



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

March 21, 2011

-----for -----

Dear -----:

Attached is a copy of the Findings of Fact and Conclusions of Law on your daughter's hearing held March 2, 2011. Your hearing request was based on the Department of Health and Human Resources' decision to terminate your daughter's benefits and services associated with the Medicaid MR/DD Waiver program.

In arriving at a decision, the State Hearings 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 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 terminate your daughter's MR/DD Waiver Services.

Sincerely,

Eric Phillips
State Hearings 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-2470

**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 March 2, 2011 on a timely appeal, filed
December 16, 2010.

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

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 representative and foster mother
-----, Treatment Coordinator [REDACTED] Services
Jim Stanley, Child Protective Service Worker-Department of Health Human Resources
Jennifer Eva, Lead Service Support Facilitator-APS Healthcare
Richard Workman, Psychologist Consultant-Bureau for 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 terminate the Claimant's 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 December 8, 2010
- D-3 DD 2-A-ICF/MR Level of Care Evaluation dated January 20, 2010
- D-4 Letter from [REDACTED] M.D. dated February 15, 2011
- D-5 Annual Psychological Update dated August 18, 2010
- D-6 Addendum to Psychological Evaluation Dated October 20, 2010
- D-7 Individualized Education Program [REDACTED] County Schools dated February 4, 2011

VII. FINDINGS OF FACT:

- 1) On December 8, 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.

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: Receptive or Expressive Language, Learning, Mobility, and Self-Direction.

- 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. Mr. Richard Workman, Bureau for Medical Services Psychologist Consultant offered testimony concerning his review of the Claimant's re-evaluation for MR/DD Waiver services. Mr. Workman indicated that the Claimant has an eligible diagnosis for program purposes, which was manifested before the age of 22. Exhibit D-3, DD-2-A ICF/MR Level of Care Evaluation documents the Claimant's diagnosis of "mood disorder NOS [not otherwise specified] and complex partial seizures, mental retardation, ADHD [attention deficit hyperactivity disorder]." 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. Additionally, Exhibit D-4, Letter from [REDACTED] M.D. documents the Claimant's diagnosis as, "mental retardation, ADHD and seizure disorder."

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. Mr. Workman stipulated that the Claimant was awarded deficits in the areas of Self-Care and Capacity for Independent Living.

- 3) Mr. Workman reviewed Exhibit D-5, Annual Psychological Update dated August 18, 2010. As part of the evaluation, the Claimant was administered an AAMR Adaptive Behavior Scale. Mr. Workman indicated scores of 12 and below or ratings of average or below average are required to meet the functionality criteria on the administered test.

In the area of mobility, the Claimant achieved a standard score of 13 in physical development along with a rating of above average. This score and the information in Exhibit D-3, DD-2-A-ICF/MR Level of Care Evaluation which indicates that the Claimant is ambulatory, did not warrant a deficit in the life area. In regards to the area of Receptive or Expressive Language, the Claimant achieved a test score of 13 in the area of Language Development with an above average rating and a standard score of 14, with an above average rating, in the area of Self-Direction which did not warrant a deficit in either of the life areas.

The Claimant, age 14, attends seventh grade at [REDACTED] Middle School. Mr. Workman testified that the Department requested an achievement test to determine if the Claimant met the criteria for a third functional deficit in the area of learning. On October 20, 2010, an Addendum to Psychological Evaluation was completed in which a Wide Range Achievement Test (WRAT-3) was administered to the Claimant. Mr. Workman indicated that eligible scores on this specific test are standard scores of 55 and below or less than one percentile rank. The Claimant achieved a standard score of 66 and 1 percentile rank in reading (Grade Score 3), a standard score of 74 with a percentile rank of 4 in spelling (Grade Score 3), and a standard score of 52 and a .09 percentile rank in arithmetic (Grade Score 2). Mr. Workman stated that the Claimant's score in the area of arithmetic was considered an eligible score, but narrative documentation did not support a deficit in the life area. Specifically, Mr. Workman referred to Exhibit D-5 which states in pertinent part, "----- can write whole sentences and perform simple addition and subtraction. She is able to read simple stories and comics and names familiar objects." Additionally, Mr. Workman reviewed Exhibit D-7, Individualized Education Program from [REDACTED] County Schools which documents that the Claimant does not need extended school year services

and her behaviors do not impede her learning or learning of others. Exhibit D-7 documents in pertinent part, in regards to the narrative documentation of the Claimant's learning, the following:

█ does well both in Social Studies and Science. We have studied politics, regions, maps, in which she does a very good job. Both Social Studies and Science has [sic] several hands on activities which she enjoys as well as writing on the board in front of the class.

Reading/LA:

█ is an excellent reader and volunteers to do so in front of the class. In November █ scored upper 3rd grade on the Brigance Comprehensive Reading independently and 4th grade on the Brigance Word Recognition. █ brings books to read to the class from home and in her spare time she will read a book. She struggles with prefixes and suffixes and needs prompts to remember their meanings. We are currently using the program "Spelling with Morphographs"; she does an excellent job. She is able to answer comprehension questions with prompts and cues.

Writing:

█ writing is below grade level. She has difficulty writing paragraphs in sequential order and is able to do so only with prompts and cues. █ uses correct capitalization however her letter shapes are very small and bunched in together. She can form simple sentences and enjoys doing so with her spelling words although they do tend to be repetitious and short. █ needs prompts and cues in order to write grammatically correct sentences and is unable to write an essay or story without assistance.

Mathematics:

█ is able to solve single digit addition and subtraction and is currently able to do so with double digit with minimal prompts. She is also able to do some multiplication operations to the number 5. █ is able to solve very simple number patterns with reminders to slow down. She can identify simple geometric shapes such as square, circle, and triangles. █ is able to use a ruler and a calculator but has difficulty interpreting data.

Mr. Workman purported that the narrative documentation is incompatible with individuals who require an institutional level of care and does not document that the Claimant has a substantial delay to be eligible in the life area of learning.

- 4) Ms. -----, the Claimant's representative and foster mother, stated that the Claimant does not read and complete arithmetic at a high level and information concerning academics must be repeated to her in order for her to maintain such knowledge. ----- acknowledged that the Claimant works on her academics, especially time, throughout the summer in order to maintain knowledge for the school year. -----indicated that the Claimant has difficulties with recognizing seasons and must be informed to change clothes to

dress for the appropriate season. -----stated that the Claimant reads basic books and has difficulties with counting change.

Ms. -----, the Claimant's Treatment Coordinator from [REDACTED] Family Services testified that the Claimant has difficulties with expressive language skills because she is not able to express herself and maintain conversations with other individuals. Additionally, ----- noted that the Claimant lacks self-direction in which she must be prompted to go read a book, etc.

Mr. Jim Stanley, the Claimant's Child Protective Service Worker through the Department of Health and Human Resources testified to the Claimant's expressive language skills indicating that the majority of answers he receives from the Claimant are one-word answers and that the Claimant cannot elaborate on topics.

- 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, she met the eligibility criteria in the areas of self-care and capacity for independent living. Testimony indicated that an eligible score on the administered ABS test are considered 12 or below, and the Claimant failed to meet the eligibility standard in the areas of mobility, receptive or expressive language, and self-direction. In the determination of a deficit in the area of learning, the Claimant was administered an achievement test in which eligible scores were determined to be 55 or below. While the Claimant's scores in the area of mathematics were considered eligible, other test scores in the areas of reading and spelling failed to meet the eligibility standard. The totality of the narrative documentation, in combination with the scores in reading and spelling, does not support a finding that the Claimant is substantially limited in the area of learning; therefore, the Claimant does not meet functionality criteria as set forth by governing policy and 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 terminate the Claimant's 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 March, 2011.

**Eric L. Phillips
State Hearing Officer**