



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
1027 N. Randolph Ave.
Elkins, WV 26241

Earl Ray Tomblin
Governor

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

March 23, 2011

-----for -----

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your daughter's hearing held March 9, 2011. Your hearing request was based on the Department of Health and Human Resources' action to terminate your daughter's benefits and services 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)

Information provided during the hearing reveals that your daughter does not meet 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 daughter's benefits and services through the Medicaid MR/DD Waiver Program.

Sincerely,

Pamela L. Hinzman
State Hearing Officer
Member, State Board of Review

Cc: Chairman, Board of Review
Jennifer Eva, APS Healthcare



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

-----,

Claimant,

vs.

Action Number: 11-BOR-341

**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 via videoconference on March 9, 2011 on a timely appeal filed December 27, 2010. It should be noted that benefits have continued pending a hearing decision.

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
-----, Claimant's mother
-----, Claimant's father
-----, Respite Worker, [REDACTED]
-----, Service Coordinator/Case Manager, [REDACTED]
-----, Therapeutic Consultant/Behavior Specialist, [REDACTED]
Jennifer Eva, MR/DD Service Support Facilitator, APS Healthcare
Linda Workman, Psychologist Consultant, Bureau for Medical Services

Presiding at the hearing was Pamela L. Hinzman, 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 DD 2-A ICF/MR Level of Care Evaluation dated October 5, 2009
- D-3 Psychological Evaluation from [REDACTED] ED.D., dated April 21, 2010
- D-4 Notice of Denial\Termination dated June 14, 2010
- D-5 Notice of Denial\Termination dated October 7, 2010
- D-6 DD-2-A ICF/MR Level of Care Evaluation dated September 8, 2010
- D-7 Psychological Evaluation from [REDACTED] ED.D., dated September 8, 2010
- D-8 Memorandum to Janice Hillman from APS Healthcare, Inc., dated October 28, 2010
- D-9 Notice of Denial\Termination dated December 8, 2010
- D-10 Speech-Language Pathology Evaluation from Therapy Services dated May 19, 2010
- D-11 Letter from -----of Therapy Services dated July 26, 2010
- D-12 Individualized Education Program from [REDACTED] County Schools dated March 12, 2010

Claimant's Exhibits:

- C-1 ----- Summary of functioning level deficits in each domain, completed by -----, Behavior Specialist
- C-2 Extraordinary Care Needs Assessment, and Inventory for Client and Agency Planning

VII. FINDINGS OF FACT:

- 1) The Claimant, currently age 12, is a recipient of Medicaid MR/DD Waiver Program services and was notified via Notice of Denial/Termination dated June 14, 2010 (D-4) that her Waiver services had been terminated. This notice states, in pertinent part:

Your Waiver services have been terminated.

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

It should be noted that a substantial adaptive deficit was identified in the area of Self-Care.

- 2) Linda Workman, Psychologist Consultant with the Bureau for Medical Services, provided testimony concerning Exhibits D-2 and D-3. Exhibit D-2, a DD-2-A ICF-MR Level of Care Evaluation completed on October 5, 2009, lists an Axis I diagnosis of autism and states that the Claimant has a history of severe developmental delay/mental retardation on Axis II. Ms. Workman testified that autism is an eligible diagnosis for the MR/DD Waiver Program, however, there is no justification for a diagnosis of mental retardation on the Claimant's psychological evaluations. The physician certified that the Claimant requires an ICF-MR Level of Care.

Ms. Workman reviewed Exhibit D-3, an April 21, 2010 Psychological Evaluation from Ronald Pearse, ED.D., which indicates that the Claimant has been diagnosed with autism or autistic disorder on psychological testing dating to 2002. No intellectual/cognitive testing was completed, however, an Adaptive Behavior Scale (ABS)-School:2 profile/summary was provided. Ms. Workman indicated that ABS scores of less than one (1) percentile are considered eligible scores for the MR/DD Waiver Program using non-mental retardation norms. The Claimant obtained the following percentile scores: Independent Functioning- <1; Physical Development- 9; Economic Activity- <1; Language Development- 1; Numbers and

Time- 9; Prevocational/Vocational Activity- 9; Self-Direction- 37; Responsibility- 50; and Socialization- 2. The evaluating psychologist listed an Axis I diagnosis of Autistic Disorder, with no Axis II diagnosis listed. The evaluator recommended an ICF-MR Level of Care for the Claimant.

- 3) Ms. Workman testified that a second DD-2-A (D-6) was completed on September 8, 2010, however the information failed to alter the Department's original findings. A second termination letter was sent to the Claimant on October 7, 2010 (D-5).
- 4) The Department reviewed a second Psychological Evaluation (D-7) from [REDACTED] dated September 8, 2010. The evaluation indicates that a Vineland Adaptive Behavior Scale, Second Edition, was completed for the Claimant, stating "The normative tables used were non MR as she has borderline intelligence." The report indicates that the Vineland scores were attached, however, Ms. Workman testified that the scores were not included in the documents submitted.

The Department sent [REDACTED] a memorandum (D-8) on October 28, 2010, requesting the following: "Please attach adaptive behavior scores. Please clarify diagnostic impressions, DD-2A, DD-3, Borderline IQ." The requested information was not received by the Department.

Ms. Workman testified that Exhibits D-10 and D-11 were provided to the Department and include an assessment of speech-language pathology/motor skills. She noted that the Claimant received no program-eligible scores on the Language Processing Test, Revised, or the Bruininks-Osteretsky Test of Motor Proficiency. In addition, Ms. Workman reviewed an Individualized Education Program from [REDACTED] County Schools dated March 12, 2010 (D-12).

The Department sent a third termination letter (D-9) to the Claimant on December 8, 2010.

- 5) The Claimant's mother, ----, testified that she had no raw scores to present at the hearing and was uncertain why the Department did not have some documentation, however she addressed school testing administered since the proposed termination of MR/DD services and indicated that the Claimant obtained low math and reading scores. ----provided narrative information about the Claimant and her skill levels, and indicated that some of the information provided in documentation submitted to the Department was inaccurate. ----indicated that she would like guidelines in completing documentation for the MR/DD Waiver Program. ----testified that ---- particularly faces challenges in regard to verbalization. Witnesses for the Claimant also indicated that Receptive/Expressive Language is ----'s most significant deficit, however they believe she exhibits deficits in other functional areas as well. They submitted Exhibits C-1 and C-2 to demonstrate that the Claimant requires extraordinary care in various major life areas. Representatives for the Claimant indicated that a score summary from the Vineland test had been faxed to the Department, however, Ms. Workman stated that there was no identifying data on the score

summary, including the name of the client or the testing date. The documents entered by the Claimant include information regarding Adaptive Behavior scores, but there was no explanation of the significance of those test scores in regard to MR/DD Waiver policy requirements.

- 6) West Virginia Medicaid Regulations, Chapter 513, – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services (D-1), 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:
- 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) 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 which manifested 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) Policy states that the presence of a substantial adaptive deficit 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 ABS score must first be identified, and then supported by the narrative information. Pursuant to Medicaid MR/DD Waiver regulations, information reviewed for eligibility supports the finding of a substantial adaptive deficit in Self-Care, however documentation does not support findings of substantial adaptive deficits in any other area. Whereas the Claimant's test scores do not support the awarding of additional substantial adaptive deficits, the Claimant does not meet the functionality requirements in the medical eligibility criterion.
- 3) Based on the evidence, 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 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 23rd Day of March, 2011

Pamela L. Hinzman
State Hearing Officer