



**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**

July 28, 2011

Dear -----:

Attached is a copy of the Findings of Fact and Conclusions of Law on your hearing held July 27, 2011. Your hearing request was based on the Department of Health and Human Resources' decision to deny your daughter's application for benefits and services associated with 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 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 deny your daughter's application for MR/DD Waiver services.

Sincerely,

Eric L. Phillips
State Hearing Officer
Member, State Board of Review

cc: Erika Young, Chairman, Board of Review
Jennifer Eva, APS Healthcare

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

IN RE: -----,

Claimant,

v.

ACTION NO.: 11-BOR-1243

**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 a timely appeal, filed April 11, 2011.

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's mother

-----, 

-----, Claimant's witness

-----, Claimant's witness

Jennifer Eva, Lead Service Support Facilitator-APS Healthcare

Richard Workman, Psychologist Consultant-Bureau for Medical Services

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 deny the Claimant's application for 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 May 24, 2011
- D-3 DD-2A ICF/MR Level of Care Evaluation dated February 23, 2011
- D-4 Comprehensive Psychological Evaluation dated March 14, 2011

VII. FINDINGS OF FACT:

- 1) On May 24, 2011, the Department issued the Claimant Exhibit D-2, Notice of Decision in response to the Claimant's application for the MR/DD Waiver program. Exhibit D-2 documents 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: self-care, receptive or expressive language, mobility, and capacity for independent living.

As a matter of record, the Claimant was issued a Notice of Denial on April 18, 2011, which initiated the Claimant's written appeal to the Board of Review on May 2, 2011. Exhibit D-2 was issued to the Claimant after she submitted her written appeal and both notices outline identical reason for denial of services. All parties were in agreement that the Notice of Denial dated May 24, 2011, was the most recent notice and should be considered for the appeal process.

- 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 application for MR/DD services. Mr. Workman reviewed Exhibit D-3, DD 2-A ICF/MR Level of Care Evaluation, which documents the Claimant's diagnosis of mild mental retardation. Additionally, Mr. Workman reviewed Exhibit D-4, Comprehensive Psychological Evaluation which documents the Claimant's diagnosis of Moderate Mental Retardation. Mr. Workman testified that the listed diagnoses are considered eligible diagnoses for program purposes. Exhibit D-3 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.

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 a deficit in the areas of learning and self-direction.

- 3) Mr. Workman reviewed Exhibit D-4, Comprehensive Psychological Evaluation dated March 14, 2011. As part of the evaluation, the Claimant was administered an Adaptive Behavior Assessment System II (ABS II) as a measure of her adaptive behavior. Mr. Workman stated that scores of two or below are considered eligible scores to meet the functionality criteria of the program.

In regards to receptive or expressive language, the Claimant achieved a standard score of 5 in the domain of communication on the ABS-II, which is not considered an eligible score under the functionality criteria.

In regards to capacity for independent living, the Claimant achieved scores in the areas of community use (3), home living (5), health and safety (4), leisure (5) and social (4). Mr. Workman testified that the Claimant did not achieve an eligible score in any of the sub-domains for capacity for independent living and a deficit could not be awarded.

In regards to self-care, the Claimant achieved a standard score of 4, which is not considered an eligible score under the functionality criteria.

Mr. Workman stated that the Claimant achieved a standard score of 4 in the area of functional academics, which is not considered an eligible score. However, the Claimant was administered a Wide Range Achievement Test (WRAT-4), which Mr. Workman considered to be a more accurate measure of functional academics. Mr. Workman stated that the Claimant achieved a standard score of 59 and a percentile rank of 0.3 in sentence comprehension, a standard score of 55 and a percentile rank of 0.1 in math computation, and a standard score of 61 and a percentile rank of 0.5 in reading composite. Mr. Workman indicated that the Claimant's scores of less than one percentile in the areas of functional academics allowed the Department to award a deficit in the life area.

- 4) -----, the Claimant's mother contended that additional deficits should have been awarded in the areas of self-care and capacity for independent living. ----- indicated that her daughter must be persuaded to make decisions and provided the example of the Claimant's ability to complete

personal hygiene tasks. In the area of self-help, [REDACTED] [REDACTED] cited the Claimant's abilities listed in the narrative descriptions in Exhibit D-4. The self help portion of current behaviors in the exhibit read:

----- dresses herself; however, she needs assistance in choosing appropriate clothing. She is continent of bowel and bladder and is able to care for most self help at the toilet; however, she sometimes does not remember to fastens [sic]/straighten her clothing before leaving the restroom. She bathes herself. She does not keep her hair neat during the day and she does not get out of her bed on time by herself. She does not cut or file her own fingernails on a regular basis. She does not wash and rinse the sink after brushing her teeth. ----- does not move from place to place when she is too hot or too cold. She does not care for minor injuries in a competent manner. She is not able to take prescriptions medications or over the counter medications by herself. ----- is able to use small electrical appliances and she can cook on the stove with supervision. She does not wipe up spills at home and she does not place her dirty clothes in the proper place. She does not wipe wet or dirty shoes before entering a building. She washes and dries clothing with assistance. ----- will not engage in simple household chores and she does not make minor repairs to her belongings. She does not clean her living quarters on a regular basis.

Mr. Workman indicated that verbal prompting in personal care is not considered because the individual has the capacity to participate in the activity with prompting.

----- referred to the Claimant's capacity for independent living and believes that the Claimant could not live on her own. [REDACTED] cited the Claimant's abilities listed in Exhibit D-4. The Developmental Findings and Conclusions portion of the exhibit read in pertinent part:

Based on the results of this assessment, ----- exhibits substantial limitations in self-direction (she is unable to make appropriate choices or to initiate purposeful activities; she cannot organize activities; she is unable to sustain attention to purposeful activities), learning (she functions in the Moderate range of Mental Retardation and her functional academic skills range between a kindergarten and third grade level; she is unable to acquire new behaviors, perceptions and information or to apply experience to new situations), and capacity for independent living (she cannot perform routine household chores; she does not exhibit appropriate social skills; she does not understand basic first aid or emergency response; she does not appreciate danger; she cannot make use of community services; she cannot shop for necessary items; ----- is unable to engage in work activity as age-appropriate).

- 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
- 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 (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 and testimony provided during the hearing, the Claimant met the eligibility standard in the areas of learning and self-direction. Testimony revealed that scores of 2 or below, on the administered Adaptive Behavior Assessment System (ABS-II), are considered eligible scores and meet the functionality criteria for the program. Based on a review of the test scores and documentation, the Claimant failed to meet the eligibility standard in the areas of self-care, receptive or expressive language, and capacity for independent living. Whereas, the Claimant failed to meet the functionality criteria as set forth by governing policy, 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 deny the Claimant's application for 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 July, 2011.

Eric L. Phillips
State Hearing Officer