



State of West Virginia  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
Office of Inspector General  
Board of Review  
9083 Middletown Mall  
White Hall, WV 26554

Earl Ray Tomblin  
Governor

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

February 7, 2011

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Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held January 21, 2011. Your hearing request was based on the Department of Health and Human Resources' proposal to terminate your benefits and services provided through 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 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 the hearing reveals that you no longer meet the medical eligibility criteria required for participation in the Medicaid MR/DD Waiver Program.

It is the decision of the State Hearing Officer to **uphold** the Department's proposal to terminate your benefits and services through the Medicaid 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

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

-----,

**Claimant,**

**vs.**

**Action Number: 10-BOR-2299**

**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 convened on January 21, 2011 on a timely appeal filed November 17, 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 Healthcare, Respondent's Representative  
Richard Workman, Psychologist Consultant, BMS

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 is correct in its proposal to terminate the Claimant's benefits and services through the Medicaid MR/DD Waiver Program.

#### **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 Notice of Denial/Termination dated October 26, 2010
- D-3 DD-2a, WVDHHR ICF/MR Level of Care Evaluation dated July 26, 2010
- D-4 DD-3, Psychological Evaluation dated February 16, 2010
- D-5 Psychological Test Report dated September 28, 2010

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

- 1) The Claimant was undergoing a certification redetermination for continued benefits and services through the Medicaid MR/DD Waiver Program when he was notified via Notice of Denial/Termination dated October 26, 2010 (D-2), that his Waiver services were being terminated. This notice states, 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: Learning, Self-

Direction, Receptive or Expressive Language and Mobility.

It should be noted that a substantial adaptive deficit was identified in Self-Care and Capacity for Independent Living.

- 2) The Department's witness, Richard Workman, a psychologist consultant employed by the Department of Health and Human Resources, hereinafter Department, testified that there are four components to establishing medical eligibility - diagnostic, functionality, level of care and the need for active treatment. Mr. Workman testified that the Claimant meets diagnostic requirements, he has been recommended for an MR/DD level of care by the psychologist, and he would clearly benefit from active treatment. However, Mr. Workman testified that the Claimant does not meet the functionality criteria, as the Claimant is not demonstrating three (3) or more substantial adaptive deficits in the six (6) major life areas. As indicated in the Department's notice, Mr. Workman indicated that the Claimant is not demonstrating a substantial adaptive deficit in Mobility, Receptive and Expressive Language, Learning and Self-Direction. Mr. Workman reviewed the medical findings in Exhibits D-3, D-4 and D-5 and explained how these finding applied to the policy criteria. Because a substantial adaptive deficit cannot be identified in any of the remaining major life areas, eligibility cannot be established.
- 3) As a matter of record, the Claimant's representative did not contest the findings presented by Mr. Workman and indicted that she was aware the Claimant would likely be ineligible for continued participation in the MR/DD Waiver Program with the improvements he has made. Her concern was whether or not the Claimant would be eligible for assistance through other programs.
- 4) Jennifer Eva testified that they were not in a position to review eligibility for other programs but indicated there would be assistance provided by the Claimant's case management agency to assist with the transition.
- 5) West Virginia Medicaid Regulations, Chapter 513, – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07, 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:

- 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) 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) The Claimant's representative indicated that she understood the medical findings and reported that she knew the Claimant would not be eligible for continued MR/DD Program services due to the improvements in his functionality. Whereas the Claimant's unfavorable medical eligibility determination is uncontested, the Department's position in this matter is affirmed.
- 3) Based on the evidence, medical eligibility for continued 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 proposal of the Department to terminate the Claimant's 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 February, 2011**

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**Thomas E. Arnett  
State Hearing Officer**