



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

November 3, 2011

Dear -----:

Attached is a copy of the Findings of Fact and Conclusions of Law on your son's hearing held October 27, 2011. Your hearing request was based on the Department of Health and Human Resources' decision to terminate your son's 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 regulation. 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 son 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 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-1829

**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 August 26, 2011.

It should be noted here that the Claimant's benefits under the MR/DD 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's father

-----, Claimant's mother

-----, Service Coordinator Supervisor [REDACTED]
-----, Service Coordinator [REDACTED]
Jennifer Eva, Lead Service Support Coordinator-APS Healthcare
Linda 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 August 8, 2011
- D-3 DD-2A-ICF/MR Level of Care Evaluation dated December 30, 2010
- D-4 Psychological Evaluation dated February 10, 2011

Claimants' Exhibits:

- C-1 Adaptive Behavior Assessment System (ABAS-II) dated October 12, 2011

VII. FINDINGS OF FACT:

- 1) On August 8, 2011, the Department issued the Claimant Exhibit D-2, Notice of Decision in response to the Claimant's medical eligibility review for the MR/DD Waiver program. Exhibit D-2 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, Self-Direction, and Capacity for Independent Living.

- 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. Ms. Linda Workman, Bureau for Medical Services Psychologist Consultant offered testimony concerning her review of the Claimant's application for MR/DD services. Ms. Workman reviewed Exhibit D-3, DD 2-A ICF/MR Level of Care Evaluation, which documents the Claimant's diagnosis of autism, which is considered an eligible diagnosis for program purposes. This exhibit also documents that the Claimant's physician recommended a 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 his continued eligibility for the MR/DD Waiver Program. Ms. Workman stipulated that the Claimant was awarded a deficit in the area of self-care.

- 3) Ms. Workman reviewed Exhibit D-4, Psychological Evaluation dated February 10, 2011. As part of evaluation the Claimant was administered an ABS-S: 2, as a measure of his adaptive behavior. Ms. Workman stated that scores of two or below are considered eligible scores (a score of one represents three standard deviations below the mean with a score of two representing less than one percentile) to meet functionality criteria.

The Claimant achieved a score of five on the physical development portion of the assessment. This score does not reflect an eligible score under the functionality criteria for a substantial deficit in the area of mobility.

The Claimant achieved a score of five in the area of self-direction, which is not an eligible score under the functionality criteria.

The Claimant achieved a score of four in the language development portion of the assessment. This score does not reflect an eligible score under the functionality criteria for a substantial deficit in the area of language.

The Claimant achieved a score of eight in the numbers and time portion of the assessment. This score does not reflect an eligible score under the functionality criteria for a substantial functional deficit in the area of learning.

In regards to Capacity for Independent Living, the Claimant achieved a score of one in economic activity which does reflect an eligible score under the functionality criteria. However, the Claimant achieved a score of eight in the area of responsibility, four in the area of socialization, and six in the area of pre-vocational activity. Ms. Workman testified that all of the identified components are subcategories to be considered for a functional deficit in the

area of Capacity for Independent Living. The additional scores do not represent an eligible score under the functionality criteria for the life area of Capacity for Independent Living.

- 4) The Claimant, through information provided by his parents, completed an Adaptive Behavior Assessment System-Second Edition (ABAS-II) (Exhibit C-1) on October 12, 2011, as an attempt to provide a more recent measure of adaptive behavior. Ms. Workman acknowledged that the Department received the scores and reviewed the information; however, she could not utilize the information for the purpose of the Claimant's medical eligibility because the documentation had not been reviewed by a licensed psychologist. The Claimant's parents indicated that they completed the information in the exhibit and forwarded the information to ---, Service Coordinator [REDACTED] for [REDACTED] M.D. review. ----acknowledged that she did not review the scores with the family because she is unable to interpret the corresponding scores. ----stated that she attempted to contact [REDACTED] and was informed that the psychologist was, "uncomfortable signing something stating that it [the corresponding exhibit] was done accurately because he did not administer the test." Ms. Jennifer Eva, Lead Service Support Facilitator provided testimony indicating that she contacted [REDACTED] in an attempted to have him sign verification that he reviewed the scores outlined in the exhibit as a licensed psychologist. Ms. Eva indicated that she was informed by Dr. [REDACTED] that the scores did support an accurate reflection of the Claimant's adaptive levels of functioning, but indicated he could not provide the verification because he did not review the scores.

Testimony revealed that the Department questioned the validity of Exhibit C-1 because the documentation failed to indicate that it was completed by a licensed psychologist or an individual properly trained and credentialed to administer the corresponding test. Because the document was not available to the Department at the time of the August 8, 2011 determination and because the issue for this hearing is that determination, Exhibit C-1 is irrelevant to the issue under appeal.

- 5) The Claimant's parents contend that additional functional deficits should have been awarded in the additional five areas of functionality. As it pertains to learning, testimony indicated that the Claimant lacks reading comprehension, is very factual with no abstract concept capability, and does not comprehend figures of speech. Testimony indicated that the Claimant self-stimulates on a daily basis occupying the majority of his time with his computer and will not clean his own room. The Claimant's father purported that the Claimant has the ability to bathe, but must be checked for cleanliness and hygiene. Testimony indicated that the Claimant could not speak until he was six years of age and that he is incapable of using expressive language. The Claimant has been placed in a program to improve his speech and ----believes his inability to express himself clearly hinders his ability to communicate in a safety situation. Testimony indicated that the Claimant is mobile, but has difficulties climbing stairs and must utilize assistance for support when traveling down stairs or stepping off a curb. The Claimant has a history of aggression problems at school and home and is inappropriate with social interactions. The Claimant is involved in twelve different programs through [REDACTED] which address his speech and his money management skills. Testimony indicated that the Claimant would require supervision if placed in a work environment.

- 6) 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. As a matter of record, the Claimant was found to be substantially limited in the area of self-care, but failed to meet the criteria in three or more of the major life areas. Testimony revealed that economic activity, responsibility, socialization, and pre-vocational activity are all subcomponents on the adaptive behavior scale that relate to Capacity for Independent Living. While the Claimant achieved an eligible score in the area of economic of activity, the totality of achieved scores for the remaining sub-components failed to meet the eligibility standard for a deficit in the contested area of 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 terminate the Claimant's medical eligibility 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 November, 2011.

**Eric L. Phillips
State Hearing Officer**