



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

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

July 26, 2011

-----for -----

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Dear -----:

Attached is a copy of the Findings of Fact and Conclusions of Law on your hearing held July 18, 2011. Your hearing request was based on the Department of Health and Human Resources' decision to deny your son's application for benefits and services associated with 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 failed to establish that your son 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 son'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 AND HUMAN RESOURCES  
BOARD OF REVIEW**

**IN RE:** -----,

**Claimant,**

**v.**

**ACTION NO.: 11-BOR-1166**

**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 a timely appeal, filed May 4, 2011.

**II. PROGRAM PURPOSE:**

*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 mother

Jennifer Eva, Lead Service Support Facilitator-APS Healthcare

Linda Workman, Psychologist Consultant-Bureau of Medical Services (BMS)

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 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 Chapter 513-Covered Services, Limitations, and Exclusions for MR/DD Waiver Services
- D-2 Notice of Decision dated April 20, 2011
- D-3 DD 2-A-ICF/MR Level of Care Evaluation dated March 22, 2011
- D-4 Comprehensive Psychological Evaluation dated March 31, 2011
- D-5 Individualized Education Program dated May 10, 2010
- D-6 Individualized Education Program dated May 10, 2011

**Claimants' Exhibits:**

- C-1 Neurologic Evaluation dated July 7, 1994
- C-2 Psycho-Educational Evaluation dated January 24, 1995
- C-3 Psychological Evaluation dated May 2004 and June 2004
- C-4 Alternate Performance Task Assessment Spring 2007
- C-5 Adaptive Behavior Evaluation dated March 2, 2009
- C-6 Speech/Language Evaluation dated February 4, 2009
- C-7 Individualized Education Program dated June 9, 2009
- C-8 Guardianship documentation from the Circuit Court of ██████████ County, West Virginia dated January 13, 2010

**VII. FINDINGS OF FACT:**

- 1) On April 20, 2011, the Department issued the Claimant Exhibit D-2, Notice of Decision in response to the Claimant's application for the MR/DD Waiver program. Exhibit D-2 documents in pertinent part:

Your Waiver Application is hereby denied.

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, learning, mobility, self-direction and capacity for independent living.

- 2) There are four components to establishing medical eligibility for the MRDD Waiver Program. These areas include: diagnostic, functionality, level of care and the need for active treatment. Ms. Linda Workman, Bureau for Medical Services Psychologist Consultant offered testimony concerning her review of the Claimant's application for MR/DD services. Ms. Workman reviewed Exhibit D-3, DD 2-A ICF/MR Level of Care Evaluation, which documents the Claimant's diagnosis of severe autism, which is considered an eligible diagnosis for program purposes. This exhibit also documents that the Claimant's physician recommended that the Claimant requires the level of care and services provided in an "Intermediate Care Facility" for individuals with mental retardation and related conditions.

The Department contends that the Claimant does not demonstrate functional deficits in three or more of the major life areas. Specifically, the Claimant did not achieve the appropriate test scores or exhibit narrative documentation to determine eligibility for the MR/DD Waiver Program. Ms. Workman stipulated that the Claimant was awarded a deficit in the area of receptive or expressive language.

- 3) Ms. Workman reviewed Exhibit D-4, Psychological Evaluation dated March 31, 2011. As part of evaluation the Claimant was administered, through information provided by his mother, an Adaptive Behavior Assessment System (ABAS II). Ms. Workman stated that scores of two or below are considered eligible scores (a score of one represents three standard deviations below the mean with a score of two representing less than one percentile) to meet functionality criteria.

In regards to Capacity for Independent Living, the Claimant achieved scores in the areas of Community Use (2), Home Living (7), Health and Safety (3), Leisure (3) and Social (2). Ms. Workman testified that the Claimant achieved eligible scores in the Community Use and the Social sub-domains; however, those scores only represent part of the Capacity for Independent Living functionality criteria. Ms. Workman testified that the Claimant did not achieve eligible scores in the remaining sub-domain areas and a deficit could not be awarded. Exhibit D-3 provides narrative documentation concerning the areas as:

The Community Use sub-domain assesses skills needed for functioning in the community, including use of community resources, shopping skills, getting around in the community, etc. -----sometimes orders simple meals at restaurants. He does not find the restroom in public places and he does not look both ways before crossing a street or parking lot. He does not find a specific department in a store and he does not rely on himself for travel in the community. He cannot pack his own clothing and he does not use a post office. He cannot follow another's directions to nearby places and he cannot find and use a phone. He does not ask a store clerk for help. He is unable to call a doctor and he does not shop for friends and family.

The Health and Safety portion of this instrument assesses skills needed for protection of health and to respond to illness and injury, including following safety rules, using medicines, showing caution, etc. -----will swallow liquid

medicines if needed and he shows caution around hot or dangerous items. He does not use electrical outlets or sockets safety [sic]. He does not go to another place when too hot or too cold. He does not take prescription medicines by himself and he does not care for minor injuries. -----does not test hot foods before eating them. He sometimes follows safety rules at parks or playgrounds.

Leisure skills are skills needed for engaging in and planning leisure and recreational activities, including playing with others, engaging in recreation at home, following rules in games, etc. These skills are deficient in that he does not select television programs or videotapes to keep up with an area of interest. He does not invite others to join him in playing games and he does not attend fun activities at another's home. He sometimes plays games with other people. He does not tell others when he needs free time to relax alone. He is unable to plan ahead for play or fun activities on free days or afternoons. He does not initiate games or select TV programs like [sic] by others. He cannot organize a game or other fun activity without help from others.

The Social sub-domain assess skills needed to interact socially and get along with other people, including having friends, showing and recognizing emotions, assisting others, and using manners. Deficits are noted because he only sometimes stands a comfortable distance from others during conversations. He sometimes moves out of another person's way without being asked. He does not laugh in response to funny statements. He does not offer assistance to others and he does not congratulate others when something good happens to them. He does not seek friendships with others when something good happens to them. He does not seek friendships with others in his age group. He does not show sympathy for others when they are sad or upset. He does not offer guest food or beverages. He does not state when others seem happy, sad, scared, or angry. He is not able to label his own feelings.

In regards to Learning, the Claimant achieved a score of 3 in Functional Academics. Ms. Workman purported that the psychologist who administered Exhibit D-3, did not chose to assess the Claimant's achievement levels and the only academic measures were from the ABAS II, which did not represent eligible scores. Exhibit D-3 documents under the Intellectual/Cognitive category that "the administration of this instrument was discontinued due to [REDACTED] inability to engage in the process. Based on previous assessment results and current observation, it is this examiner's opinion that -----functions in the severe range of mental retardation."

The Claimant achieved a score of 3 in Self-Care and 3 in Self-Direction, which are not considered eligible scores under the functionality criteria.

- 4) -----, Claimant's mother provided exhibits which document previous neurologic and psychological evaluations for the Claimant. -----believed that the findings in Exhibit C-5 were more reflective of the Claimant's abilities than those derived from Exhibit D-4. As a matter of record, Ms. Workman identified that the documentation was not considered in the Department's decision as they are considered outdated and the Department must use recent evaluations.

-----testified that the Claimant could not count accurate change and had the Claimant demonstrate his inability with the task. -----indicated that the Claimant cannot cross the street by himself, cannot fill out a job application or tell time, does not know what size clothing he wears, cannot tie his own shoes, and cannot inform someone if he is hurting. -----stated that the Claimant is fearless and does not understand cause and effect and indicated that due to his impulsiveness, the Claimant will walk into moving traffic and will jump from anything. -----indicated that the Claimant has outbursts due to his frustrations and cited some outbursts that he has had in a public setting.

- 5) 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 (5) 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 (3) substantial deficits out of the major life areas. Substantially limited functioning in three (3) or more of the major life areas 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 equal to or below the seventy fifth percentile when derived from 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) Policy states that the presence of substantial adaptive deficits must be supported not only by the relevant test scores, but by narrative descriptions contained in the documentation submitted for review. This policy is interpreted to mean that an eligible score, on administered tests, must first be identified and then supported by the narrative documentation. Based on a review of the Claimant's evaluations and testimony provided during the hearing, the Claimant met the eligibility standard in the area of receptive or expressive language. Testimony revealed that scores of 2 or below, on the administered Adaptive Behavior Assessment System (ABAS-II), are considered eligible scores and meet the functionality criteria for the program. Based on a review of the test scores and documentation, the Claimant failed to meet the eligibility standard in the areas of learning, self-direction, and self-care. While the Claimant achieved eligible scores in the areas of community use and social skills, both sub-domains of capacity for independent living, scores in other assessed sub-domains including home living, health and safety and leisure, failed to meet the eligibility criteria as it relates to the functionality criteria. While the Claimant is limited in his capacity for independent living, the totality of narrative documentation and relevant test scores failed to support a deficit in the functional area. Whereas, the Claimant failed to meet the functionality criteria as set forth by governing policy, medical eligibility for participation in the Medicaid MR/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 application for benefits and services under the Medicaid 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 July, 2011.**

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**Eric L. Phillips  
State Hearing Officer**