



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

August 16, 2011

-----for

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held August 12, 2011. Your hearing request was based on the Department of Health and Human Resources' action to terminate your son's medical eligibility for 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 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. (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 medical criteria necessary to establish your son's medical eligibility for continued participation in the MR/DD Waiver Program. The current medical evidence supports that your son does not have mental retardation, and that although he has a potentially eligible related developmental condition of cerebral palsy, the evidence does not support that this diagnosis is severe and chronic as required by policy.

It is the decision of the State Hearing Officer to **uphold** the Department's action in terminating your son's medical eligibility for 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 AND HUMAN RESOURCES
BOARD OF REVIEW**

IN RE: -----,

Claimant,

v.

ACTION NO.: 11-BOR-1421

**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 August 12, 2011.

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 representative

-----, Claimant

Jennifer Eva, Department representative
Richard Workman, Department's witness

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 terminate the Claimant's medical eligibility for 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

Department's Exhibits:

- D-1 West Virginia Medicaid Regulations, Chapter 513.3 through 513.3.6
- D-2 Notice of Denial/Termination dated June 14, 2011
- D-3 The [REDACTED] – West Virginia Department of Health and Human Resources ICF/MR Level of Care Evaluation dated February 4, 2011
- D-4 Triennial DD-3 Psychological Evaluation dated April 1, 2011
- D-5 Copy of Page forty-nine of the DSM IV TR, Edition IV, Copyright 2000, Diagnostic Criteria for Learning Disorders [formerly Academic Skills Disorders]

Claimant's Exhibits:

None

VII. FINDINGS OF FACT:

- (1) In response to a review application for continued benefits and services through the Medicaid MR/DD Waiver Program, on or about June 14, 2011, the Claimant was notified via a Notice of Denial/Termination (D-2) 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 for review does not support continued eligibility for the Title XIX MR/DD Waiver program as ----- no longer meets diagnostic eligibility requirements. His performance on the most current measure of intellectual ability is inconsistent with the diagnosis of mental retardation according to DSM IV criteria and while cerebral palsy is considered to be a “related condition” it must be severe to meet eligibility criteria and [REDACTED] [sic] degree of cp [cerebral palsy] is mild.

- 2) West Virginia Medicaid Regulations, Chapter 513, – Covered Services, Limitations, and Exclusions, For MR/DD Waiver Services, effective 11/1/07 and revised January 1, 2008, 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 whether the Claimant has a diagnosis of Mental Retardation and/or a related developmental condition which constitutes a severe and chronic disability with concurrent substantial deficits.

The Department contends that, although the Claimant was determined by a licensed psychologist on April 1, 2011, at the approximate age of eighteen (18) years, to have a diagnosis of Mild Mental Retardation, the information provided within the psychological report (D-4) does not support this diagnosis. Further, the Department contends that although the Claimant also has a potentially eligible diagnosis of Mild Cerebral Palsy, the diagnosis is not qualifying because it is not severe in nature.

The Claimant contends that her son has been diagnosed with Mental Retardation and that it is not possible for someone to recover from the condition. She contends that the Department should consider the psychologist's offered diagnosis of Mild Mental Retardation based on the April 2, 2011 psychological evaluation report. She added that her son is at a crucial point in his life, and needs the program in order to affect a better outcome in adulthood.

- 5) The Department's witness, Richard Workman, is a licensed psychologist, and he has been involved with the Waiver program since its inception in 1985 functioning as a consultant to the Bureau for Medical Services since 1983. Mr. Workman explained that the first level in determining medical eligibility for the program requires the individual to have a diagnosis of Mental Retardation and/or a related developmental condition which constitutes a severe and chronic disability with concurrent substantial deficits.

Mr. Workman stated that he first reviewed the West Virginia Department of Health and Human Resources ICF/MR Level of Care Evaluation (D-3) completed by Claimant's physician on February 4, 2011, and found that the physician listed that the Claimant has Mental Retardation in the Axis III section of the report, which lists all medical conditions. He stated that this diagnosis is usually offered as an Axis II diagnosis, which lists all

cognitive, developmental conditions, and personality disorders. He noted that the Claimant was listed by the physician as functioning normally in most areas of the evaluation. He was listed as delayed under the area of “attention span,” and was diagnosed by the physician as having Attention Deficit Hyperactivity Disorder. Mr. Workman also noted that a diagnosis of Mild Cerebral Palsy is also offered by the physician under Axis III of this report.

Mr. Workman stated that he also reviewed a Psychological Evaluation (D-4) submitted by the Claimant’s psychologist. He noted that the psychologist offered scores from the Wechsler Abbreviated Scale of Intelligence (WASI) from prior testing conducted on April 2, 2008, which showed that the Claimant obtained of Full Scale IQ [intelligence quotient] of fifty-one, which falls in the Mild Mental Retardation range, and that the Claimant was diagnosed with Moderate Mental Retardation at that time under Axis II. He stated that the WASI was again administered for the April 1, 2011 psychological evaluation, and that those results showed the Claimant obtained a Full Scale IQ of eighty-six, which falls in the “low average” range of functioning, and not within the mental retardation range. The psychologist offered a diagnosis after the current evaluation of Mild Mental Retardation under Axis II. The variation in IQ score between the 2 tests is thirty-five points.

Mr. Workman presented evidence (D-5) from the current DSM IV TR, which provides a recognized standard criteria for diagnosing learning disorders, and which provides that the diagnostic criteria for mental retardation involves significantly sub-average intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test, and concurrent deficits or impairments in present adaptive functioning (i.e., the person’s effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety, and the onset occurring before the age of eighteen years. Codes are provided for determining the severity of the diagnosis, which show that mild mental retardation is reflected by IQ scores between fifty and fifty-five to approximately seventy.

Mr. Workman testified that the Claimant’s current IQ test score of eighty-six does not fit the criteria for diagnosing mental retardation. In comparing his current IQ test score to his prior score of fifty-one, he stated that an individual’s test scores do not typically vary more than five points one way or the other in this test, and stated that he does not know what to derive from the huge variation in test scores. The psychologist who completed the Claimant’s testing also offered no explanation, thereby leaving her documentation questionable. Mr. Workman stated that the documentation submitted does not support that the Claimant has mental retardation, and does not support that his cerebral palsy is severe in nature.

- 6) -----is the Claimant’s mother and representative. She stated that she does not understand how the Claimant could recover from a diagnosis of mental retardation, and stated that she believes he continues to suffer from the condition. She stated that her son continues to require assistance with his daily living activities and that she believes he will continue to

need this assistance for several years. She did not dispute that her son's cerebral palsy is mild in nature. She offered no written evidence in support of her position that the Claimant has mental retardation.

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 nature.
- 2) The evidence submitted supports that the Claimant does not have mental retardation. Although the Claimant's psychologist indicated a diagnosis of Mild Mental Retardation under Axis II of her report, the information supplied within her report suggests otherwise, and she offered no explanation for the substantial variation in IQ test scores for the Claimant. By not addressing the variation, her interpretation is found to be questionable. The Claimant's IQ score of eighty-six does not meet the diagnostic criteria for mental retardation, and the psychologist did not explain why she continued to offer the diagnosis of Mild Mental Retardation even though the results of her testing did not support this finding.
- 3) The evidence supports that the Claimant is diagnosed with Mild Cerebral Palsy, and there was no evidence submitted to support that this condition is severe as required by policy to meet the diagnostic criteria for the program.
- 4) Based on the evidence presented at the hearing, the Department was correct in terminating the Claimant's continued medical eligibility for 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 16th Day of August, 2011.

**Cheryl Henson
State Hearing Officer**