



State of West Virginia  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
Office of Inspector General  
Board of Review  
9083 Middletown Mall  
White Hall, WV 26555

Earl Ray Tomblin  
Governor

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

January 19, 2011

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Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held January 14, 2011. Your hearing request was based on the Department of Health and Human Resources' action to deny your application for benefits and services through the 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 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 Facility). (West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07).

Information submitted at your hearing fails to demonstrate that you meet the criteria necessary to establish MR/DD Waiver Program medical eligibility.

It is the decision of the State Hearing Officer to **uphold** the Department's action in denying your application for benefits and services through the Medicaid, Title XIX, MR/DD Waiver Program.

Sincerely,

Thomas E. Arnett  
State Hearing Officer  
Member, State Board of Review

Pc: Chairman, Board of Review

Jennifer Eva, APS Healthcare, Inc.

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

-----,

**Claimant,**

vs.

**Action Number: 10-BOR-2146**

**West Virginia Department of  
Health and Human Resources,**

**Respondent.**

**DECISION OF THE 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 January 14, 2011 on a timely appeal filed November 1, 2010.

All persons giving testimony were placed under oath.

**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 Mother/Representative

Jennifer Eva, APS Health Care, Respondent's Representative (Participated telephonically)

Richard Workman, Psychologist Consultant, BMS, Respondent's witness (Participated telephonically)

Presiding at the hearing was Thomas E. Arnett, 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 action to deny the Claimant's application for benefits and services through the MR/DD Waiver Program.

### **V. APPLICABLE POLICY**

West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07.

### **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, effective 11/1/07
- D-2 Notice of Denial/Termination dated November 15, 2010
- D-3 DD-2-A-ICF/MR Level of Care Evaluation dated June 27, 2010
- D-4 DD-3, Psychological Evaluation dated August 26, 2010
- D-5 Occupational Therapy Assessment dated May 14, 2010

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

- 1) In response to an application completed for benefits and services through the Medicaid MR/DD Waiver Program, the Claimant was notified via a Notice of Denial/Termination (D-2) that Waiver services were denied. This notice states, in pertinent part:

Your Waiver Application is hereby denied.

Your application was Denied because:

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, Learning, Self-Direction, Receptive or Expressive Language, Mobility and Capacity for Independent Living.

- 2) The Respondent's representative, Jennifer Eva, introduced policy and called upon Richard Workman, a Psychologist Consultant with the Bureau for Medical Services (BMS), to review the medical evidence considered for eligibility. Mr. Workman testified that eligibility could not be established in this case as substantial adaptive deficits were not identified in three or the six major life areas. In addition, the evaluating psychologist does not endorse the need for an ICF/MR (Intermediate Care Facilities for individuals with Mental Retardation) Level of Care in Exhibit D-4.
- 3) The primary area of concern for the Claimant, according to the Claimant's mother/representative, is her mobility and the need for physical and occupational therapy. She contends that her daughter is currently getting services through Birth-To-Three and that she will be without services when she ages-out of this program. She contends that her daughter is demonstrating a substantial adaptive deficit in Mobility and Self-Care. It should be noted that the medical eligibility criteria requires that the individual demonstrate substantial adaptive deficits in three (3) major life areas.
- 4) Richard Workman testified that the information found in Exhibit D-2 is consistent with the Claimant's diagnosis of Spinal Muscular Atrophy and the Claimant is demonstrating neurological abnormalities in her coordination, gait, muscle tone and reflexes. While Mental Retardation (MR) is often associated with Spinal Muscular Atrophy, the Claimant has not been diagnosed with MR and her evaluation results indicate that she is not MR.

Mr. Workman noted that the Claimant was only 24 months old when the psychological evaluation (D-4) was completed. Page 2 of Exhibit D-4 begins by stating – "Speech and language skills are seemingly a strength, according to the mother." "However, ----- is able to stand, but requires holding on for support in order to walk." The Claimant's inability to ambulate without holding onto support is noted again under "Current Behaviors" and while this is clearly a delay, this is not substantially delayed for a 24 month old child. She presents a Standard Score of 67 on the Vineland (a Score of 55 or less indicates eligibility) and the Occupational Therapy Assessment (D-5) states that the Claimant is displaying gross motor skills equivalent to a child 12 months old, representing a 40% delay.

It is noted in Exhibit D-3 (Page 2, Self-Help) that the Claimant is generally able to feed herself. She is not yet potty trained, frequently spills when drinking from a cup, and will sometimes verbalize to her parents when she has soiled her diaper. The information found in Exhibit D-5 indicates that the Claimant's Self-Help skills are equal to a 16 month old child,

representing a 25% delay. There is no indication that the Claimant's Self-Care/Self-Help skills are substantially deficient when compared to her same-age peers. As a result, a substantial adaptive deficit cannot be identified in Self-Care.

- 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 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:
  - o 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,
  - o 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) The 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. "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 emphasis added.
- 2) The evidence in this case fails to demonstrate that the Claimant is demonstrating a substantial adaptive deficit in three (3) or more of the six (6) major life areas.
- 3) Based on the evidence presented at the hearing, the Department was correct in denying the Claimant's application for participation in the Medicaid MR/DD Waiver Program as the Claimant has not demonstrated medical eligibility.

### **IX. DECISION:**

It is the decision of the State Hearing Officer to **uphold** the action of the Department in denying the Claimant's application for benefits and services through the 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 January, 2011**

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**Thomas E. Arnett  
State Hearing Officer**