclusions of Law on your hearing held October 29, 2010. Your hearing request was based on the Department of Health and Human Resources' decision to terminate your 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. Policy states that in order to be eligible for the Title XIX MR/DD Home & Community-Based Waiver Program, an individual must substantiate each of the following elements: 1) a diagnosis of mental retardation with concurrent substantial deficits which require the level of care and services provided in an Intermediate Care Facility for the Mentally Retarded (ICF/MR); 2) substantially limited functioning in three or more of the major life areas of self-care, receptive or expressive language, learning, mobility, self-direction, and capacity for independent living; 3) the requirement for and ability to derive benefit from continuous active treatment; and 4) the endorsement of the need for an ICF/MR level of care from both a physician and a psychologist. (MR/DD Waiver Manual, Chapter 513 – *Covered Services, Limitations, and Exclusions for MR/DD Waiver Services*, §513.3.1).

The information which was submitted at your hearing fails to establish that you exhibit substantial adaptive deficits in three or more of the major life areas that require the level of care and services provided in an Intermediate Care Facility for individuals with mental retardation or related conditions.

It is the decision of the State Hearing Officer to Uphold the action of the Department to terminate your benefits and services through the MR/DD Waiver Program.

Sincerely,

Eric L. Phillips
State Hearing Officer
Member, State Board of Review

cc: Erika Young, Chairman, Board of Review
Jennifer Eva, APS Healthcare

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

-----,

Claimant,

v.

Action Number: 10-BOR-1798

**West Virginia Department of
Health and Human Resources,**

Respondent.

DECISION OF 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 October 29, 2010 on a timely appeal, filed July 29, 2010.

It should be noted here that the Claimant's benefits under the MR/DD Waiver Program continue at the previous level of determination pending a decision from the State Hearing Officer.

II. PROGRAM PURPOSE:

The *Medicaid Home and Community-Based MR/DD Waiver Program* (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
-----, Claimant's Representative and Foster Mother
-----, Case Manager, [REDACTED]
-----, Therapeutic Consultant, [REDACTED]
Jennifer Eva, APS Healthcare
Richard Workman, Psychologist Consultant

Presiding at the hearing was Eric L. Phillips, State Hearing Officer and a member of the Board of Review.

IV. QUESTION TO BE DECIDED:

The question to be decided is whether or not the Department was correct in its decision to terminate the Claimant's benefits and services through the MR/DD Home and Community Based Waiver Program.

V. APPLICABLE POLICY:

Chapter 513-Covered Services, Limitations, and Exclusions for MR/DD Waiver Services

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 Notice of Denial/Termination dated June 7, 2010
- D-2 Notice of Denial/Termination dated July 19, 2010
- D-3 DD-2A-ICF/MR Level of Care Evaluation dated May 10, 2010
- D-4 DD-2A-ICF/MR Level of Care Evaluation dated June 21, 2010
- D-5 DD-3, Psychological Evaluation dated June 28, 2010

VII. FINDINGS OF FACT:

- 1) On June 7, 2010, the Department issued the Claimant, Exhibit D-1 Notice of Denial/Termination. This notice documents in pertinent part:

Your Waiver services have been terminated.

Your application was Terminated [sic] because: The physician has not provided an eligible diagnosis on the DD-2A.

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

Richard Workman, Psychologist Consultant for the Department testified that the physician completing Exhibit D-3, DD-2A ICF/MR Level of Care Evaluation on May 10, 2010, failed to indicate a diagnosis of mental retardation or a related condition on the documentation.

- 2) Mr. Workman testified that Exhibit D-4, DD-2A ICF/MR Level of Care Evaluation was submitted for review on June 21, 2010. This additional evaluation provided a diagnosis of mild mental retardation and certified that the Claimant required the level of care and services provided in an “Intermediate Care Facility” for individuals with mental retardation and related conditions. Mr. Workman testified that in order for the Claimant to be considered eligible for program purposes, she would need to have adaptive behaviors consistent with persons who exhibit mental retardation at a level lower than a mild range of mental retardation. On July 19, 2010, the Department issued the Claimant, Exhibit D-2 Notice of Denial/Termination. This notice documents 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: Self-Care, Receptive or Expressive Language, Mobility, Self-Direction, Capacity for Independent Living.

This documentation indicates that the Claimant has one substantial adaptive deficit in the area of learning.

- 3) Mr. Workman testified that all documentation was reviewed and the Claimant did not meet the criteria for continued ICF/MR Level of Care. The Department contends that the eligibility criteria in the area of functionality has not been met, specifically the Claimant is not demonstrating substantial adaptive deficits in three or more of the six major life areas.

The Claimant’s representatives contend that additional deficits should be awarded in the areas of Self-Direction, Self-Care, and Capacity for Independent Living.

The following relates to the contested areas:

Self-Direction- -----, Claimant’s Case Manager, [REDACTED] stated that the Claimant has deficits in the required functionality life areas. -----stated that the Claimant’s deficits do not allow her to maintain employment in the community and that she is not able to function independently because she does not possess adequate self-direction skills. Additionally, -----, the Claimant’s foster mother indicated that the Claimant uses a handicap bike, she cannot swim, and that the Claimant can answer the phone, but cannot dial a regular phone.

As part of the Claimant’s psychological evaluation, an Adaptive Behavior Assessment System II (ABS-II) instrument was utilized to determine the Claimant’s adaptive behavior. Mr. Workman stated that scores must be less than one percentile rank or three standard deviations below the mean. Mr. Workman indicated that the psychologist completing the ABS-II documented scaled scores and scores of 1 or 2 are considered eligible scores for the assessment of deficits in the life areas. Mr. Workman testified that scaled scores are translated into a

percentile rank and a scaled score of 2 translates to a .36 percentile rank which is less than one percentile rank according to policy. In the area of Self-Direction, the Claimant was awarded a scaled score of 4, which does not translate to a score of three standard deviations below the mean or less than one percentile rank. Mr. Workman added that the narrative suggests that the Claimant possesses leisure and self-direction abilities.

Self-Care- ----, the Claimant's Therapeutic Consultant with the [REDACTED] stated that the Claimant may appear high-functioning, but she has multiple deficits. ----indicated that goals in the area of self-care must be reintroduced over time, in order to build on the Claimant's skills and that the Claimant requires intensive training to maintain skill levels and reintroduce goals and skills involved with self-care. ----cited the example of reintroducing the correct technique for brushing teeth to the Claimant, in order to prevent plaque build-up. In the area of self-care, the Claimant was assessed a scaled score of 5 which does not translate to an eligible score for program purposes. Mr. Workman testified that the narrative in Exhibit D-5 suggests that the Claimant is independent in most self-care activities with continued monitoring. Mr. Workman purported that the Claimant's capacity to be independent in the area of self-care does not represent a substantial deficit in the life area.

Capacity for Independent Living- ----indicated that the Claimant's data, in the functional areas, fluctuates from year-to-year and the Claimant requires intensive training to maintain skill levels and reintroduce goals and skills involved with Capacity for Independent Living. Mr. Workman indicated that Capacity for Independent Living includes home living, social skills, employment, health and safety, and community and leisure skills. Mr. Workman indicated that the Claimant's social skills test score on the Adaptive Behavior Scale were weak as they relate to her Capacity for Independent Living. However, Mr. Workman indicated that the Claimant's scores in Home Living (7) and Health and Safety (5), did not fall below the one percentile rank to be eligible and she was not awarded a deficit in the life area. Mr. Workman added that leisure is not examined in the area of Capacity for Independent Living.

- 4) West Virginia Medicaid Regulations, Chapter 513, – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07, includes 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
- Tuberos 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:

- 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,

- 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).

VIII. CONCLUSIONS OF LAW:

- 1) Policy and regulations that govern the MR/DD Waiver Program require eligible individuals to have a diagnosis of Mental Retardation or a related condition, which is severe and chronic. Additionally, the individual must present three substantial deficits out of the major life areas. Substantially limited functioning in three or more of the major life areas is defined on standardized measures of adaptive behavior scores as three standard deviations below the mean or less than one percentile when derived from non MR normative populations. Substantial deficits must be supported by relevant test scores, as well as narrative descriptions contained in the documentation submitted for review.
- 2) Testimony and evidence presented during the hearing revealed that the Claimant's diagnosis was considered in the evaluation of her eligibility and she exhibited a substantial deficit in the area of learning. The documentation provided for review failed to establish two additional deficits to meet the requirements set forth by policy. Narrative documentation, test scores, and other medical information indicate that the Claimant does not possess deficits in the areas of self-care and self-direction. While the Claimant's scores in some aspects in the area of Capacity for Independent Living are weak, exploring such area is moot as a deficit in this area would only bring the Claimant's deficits to two, thus failing to meet the functional requirements of the program.
- 3) The Department was correct in its decision to terminate the Claimant's eligibility for MR/DD Waiver Services.

IX. DECISION:

It is the decision of the State Hearing Officer to uphold the decision of the Department to terminate the Claimant's eligibility for 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 _____ day of December 2010.

**Eric L. Phillips
State Hearing Officer**