



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

-----for -----

Dear -----:

Attached is a copy of the Findings of Fact and Conclusions of Law on your daughter's hearing held November 10, 2010. Your hearing request was based on the Department of Health and Human Resources' decision to deny your daughter's application for benefits and services under 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 your daughter exhibits 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 deny your daughter's application for MR/DD Waiver Services.

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-1825

**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 November 10, 2010 on a timely appeal, filed August 23, 2010.

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's Representative and Mother

-----, Licensed Professional Counselor

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 deny the Claimant's application for benefits and services under the MR/DD 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 Chapter 513-Covered Services, Limitations, and Exclusions for MR/DD Waiver Services
- D-2 Notice of Denial/Termination dated June 23, 2010
- D-3 DD-2A-ICF/MR Level of Care Evaluation
- D-4 DD-3-Psychological Evaluation
- D-5 Letter from [REDACTED] M.D., PLLC dated April 12, 2010
- D-6 Section 504 Accommodation Plan dated September 30, 2009

Claimants' Exhibits:

- C-1 Letter from [REDACTED] Licensed Professional Counselor, dated October 29, 2010
- C-2 Section 504 Accommodation Plan dated September 14, 2010
- C-3 Letter from [REDACTED] M.D. dated October 5, 2010
- C-4 Letter from [REDACTED] OTR/L
- C-5 Report from [REDACTED] Autism Training Center

VII. FINDINGS OF FACT:

- 1) On June 23, 2010, the Department issued the Claimant Exhibit D-2, Notice of Denial/Termination in response to the Claimant's application for Title XIX MR/DD Waiver Program benefits. Exhibit D-2, documents in pertinent part:

Your MR/DD Waiver Application is hereby denied.

Your application was denied 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, Learning, Mobility, Self-Direction, Capacity for Independent Living.

- 2) Mr. Workman testified that the Claimant met the diagnostic criteria established by policy with the conditions listed in the diagnostic section of Exhibit D-3, DD 2-A ICF/MR Level of Care Evaluation of “psychotic DO NOS, depression NOS, and oppositional defiance PDD-Aspergers DO.” The Claimant has the recommendation of ICF/MR services by her physician (Exhibit D-3). However, the psychologist completing Exhibit D-4, Psychological Evaluation noted under the Placement Recommendations section of the exhibit that, “----- is currently living with her parents and no change is anticipated.” The Department contends that the evaluation does not recommend that the Claimant would require the level of care and services provided in an Intermediate Care Facility and does not meet eligibility requirements. Additionally, 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.
- 3) The Claimant’s representatives provided testimony relating to the Claimant’s condition and provided Exhibit C-1, Letter from -----, Licensed Professional Counselor indicating that the Claimant possess deficits in the areas of Learning, Self-Care, Self-Direction, Mobility, Receptive and Expressive Language.

The following relates to the contested areas:

Learning-----testified that the Claimant’s condition is not improving and her prognosis may change in which she will experience an increase in her level of care. -----indicated that the Claimant’s problems are more evident in her school attendance. -----purported that the Claimant does not have an Individualized Education Plan (IEP) and she is not able to function in a school environment for a full school day. -----indicated that the Claimant is in the process of being placed in an IEP, which would allow for the coordination of an aide for the Claimant. Exhibit C-1 documents the Claimant’s difficulties in the contested area as:

“Her [Claimant] disability has caused impairment in learning, speaking, hearing, and working (as documented in her 504 plan). Claimant’s anxiety and physical symptoms severely impair her ability to not only attend school but to stay in class and learn while she is there. She has had attendance problems every school year. She currently is on a shortened daily class schedule due to her disabling anxiety. Because of her seizure disorder she gets stress induced migraine headaches. Her feelings of anxiety cause her stress thus having headaches. Claimant has to have a place at school that she can go and lie down when she begins to feel these headaches begin. She uses this room often. ----- maintains the stress in the school setting for as long as she can, but then physical exhaustion sets in, her mind shuts down and she has to go home. Social and phobic anxiety causes her difficulty in being around other children for long periods of time. Claimant’s thought disorder causes her to have very

odd and eccentric thoughts that most children would not understand. She knows this, therefore is reluctant to talk, share, or make friends with other kids. Claimant's obsessive compulsive tendencies cause her to repeat a lot of things mentally and behaviorally. This too impairs her learning.

-----, the Claimant's mother stated that her daughter's established educational "504 Plan" did not achieve its desired outcomes and her daughter experiences increased challenges with her special needs.

Exhibit D-6 and Exhibit C-2 document the purpose and eligibility criteria for a Section 504 Accommodation Plan as:

Section 504 of the Rehabilitation Act of 1973 is designed to prohibit discrimination based on disability in any program or activity receiving federal money. This statute obligates most public schools to provide equal access and equal opportunity to otherwise qualified persons with disabilities. For a student to be eligible for a 504 plan, the student must meet all three of the following criteria.

- A physical or mental impairment (has a history of having a physical or mental impairment)
- That substantially limits
- One or more major life activities

It must be because of this disability that the student is unable to gain equal access and benefit from school programs and services

As part of the psychological evaluation, the Claimant was administered the Wechsler Abbreviated Scale of Intelligence (WASI) to measure intellectual and cognitive skills and the Wide Range Achievement Test to measure basic achievement.

The Claimant's test score results are as follows:

Wechsler Abbreviated Scale of Intelligence

Verbal IQ= 108
Performance IQ= 91
Full Scale IQ= 100

Wide Range Achievement Test

Subtest	SS	Grade
Word Reading	94	4.9
Spelling	107	7.3
Math Computation	101	5.9

Mr. Workman noted that the Claimant's superior range of intelligence was not reflective of those individuals that require the level of care associated with an ICF. Mr. Workman indicated that the Claimant has a "504 Plan" through the ██████████ County School System and that an

individual who would require an institutional level of care requires a structured IEP to address developmental disabilities.

Self-Care-Exhibit C-1 indicates the Claimant's difficulties in the contested area as:

“At eleven years of age, Claimant falls far behind in her ability to care for herself. She needs verbal direction to do anything such as showering, brushing her teeth, combing her hair, eating healthy foods, etc. She simply does not have the desire. She also can't remember these things because of her thought disorder and the likelihood of distraction. I question her if her ability for independent living with [sic] develop over time.

The Claimant was administered an Adaptive Behavior Scale II (ABS) to measure her adaptive behavior in the contested area. Mr. Workman indicated that the Claimant's scores on the ABS did not meet the requirements set forth by policy. Mr. Workman testified that Non-MR Norms were used in the ABS because the Claimant achieved an IQ score over 70 and it was appropriate to compare the Claimant to her associated normative group. Mr. Workman indicated that eligible scores are 3 standard deviations below the mean or less than one percentile rank. Mr. Workman indicated that the psychologist utilized standard scores and scores of 1 or 2 are considered eligible scores.

The Claimant achieved a standard score of 5 in the area of Independent Functioning and was rated as poor in such area. The Claimant's score does not meet eligibility criteria in the contested area. Mr. Workman indicated that the Claimant has some self-care skills and her noted abilities are not reflective of active treatment for ICF/MR individuals.

Self-Direction-Exhibit C-1 indicates the Claimant's difficulties in the contested area as:

Claimant has difficulty beginning daily tasks (schoolwork, hygiene, chores, etc) without prompting or one on one direction. She also does not have the ability to know when to stop. There have been behavioral outburst in many public settings (counseling office, school, doctors [sic] office, costco [sic]) because Claimant's brain cannot shut down easily when she has a desire or intention in her mind. Her behavior is not completely in her control because of her disability.

The Claimant achieved a standard score of 5 in the area of self-direction and was rated as poor in the contested area. The Claimant's score does not meet the eligibility criteria of three standard deviations below the mean and a deficit was not awarded in the contested area.

Mobility-Exhibit C-1 indicates the Claimant's difficulties in the contested area as:

Claimant has mobility, but is a very clumsy young lady. She broke her leg last year and had very little ability to leave the house because of her clumsiness and risk of falling and a head injury (seizure disorder). She is very slow and awkward when she runs.

It shall be noted that Exhibit D-3, DD-2-A ICF/MR Level of Care specifies that the Claimant is ambulatory and does not indicate that the Claimant has any problems which require special care in her mobility.

Receptive or Expressive Language-Exhibit C-1 indicates the Claimant's difficulties in the contested area as:

Receptive Language-Claimant has difficulty with receptive language for various reasons. First of all, her mind is constantly on [sic] go thinking about the things that she likes or wants to do or she is consumed with OCD thoughts. This prevents her from hearing others correctly. She also misperceives a variety of social situations. In the classroom, she needs visual cues as well as auditory instruction to understand.

Expressive Language-This is a huge problem for Claimant. She just cannot always express properly what she is thinking and feeling. Due to her thought disorder, her brain often gets "stuck" and she can't move on or articulate clearly her needs.

The Claimant received a standard score of 6 on the ABS. This score was rated as below average and did not meet the eligibility criteria for the contested area. WRAT-4 is at grade level 4.9 with a standard score of 94." Mr. Workman indicated that the Claimant's score in language is in the average range and eligible scores for program purposes are a standard score of 55 or below; therefore, the Claimant was ineligible to receive a deficit in the contested area.

- 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
- 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:

- 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 fails to demonstrate that the Claimant is substantially limited in any of the major life areas associated with the functionality criteria. Test scores and narrative documentation indicate that the Claimant does not possess deficits in the contested life areas; therefore, the Department was correct in its decision to deny the Claimant's application for MR/DD services.

IX. DECISION:

It is the decision of the State Hearing Officer to uphold the decision of the Department to deny the Claimant's application for 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 ____ day of December 2010.

**Eric L. Phillips
State Hearing Officer**