



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
1027 N. Randolph Ave.
Elkins, WV 26241

Earl Ray Tomblin
Governor

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

February 4, 2011

-----for -----

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your daughter's hearing held January 26, 2011. Your hearing request was based on the Department of Health and Human Resources' action to deny 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 have a diagnosis of mental retardation and/or a related condition. The condition must be severe and chronic with concurrent substantial deficits that require the level of care and services provided in an Intermediate Care Facility for individuals with Mental Retardation and /or related conditions (ICF/MR Facility). (West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07).

Information provided during the hearing reveals that your daughter does not meet medical eligibility criteria required for participation in the Medicaid MR/DD Waiver Program.

It is the decision of the State Hearing Officer to **uphold** the Department's action to deny your daughter's benefits and services through the Medicaid MR/DD Waiver Program.

Sincerely,

Pamela L. Hinzman
State Hearing Officer
Member, State Board of Review

Cc: Chairman, Board of Review
Jennifer Eva, APS Healthcare

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

-----,

Claimant,

vs.

Action Number: 10-BOR-2278

**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 convened telephonically on January 26, 2011 on a timely appeal filed November 19, 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 mother/representative

Jennifer Eva, MR/DD Service Support Facilitator, APS Healthcare

Richard Workman, Psychologist Consultant, Bureau for Medical Services

Presiding at the hearing was Pamela L. Hinzman, 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 benefits and services through the Medicaid 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 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services
- D-2 Notice of Denial/Termination dated August 25, 2010
- D-3 DD-2a, WVDHHR ICF/MR Level of Care Evaluation dated May 4, 2010
- D-4 DD-3, Initial Psychological Evaluation dated June 23, 2010
- D-5 Individualized Education Program dated January 28, 2010

Claimant's Exhibits:

- C-1 Speech Therapy Assessment dated December 30, 2009
- C-2 Preschool Developmental/Behavioral Evaluation dated December 2, 2009
- C-3 Individualized Education Program dated March 29, 2010
- C-4 Individualized Education Program dated May 4, 2010

VII. FINDINGS OF FACT:

- 1) The Claimant applied for the Medicaid MR/DD Waiver Program and was notified via Notice of Denial/Termination dated August 25, 2010 (D-3) that her Waiver services were denied. This notice states, 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: Learning, Self-Direction, Receptive or Expressive Language, and Capacity for Independent Living.

It should be noted that substantial adaptive deficits were identified in the areas of Self-Care and Mobility.

- 2) Bureau for Medical Services (BMS) Psychologist Consultant Richard Workman testified that there are four components in establishing medical eligibility for the MR/DD Waiver Program. These areas include diagnostic, functionality, level of care and the need for active treatment. Mr. Workman said the Claimant, age three, has an eligible diagnosis of mental retardation, has been recommended for an ICF-MR Level of Care by evaluators, and could benefit from active treatment. However, the Claimant is not demonstrating three (3) or more substantial adaptive deficits in the major life areas.

Mr. Workman introduced Exhibit D-4, an Initial Psychological Evaluation dated June 23, 2010, and reviewed the Claimant's Adaptive-Behavior Assessment System (ABS-II) scores. He testified that the ABS-11 reveals program qualifying scores (when derived from non MR normative populations) in Self-Care (2) and Motor (1). He noted that scores of less than 1 percentile are considered eligible scores for the program. While a standard score of 2 is not three (3) standard deviations below the mean, it is less than 1 percentile and the Claimant was awarded the deficits based on the scores and narrative information. Additional scores were as follows: Communication- 5; Community Use- 2; Functional Academics- 3; Home Living- 6; Health & Safety- 2; Leisure- 3; Self-Direction- 4; and Social- 3. Mr. Workman contended that children of the Claimant's age are not expected to have Capacity for Independent Living in that stage of development.

Mr. Workman also reviewed documentation in Exhibit D-5, an Individualized Education Program from ██████████ County Schools, and noted that the Claimant scored a 61 in receptive

language and a 71 in expressive language on the Preschool Language Scale-4 (PSL-4). He explained that scores of 55 and below are needed to qualify for MR/DD Waiver services.

The Psychologist Consultant testified that while the Claimant is delayed, she does not currently exhibit program qualifying test scores in three (3) or more major life areas. He stated, however, that the Claimant may fall further behind her peers as she ages.

- 3) -----, the Claimant's mother, testified that her daughter's poor vision hinders her gross motor skills and that her daughter is unable to articulate so that she can be understood, particularly by individuals who do not interact with her on a frequent basis. She indicated that the Claimant will need assistance throughout her life due to her cognitive impairments.
- 4) West Virginia Medicaid Regulations, Chapter 513, – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services (D-1), 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) 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 which manifested prior to age 22. "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.

- 2) Policy states that the presence of a substantial adaptive deficit 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 ABS score must first be identified, and then supported by the narrative information. Pursuant to Medicaid MR/DD Waiver regulations, documentation reviewed for eligibility supports the finding of substantial adaptive deficits in Mobility and Self-Care. Whereas the Claimant's test scores do not support the awarding for additional substantial adaptive deficits, the Claimant does

not meet the functionality requirements in the medical eligibility criterion.

- 3) Based on the evidence, 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 in denying the Claimant's 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 February, 2011

**Pamela L. Hinzman
State Hearing Officer**