



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

March 18, 2011

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

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Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held March 14, 2011. Your hearing request was based on the Department of Health and Human Resources' decision to deny your application for 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 fails to demonstrate that your son meets 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 action in denying your application for 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: 11-BOR-401**

**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 March 14, 2011 on a timely appeal filed November 2, 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 Father/Representative

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 decision to deny the Claimant's application for 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 14, 2010
- D-3 DD-2a, WVDHHR ICF/MR Level of Care Evaluation - dated July 15, 2010
- D-4 DD-3, New Waiver Psychological Evaluation – dated August 19, 2010
- D-5 [REDACTED] County Schools Pre-K Evaluation Report – dated August 4, 2010
- D-6 Individualized Education Program (IEP) – dated September 24, 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: 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 indicated 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 should have been found eligible for the MR/DD Waiver Program as he is also demonstrating substantial adaptive deficits in Self-Direction and in his Capacity for Independent Living.
- 4) Ms. Workman reviewed the documentation submitted and noted that the Claimant's Adaptive Behavior Scale-School Edition, Second Edition (ABS-S:2), hereinafter ABS, score (Exhibit D-4, page 3) in the area of Self-Direction was very close to being eligible (1<sup>st</sup> percentile / Standard Score of 7), however, an eligible ABS score is less than the 1<sup>st</sup> percentile or a Standard Score of 2 or less [note the eligible scores in the areas of Independent Functioning (Self-Care) and Language Development]. Ms. Workman testified that it was difficult to determine a deficit in the area of Self-Direction based on the narrative information reviewed as the Psychological Evaluation (D-4, page 2) indicates that the Claimant reportedly enjoys playing with his toy cars and watching television during his free time.
- 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. According to testimony provided by Ms. Workman, narrative information is used in conjunction with the 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. Ms. Workman noted that the Claimant is compared to the ability of same-age peers and an ABS-S:2 score of less than the 1<sup>st</sup> percentile, or a Standard Score 2 or less, identify a substantial adaptive deficit.

A review of the ABS in Exhibit D-4 reveals a qualifying score in Socialization (social skills), however, Prevocational/Vocational (Employment) is noted to be in the 16<sup>th</sup> percentile and Responsibility (Health and Safety) is in the 5<sup>th</sup> percentile. While there is not an ABS score relied upon to identify deficits in home living skills (chores, feeding pets, laundry, making bed, etc...) or community use/leisure activities, there is no information in the documentation to indicate the Claimant is deficient in either of these components. Because the ABS verifies the Claimant is demonstrating a significant deficiency in only one (1) of the components that

make up Capacity for Independent Living (social skills), and there are no other components identified by either ABS or narrative documentation reviewed for eligibility, a substantial adaptive deficit cannot be established in the Claimant's 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) Policy states that the presence of a substantial adaptive deficit must be supported not only by the relevant test scores, but also the 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. 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. However, evidence submitted on behalf of the Claimant (relevant test scores and narrative descriptions contained in the documentation submitted for review) fail to identify a substantial adaptive deficit in any of the other major life areas. Whereas the Claimant is not demonstrating a substantial adaptive deficit in three (3) or more of the major life areas, 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 deny 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 March, 2011**

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**Thomas E. Arnett  
State Hearing Officer**