



State of West Virginia  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
Office of Inspector General  
Board of Review  
1400 Virginia Street  
Oak Hill, WV 25901

Earl Ray Tomblin  
Governor

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

December 5, 2011

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Dear -----:

Attached is a copy of the Findings of Fact and Conclusions of Law on your hearing held November 17, 2011. Your hearing request was based on the Department of Health and Human Resources' decision to deny you services under the 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 Waiver program is based on current policy and regulations. These regulations provide 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 (West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations, and Exclusions, for MR/DD Waiver Services).

The information submitted at your hearing revealed that you do not meet the medical criteria required to receive MR/DD Waiver services.

It is the decision of the State Hearings Officer to **Uphold** the action of the Department to deny services under the MR/DD Waiver program.

Sincerely,

Kristi Logan  
State Hearings Officer  
Member, State Board of Review

cc: Chairman, Board of Review  
APS Healthcare

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

**IN RE:    -----,**

**Claimant**

**v.**

**ACTION NO.: 11-BOR-2020**

**WEST VIRGINIA DEPARTMENT OF  
HEALTH AND HUMAN RESOURCES,**

**Respondents**

**DECISION OF STATE HEARING OFFICER**

**I.    INTRODUCTION:**

This is a report of the State Hearing Officer resulting from a fair hearing concluded on November 17, 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 a timely appeal, filed September 21, 2011.

**II.   PROGRAM PURPOSE:**

The program entitled MR/DD Waiver is administered by the West Virginia Department of Health and Human Resources.

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  
-----, Witness for Claimant  
-----, Witness for Claimant

Jen Eva, APS Healthcare (testified by phone)

Linda Workman, Consulting Psychologist, Bureau of Medical Services (testified by phone)

Presiding at the Hearing was Kristi Logan, 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's decision to deny Claimant services under the MR/DD Waiver program was correct.

### **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 Notification Letter dated June 6, 2011
- D-3 Notification Letter dated June 30, 2011
- D-4 ICF/MR Level of Care Evaluation (DD-2A) dated May 16, 2011
- D-5 Psychological Evaluation (DD-3) dated April 7, 2011

### **VII. FINDINGS OF FACT:**

- 1) Claimant was evaluated for medical eligibility for the MR/DD Waiver program. A denial notification letter was issued by the Department on June 30, 2011 which reads in pertinent parts (D-3):

The physician has not certified the need for an ICF/MR level of care on the DD-2A. Neither the comprehensive measure of intellect nor

additional documentation regarding present functional status, functional history nor social history has been submitted.

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.

- 2) There are four (4) components to establishing medical eligibility. The applicant must have a diagnosis of mental retardation or related condition, have a recommendation of ICF/MR level of care by a physician and the need for active treatment and at least three (3) substantial deficits in the six (6) major life areas: self-care, learning, self-direction, receptive or expressive language, mobility and capacity for independent living.
- 3) Linda Workman, consulting psychologist with the Bureau of Medical Services, testified to the documentation that was reviewed in determining Claimant's eligibility for services. Ms. Workman referred to the ICF/MR Level of Care Evaluation (DD-2A) dated May 16, 2011. Claimant was diagnosed with cerebral palsy and mild mental retardation. Ms. Workman stated Claimant's physician did not recommend her for ICF/MR services, which is a requirement to receive services. The DD-2A noted Claimant as ambulatory, continent, alert and independent with feeding and hygiene/self-care (D-4).
- 4) Ms. Workman stated even though a recommendation for services by a physician is necessary to establish eligibility for the MR/DD Waiver program, she reviewed the psychological evaluation that was submitted to evaluate Claimant's deficits in the major life areas. The psychological evaluation completed on April 7, 2011 (amended June 8, 2011) indicated Claimant was mobile, was able to complete all self-help tasks with prompting, had good expressive and receptive language, and enjoyed crafts and using the internet (D-5).
- 5) The Adaptive Behavior Assessment System (ABAS-II) was administered that date and Ms. Workman referred to Claimant's scores in relation to the major life areas (D-5):

Communication (language) – 5  
Functional academics (learning) – 2  
Self-care – 2  
Self-direction – 3  
Home living (capacity for independent living) – 4  
Health and safety (capacity for independent living) – 2

Ms. Workman testified that an eligible score on the ABAS-II would be a scaled score of a 1 or a 2, which is less than one percentile. Claimant was only found to have eligible scores in the areas of learning and self-care. Claimant was already found to be ambulatory and living alone, therefore deficits could not be given for capacity for independent living or mobility.

- 6) Ms. Workman testified that while Claimant had eligible diagnoses of mental retardation and cerebral palsy, eligibility for MR/DD Waiver services could not be established without a recommendation for ICF/MR level of care by a physician and at least three (3) substantial deficits in the major life areas.
- 7) -----, friend of Claimant's, testified Claimant needs help with her finances and paperwork. Claimant lived with her mother until October 2010 when her mother remarried and moved away. -----stated Claimant now has no family support and no one to watch over her. -----stated she checks on Claimant daily to make sure she has eaten and is taking care of herself. -----testified Claimant can get overwhelmed and depressed, and as a result will stay in bed for days. Claimant will not clean up after her pets or clean the house unless she is prompted.
- 8) -----, friend of Claimant, started helping -----when she was unable to check in on Claimant. -----stated Claimant cannot live alone without some assistance. -----stated when she has visited Claimant, she has found dirty dishes, dog feces everywhere and no food in the home. -----stated Claimant will ignore disconnect notices on her utilities and does not understand how to budget when grocery shopping. Claimant will miss her doctors' appointments because she has no transportation and will not ask for help.
- 9) West Virginia Medicaid Regulations, Chapter 513, – Covered Services, Limitations, and Exclusions, for MR/DD Waiver Services 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:

- 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 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) Claimant had an eligible diagnosis of mental retardation that manifested prior to age 22. However, Claimant did not receive a recommendation for ICF/MR level of care



services from a physician and was found to have only two (2) deficits in the major life areas.

- 3) Claimant does not meet the medical criteria required to receive services under the MR/DD Waiver program.

**IX. DECISION:**

It is the decision of the State Hearing Officer to **uphold** the decision of the Department to deny Claimant 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 5<sup>th</sup> day of December 2011.**

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**Kristi Logan**  
**State Hearing Officer**