



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 18, 2011

----- and -----for

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held February 14, 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 continue to 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 **reverse** 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
[REDACTED]

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

-----,

Claimant,

vs.

Action Number: 10-BOR-2350

**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 February 14, 2011 on a timely appeal filed September 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

[REDACTED] / Claimant's Representative

-----, Claimant's Father / Witness

-----, Claimant's Mother / Witness

Jennifer Eva, APS Healthcare, Respondent's Representative

Linda Workman, Psychologist Consultant, Bureau for Medical Services (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 was 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 September 10, 2010
- D-3 DD-2a, WVDHHR ICF/MR Level of Care Evaluation dated May 24, 2010
- D-4 Annual Psychological Update completed on May 6, 2010

Claimant's Exhibits:

- C-1 Individualized Education Program (IEP) from [REDACTED] School dated January 26, 2010.

VII. FINDINGS OF FACT:

- 1) The Claimant was undergoing an eligibility redetermination for continued benefits and services through the Medicaid MR/DD Waiver Program when he was notified via Notice of Denial/Termination dated September 10, 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, Mobility and Capacity for Independent Living.

It should be noted that a substantial adaptive deficit was identified in Self-Care and Receptive or Expressive Language.

- 2) There are four components to establishing medical eligibility. These areas include; diagnostic, functionality, level of care and the need for active treatment. The Claimant presents an eligible diagnosis of Autism, the psychologist has recommended an MR/DD level of care and the Claimant would benefit from active treatment. Functionality is the primary issue in this case as the Department contends the Claimant is not demonstrating three (3) or more substantial adaptive deficits in the major life areas. As a matter of record, Linda Workman, the Department's psychologist consultant, stipulated that the Claimant is demonstrating two (2) substantial adaptive deficits in the areas of Self-Care and Language.
- 3) The Claimant, through his representative, contends that he continues to be eligible for participation in the MR/DD Waiver Program as he is also demonstrating substantial adaptive deficits in Learning and in his Capacity for Independent Living.
- 4) Linda Workman, the Department's Psychologist Consultant, reviewed the documentation submitted for review and noted that Learning could not be identified as a substantial adaptive deficit because there are no current results of achievement testing documented in the Annual Psychological Update (D-4). Ms. Workman indicated that she reviewed Exhibit C-1, Individualized Education Program (IEP), however, the only test scores available were from a test completed almost three years ago. The IEP clearly shows some cognitive delays and indicates that the Claimant attends Special Education classes 68% of his school day. However, in the absence of current achievement testing results that confirm the Claimant's cognitive delays meet policy requirements (3 standard deviations below the mean), a deficit cannot be established in Learning.
- 5) Pursuant to MR/DD Waiver Policy, the major life area identified as Capacity for Independent Living is comprised of several components which include; home living, social skills, employment, health and safety, community and leisure activities. Policy does not indicate whether the individual is required to demonstrate deficiencies in one or all of these components, however, a substantial limitation in any one of these components would compromise the individual's Capacity for Independent Living.

According to testimony provided by Ms. Workman, narrative information is used in conjunction with the Adaptive Behavior Scores (ABS) to determine eligibility because the ABS-S:2 does not clearly define limitations in all of the components used to determine

Capacity for Independent Living. A review of the ABS in Exhibit D-4 (Annual Psychological Update) reveals that Non-MR (Non-Mental Retardation) Norms were appropriately used to assess the Claimant – ABS-S:2 scores of less than 1 percentile “Pcnt” or a Standard Score “SS” of 1 identify a substantial adaptive deficit.

Ms. Workman testified that “Economic Activity” and “Socialization” scores were eligible but there are several other components that must be identified in the narrative. Ms. Workman went on to testify that the ABS Factor 1 scores (Personal Self-Sufficiency, Community Self-Sufficiency and Personal-Social Responsibility) although eligible (less than 1 percentile) are not considered for eligibility when reviewing for recertification.

As noted by the Claimant’s representative, the documentation found in Section I.A.3 of Exhibit D-4 (Discussion, 3rd paragraph) states, in pertinent part:

Factor scores measure one’s ability to take care of oneself and live as a functioning member of the community. In comparison to other same-aged peers without mental retardation living in the community or in institutions, Jack’s Part One Factor Scores fell in the very poor range, falling at less the [sic] 1st percentile. His age equivalents were less than 3 years. Areas assessed included Personal Self-Sufficiency (ability to take care of one’s self on a daily basis), Personal-Social Responsibility (ability to help others, and participate in group activities) and Community Self-Sufficiency (measures abilities that are important for integrating a person fully into the mainstream of society).

Exhibit D-4, Section I.C. (Developmental Findings/Conclusions), notes health and safety concerns and Exhibit C-1 reveals that the Claimant requires constant and consistent adult supervision, and requires assistance with all activities and transitions to and from classes. Testimony presented at the hearing reveals that the Claimant cannot be unsupervised at anytime while outside because he is a runs away and is vulnerable to being struck by a car due to his inability to recognize danger.

Testimony presented at the hearing by the Claimant’s parents indicates that the Claimant is not currently involved in community activities and that he does not have the ability to initiate community involvement without the assistance of his parents. The Claimant is unable to engage in any “home living” skills because he cannot complete chores, cook, or pay bills and he does not respond to verbal prompts to complete these activities. According to the Claimant’s parents, the Claimant requires physical guidance to complete simple tasks like picking up his shoes.

Evidence demonstrates that the Claimant has an eligible ABS-S:2 score in Economic Activity and Socialization (social skills) and the narrative information indicates substantial deficiencies in the Claimant’s health and safety, home living as well as community and leisure activities. Based on the evidence, the Claimant is demonstrating a substantial adaptive deficit in his Capacity for Independent Living.

- 6) 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) As a matter of record, the Department stipulated that the Claimant was demonstrating a substantial adaptive deficit in the major life areas of Self-Care and Language. Evidence submitted on behalf of the Claimant (relevant test scores and narrative descriptions contained in the documentation submitted for review) identify a substantial adaptive deficit in the Claimant's Capacity for Independent Living. Whereas the Claimant is demonstrating a substantial adaptive deficit in three (3) or more of the major life areas, the Claimant meets the functionality requirements in the medical eligibility criterion.
- 3) Based on the evidence, medical eligibility for continued participation in the Medicaid MR/DD Waiver Program is established.

IX. DECISION:

It is the decision of the State Hearing Officer to **reverse** 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

Thomas E. Arnett
State Hearing Officer