



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
2699 Park Avenue, Suite 100
Huntington, WV 25704

Earl Ray Tomblin
Governor

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

December 30, 2011

-----for -----

Dear -----:

Attached is a copy of the Findings of Fact and Conclusions of Law for -----'s hearing held November 2, 2011 and December 7, 2011. The hearing request was based on the Department of Health and Human Resources' denial of Title XIX MR/DD Waiver services for -----.

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 Waiver Program is based on current policy and regulations. Policy states that in order to be eligible for the MR/DD 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). Individuals must meet the diagnostic criteria for medical eligibility not only by the relevant test scores, but also by the narrative descriptions contained in the documentation. (MR/DD Waiver Manual, Chapter 513 – *Covered Services, Limitations, and Exclusions for MR/DD Waiver Services*, effective November 1, 2007)

Information submitted at the hearing revealed that ----- did not meet the diagnostic requirement for MR/DD Waiver program eligibility.

It is the decision of the State Hearing Officer to **uphold** the Department's denial of MR/DD Waiver services.

Sincerely,

Todd Thornton
State Hearing Officer
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review
-----, Department Representative
Linda Workman

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

IN RE:



Claimant,

v.

ACTION NO.: 11-BOR-1840

**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 concluded on December 30, 2011 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 two separate dates – November 2, 2011 and December 7, 2011 – on a timely appeal, filed August 29, 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's witness
-----, Department representative
Linda Workman, Department's witness

Presiding at the Hearing was Todd Thornton, 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 decision to deny Title XIX MR/DD Waiver Program services to the Claimant based on a finding that medical eligibility was not met.

V. APPLICABLE POLICY:

MR/DD Waiver Manual, Chapter 513 – *Covered Services, Limitations, and Exclusions for MR/DD Waiver Services*, effective November 1, 2007

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 MR/DD Waiver Manual, Chapter 513 – *Covered Services, Limitations, and Exclusions for MR/DD Waiver Services*, effective November 1, 2007
- D-2 Notice of denial dated August 1, 2011
- D-3 ICF/MR Level of Care Evaluation (DD-2A) dated June 29, 2011
- D-4 Psychoeducational Assessment Report (DD-3) dated July 11, 2011

VII. FINDINGS OF FACT:

- 1) The Claimant, who is a 5-year old applicant for MR/DD Waiver Services, received notification of denial for the program (Exhibit D-2) on or about August 1, 2011. This notice stated, in pertinent part:

The physician as [*sic*] not offered an eligible diagnosis for the Waiver program on the DD-2A. The physician and psychologist have offered differing diagnostic opinions. Psychometric assessment does not support the presence of a related condition (autism) which is severe. Thus, ----- does not meet diagnostic eligibility criteria. The psychologist did not address the need for an ICF/MR level of care.

Testimony from Linda Workman, psychologist consultant for the Department, confirmed that it was later discovered that the Claimant's psychologist did certify the need for an ICF/MR level of care, and that the last sentence (cited above) may be disregarded.

- 2) -----, representative for the Department, testified that the appropriate policy for this matter was the MR/DD Waiver Manual, Chapter 513, §513.3.1, effective November 1, 2007 (Exhibit D-1). This policy states, in pertinent part:

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 Section 513.3.1, 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 CFR 435.1009.

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 must 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).

- 3) Linda Workman, Psychologist Consultant for the Department, testified regarding her background and experience as a licensed psychologist since 1981, noting her reviews of the program applications and extensive history with the underlying eligibility criteria for the MR/DD Waiver Program and the population of individuals eligible for both the MR/DD Waiver Program and for the ICF/MR Group Homes, which share identical medical eligibility criteria.
- 4) -----, the Claimant's assessing School Psychologist and the author of the Psychoeducational Assessment Report (Exhibit D-4), testified that he has been a licensed psychologist since 1974, noting his extensive training and experience with school-aged children, as well as children with many disabilities, including Down syndrome and autism. He testified that he has completed between 18,000 and 20,000 assessments during the course of his career.
- 5) Ms. Workman testified that the Claimant did not present an eligible diagnosis on the ICF/MR Level of Care Evaluation (Exhibit D-3). The diagnostic section of this document includes the following conditions: hyperactive child – which Ms. Workman testified is not a formal diagnosis – verbal apraxia, fine motor control problems, and a mouth droop on the left side. She testified that verbal apraxia is a motor problem with speech and is not a “related condition.” She testified that diagnostic eligibility is required by policy, and that nothing discovered through further review of the documentation submitted on the Claimant's behalf could make him meet medical eligibility.
- 6) Ms. Workman testified that the Psychoeducational Assessment Report (Exhibit D-4) of the Claimant included two sets of test results for the Wechsler Preschool Primary Scale Intelligence – Third Edition, or WPPSI-III. The first set of results was from an assessment completed by [REDACTED] MA, on January 31, 2011 and March 7, 2011. The Claimant scored a verbal IQ of 74 and a performance IQ of 82. These results were cited by -----, the School Psychologist that completed the report and administered the second testing of the Claimant with this instrument. In -----set of WPPSI-III results, the Claimant achieved only a verbal IQ score of 57, a performance IQ of 61, and a full-scale IQ of 54. Ms. Workman testified that the Claimant's first set of results was in the low average range, and the second set was in the very low end of the mild range of mental retardation. She characterized the two sets of test results as “extremely different,” and noted that there was no explanation for this in the report. -----agreed that he did not explain the discrepancy in his report, and testified that he strongly disputes -----results with the Claimant, opining that these scores were “impossible” for the Claimant to have earned.
- 7) Based on his results and his dispute of -----results with the Claimant, -----diagnosed the Claimant with Moderate Mental Retardation. Ms. Workman disagrees with this diagnosis based on the testing discrepancy, and noted that ----- was not available to defend her position regarding the testing of the Claimant.

- 8) Ms. Workman noted Exhibit D-4 included autism testing. The report states, in pertinent part:

The Gilliam Autism Rating Scale second edition was completed with the resulting Autism Index score of 79 at the eighth percentile. This would be considered as borderline evidence of likely interference from autism.

Ms. Workman testified that the probability of autism is low when an individual scores 79 on this instrument. She further testified that such a score would not be indicative of the severe degree of autism required by policy.

- 9) Ms. Workman also noted a section of Exhibit D-4 in which -----presented his responses, regarding the Claimant, to the DSM-IV criteria for Autistic Disorder and Asperger's Disorder. -----concludes this section by stating:

The picture is not clear, but ----- appears to meet criteria required for diagnosis of Autism. This disorder predominates as a major factor reducing his success in a wide variety of appropriate developmental settings. Yes, he also meets criteria for Asperger's Disorder, but according to the DSM-IV a diagnosis of Autism can be made based upon -----'s documented significant delay in early language development.

Ms. Workman testified that she disagrees with this conclusion because of several criteria listed requiring affirmative responses that were instead marked "unknown," and because of the Claimant's previously noted results on the Gilliam Autism Rating Scale; additionally, she noted that neither autism nor Asperger's Disorder were listed in the diagnosis section of the document. Ms. Workman also noted that, by policy, an individual cannot be considered medically eligible for the program if delays – such as language delays – are due to a non-related condition – such as the previously noted diagnosis of verbal apraxia – instead of to mental retardation or a related condition.

- 10) Although Ms. Workman testified that the denial was based only the diagnostic component of program medical eligibility, functionality was discussed by briefly noting the adaptive behavior scores in -----report (Exhibit D-4). -----used the Adaptive Behavior Evaluation Scale Revised – Home Version, and results were based on information provided by -----, the Claimant's grandmother. Ms. Workman described the results as a "rather flat profile of one," and "very severe." -----testified, describing the results as being the lowest possible in all areas, and as reflecting minimum functioning on the part of the Claimant.
- 11) [REDACTED] [REDACTED] the Claimant's Service Coordinator with [REDACTED] County Developmental Center, testified that an amended ICF/MR Level of Care Evaluation form has been submitted to the Department, subsequent to denial notification. Neither this Hearing Officer nor the Department – according to testimony – has received this amended form, and it was not considered in this hearing.

- 12) -----, the Claimant's grandmother and custodian, testified that she has watched the Claimant struggle with daily living. She noted that he has been retained in preschool, and that in spite of therapy he still has major communication issues.

VIII. CONCLUSIONS OF LAW:

- 1) The regulations that govern the MR/DD Waiver Program require eligible individuals to have an eligible diagnosis, require an ICF/MR level of care, and present severe functionality limits established through testing and narrative. The Department determined that the Claimant did not meet program medical eligibility based on the lack of the diagnostic component. Testimony from the Department confirmed that no other information contained in the documentation from an applicant can replace or substitute for this diagnostic component. It is clear that the ICF/MR Level of Care Evaluation does not include an eligible diagnosis for program medical eligibility.
- 2) The Psychoeducational Assessment Report alludes to, but does not provide, a diagnosis of autism. Considering the unwillingness on the part of the assessing psychologist to explicitly provide an autism diagnosis, in conjunction with the testimony from the Department's psychologist that the Claimant's autism testing did not indicate a high likelihood of autism or the required severity standard, the Department was correct to determine the Claimant does not have a diagnosis of autism.
- 3) This report additionally provides a diagnosis of moderate mental retardation. Testing by the author of the report supports this diagnosis, if prior testing is ignored. Test results for the Claimant, using the same instrument only a few months prior, contradicts this diagnosis. It is unconvincing to characterize prior test results as "impossible" to achieve without any basis for that characterization. ----- offered no explanation for the discrepancy in test results in his report, and in testimony only stated that he "disputed" the results obtained when the Claimant was tested by ----- . It is more reasonable to believe that an individual can underperform relative to his true ability during testing – for any number of reasons – than to believe that the individual can outperform his ability. Any other assertion requires discrediting the testing methods used by ----- in obtaining her results with the Claimant; such an assertion was neither provided nor supported. The Department was correct to not arbitrarily dismiss the higher testing results of the Claimant, and to consequently determine that the Claimant does not have a diagnosis of mental retardation. Without an eligible diagnosis, the Department was correct to determine that the Claimant did not meet medical eligibility for MR/DD Waiver services.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the decision of the Department that documentation submitted on behalf of the Claimant did not support a finding of medical eligibility for MR/DD Waiver services.

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this _____ Day of December, 2011.

Todd Thornton
State Hearing Officer