



State of West Virginia  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
Office of Inspector General  
Board of Review  
2699 Park Avenue, Suite 100  
Huntington, WV 25704

Earl Ray Tomblin  
Governor

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

April 15, 2011

-----for -----

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Dear -----:

Attached is a copy of the findings of fact and conclusions of law on -----'s hearing held April 11, 2011. The hearing request was based on the Department of Health and Human Resources' denial of Title XIX MR/DD Waiver services.

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 Waiver Program is based on current policy and regulations. Policy states that in order to be eligible for the MR/DD 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). Individuals must meet the diagnostic criteria for medical eligibility not only by the relevant test scores, but also by the narrative descriptions contained in the documentation. (MR/DD Waiver Manual, Chapter 513 – *Covered Services, Limitations, and Exclusions for MR/DD Waiver Services*, effective November 1, 2007)

Information submitted at your hearing revealed the additional functional deficit in the major life area of self-care. With this deficit, the functionality component of medical eligibility, and medical eligibility as a whole, was met for participation in the MR/DD Waiver Program.

It is the decision of the State Hearing Officer to **reverse** the Department's denial of -----'s Title XIX MR/DD Waiver services.

Sincerely,

Todd Thornton  
State Hearing Officer  
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review  
Jennifer Eva  
Linda Workman

WEST VIRGINIA DEPARTMENT OF HEALTH & HUMAN RESOURCES

## **BOARD OF REVIEW**

-----,

**Claimant,**

**v.**

**Action Number: 11-BOR-724**

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

**Respondent.**

### **DECISION OF STATE HEARING OFFICER**

#### **I. INTRODUCTION:**

This is a report of the State Hearing Officer resulting from a fair hearing concluded on April 15, 2011 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 April 11, 2011 on a timely appeal, filed March 14, 2011.

#### **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 witness  
-----, Claimant's witness  
-----, Claimant's witness  
-----, Claimant's witness  
Jennifer Eva, Department representative  
Linda Workman, Department's witness

Presiding at the Hearing was Todd Thornton, 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 Title XIX MR/DD Waiver Program services to the Claimant based on a finding that medical eligibility was not met.

### **V. APPLICABLE POLICY:**

MR/DD Waiver Manual, Chapter 513 – *Covered Services, Limitations, and Exclusions for MR/DD Waiver Services*, effective November 1, 2007  
Code of Federal Regulations – 42 CFR §431.302(c)(2)(iii); 42 CFR §435.1010; 42 CFR §483.440; 42 CFR §440.150

### **VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:**

#### **Department's Exhibits:**

- D-1 MR/DD Waiver Manual, Chapter 513 – *Covered Services, Limitations, and Exclusions for MR/DD Waiver Services*, effective November 1, 2007
- D-2 Notice of Denial/Termination, dated June 28, 2010
- D-3 ICF/MR Level of Care Evaluation (DD-2A), dated May 10, 2010
- D-4 Psychological Evaluation (DD-3), dated June 7, 2010
- D-5 Psychoeducational Assessment Report, assessment date January 3, 2011
- D-6 Notice of Denial/Termination, dated February 18, 2011

## VII. FINDINGS OF FACT:

- 1) The Claimant, who is a 22-year old adult male, submitted an application for MR/DD Waiver Services. After review of the documentation submitted to establish the Claimant's medical eligibility for this program, the Department sent a notice of denial to the Claimant on or about June 28, 2010 (Exhibit D-2). The notice explains the reason for denial of services, in pertinent part, as:

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:
- |  |  |
|--|--|
| <input type="checkbox"/> Self-Care                 | <input checked="" type="checkbox"/> Receptive or Expressive Language |
| <input checked="" type="checkbox"/> Learning       | <input checked="" type="checkbox"/> Mobility                         |
| <input checked="" type="checkbox"/> Self-Direction | <input checked="" type="checkbox"/> Capacity for Independent Living  |

The notice indicated that the facts relied on in making the Department's decision were an ICF/MR Level of Care Evaluation (DD-2A), dated May 10, 2010 (Exhibit D-3), and a Psychological Evaluation (DD-3), dated June 7, 2010 (Exhibit D-4).

- 2) Additional documentation was submitted to the Department, and, after review of this information, a second notice of denial was sent to the Claimant on or about February 18, 2011 (Exhibit D-6). This notice provided the denial reason as follows, in pertinent part:

Your application was denied/terminated 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:

- |   |  |
|---|--|
| <input checked="" type="checkbox"/> Self-Care | <input checked="" type="checkbox"/> Receptive or Expressive Language |
| <input type="checkbox"/> Learning             | <input checked="" type="checkbox"/> Mobility                         |
| <input type="checkbox"/> Self-Direction       | <input checked="" type="checkbox"/> Capacity for Independent Living  |

In addition to the documents relied on in the June 2010 decision (Exhibits D-3 and D-4), this denial was additionally based on a review of the June denial notice (Exhibit D-2) and a Psychoeducational Assessment (Exhibit D-5) dated January 3, 2011.

- 3) Jennifer Eva, representative for the Department, presented the appropriate policy for this matter as the MR/DD Waiver Manual, Chapter 513, §513.3.1, effective November 1, 2007. *(It should be noted that 42 CFR §435.1009 – referred to in the following policy – has since been changed to 42 CFR §435.1010)* This policy states, in pertinent part:

**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 Section 513.3.1, 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 CFR 435.1009.

## **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 must 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).

- 4) Linda Workman, Psychologist Consultant for the Department, testified regarding her background and experience, noting an extensive history with the underlying policy for the MR/DD Waiver Program, reviews of the applications for the program, and psychological evaluations of school-aged children. -----, an assessing Psychologist for the Claimant, testified regarding his experience; he completed the January 2011 Psychoeducational Assessment Report (Exhibit D-5) regarding the Claimant.
- 5) Ms. Workman testified that the Claimant did not meet medical eligibility for the MR/DD Waiver Program due to unmet functionality. She testified that the documentation she reviewed indicated an eligible diagnosis for the Claimant and certification of the Claimant's need for an ICF/MR level of care. She testified that the intelligence testing on both psychological evaluations (Exhibits D-4 and D-5) were consistent with the Claimant's diagnosis of Moderate Mental Retardation. The first denial indicated that the Claimant met functionality in the major life area of *self-care*. The second denial indicated that the Claimant met functionality in the major life areas of *learning* and *self-direction*, but not *self-care*.
- 6) Ms. Workman testified that she reviewed the DD-2A form (Exhibit D-2), which indicated the Claimant requires assistance with personal hygiene or self care. A note in this area of the document states, "no fine motor activities." The psychological evaluation, or DD-3, addresses this further by stating (Exhibit D-4, page 2 of 10), "He has problems with fine motor control and requires assistance with some tasks requiring manual dexterity, such as buttoning." The same evaluation assessed the Claimant's adaptive behavior using the Adaptive Behavior Scale – Residential and Community (ABS-RC:2), using mental retardation norms, due to the Claimant's diagnosis of Moderate Mental Retardation. The ABS-RC:2 revealed a raw score of 77 and a standard score of 11, at the 63<sup>rd</sup> percentile, in the subtest of Independent Functioning; Ms. Workman testified that this was an eligible score because it was a standard score of less than 12, and less than the 75<sup>th</sup> percentile, using mental retardation norms. The Independent Functioning subtest closely corresponds with the major life area of *self-care*. *Self-care* was identified as a major life area of substantially limited functioning for the Claimant in the first eligibility determination for these reasons.
- 7) In the second eligibility determination, Ms. Workman testified that additional and more current information was available. The second psychological assessment (Exhibit D-5)



noted the Wechsler Individual Achievement Test-II was administered to the Claimant to evaluate functional academics, or learning. Ms. Workman testified that on the first DD-3 (Exhibit D-4), learning was not assessed; however, the Claimant's results on the Wechsler Individual Achievement Test-II revealed eligible scores in the areas of Arithmetic Computation, Reading Comprehension, and Arithmetic Reasoning. The Adaptive Behavior Evaluation Scale Revised-Home Version (ABES) was administered, and the Claimant's Functional academics score was 2 – an eligible score, according to Ms. Workman's testimony. As a result, *learning* was identified as a major life area of substantially limited functioning for the Claimant in the second eligibility determination.

The ABES score for the Claimant in the area of *self-direction* was also 2. This area was identified as a major life area of substantially limited functioning for the Claimant in the second eligibility determination.

The ABES score for the Claimant in the area of *self-care* was 7, which was not an eligible score. Ms. Workman testified that the ineligible score was more current than the eligible score from the previous instrument (Exhibit D-4, page 5 of 10, Independent Functioning subtest), and *self-care* was not identified as a major life area of substantially limited for the Claimant in the second eligibility determination.

- 8) ----, the Claimant's assessing psychologist, testified that he has concerns with the scores presented by the ABES on his assessment (Exhibit D-5), and the ABS-RC:2 on the previous assessment (Exhibit D-4). He testified that these instruments are based on ratings provided, in the Claimant's case, by his parents. He opined that because they are rating scales, they involve a degree of judgmental factor or variance. He indicated that the Claimant's parents were proud of their accomplishments with the Claimant, and could have been too 'enthusiastic' with their ratings. This would result in inflated scores on the instruments.
- 9) ----, a representative from the [REDACTED] County Developmental Center, read from a document indicating that the Claimant would not be able to be employed without outside support, and that the Claimant requires reminders to 'stay on task' with work. This document was not submitted as evidence, and the second-hand testimony was allowed, over objection, with the weight it merits. Very little consideration was given to this testimony, considering its nature.
- 10) ---- testified that he was the Claimant's teacher for several years, both in high school and elementary school. He opined that the Claimant's test scores were inflated. He testified that with supervision, the Claimant may accomplish things that without supervision he would not. He testified that the Claimant could not count change or deal with money, make meals with a stove or microwave, or live independently.

- 11) -----, the Claimant's mother, testified that the Claimant is unable to wash his hair, brush his teeth, put on a watch or necklace, use buttons, put on a belt, or tie his shoes. She testified that she was a respondent for the Claimant's adaptive behavior assessments.

### 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. Substantially limited functioning in three or more of the major life areas is required. Substantial limits is defined on standardized measures of adaptive behavior scores three standard deviations below the mean or equal to or below the 75<sup>th</sup> percentile when derived from MR normative populations.
- 2) The Claimant established a qualifying diagnosis and functionality in two major life areas – *self-direction* and *learning* – in the most recent Department determination prior to this hearing. Functionality was additionally established in the first – but not the subsequent – eligibility determination, in the major life area of *self-care*. Two different psychological evaluations, separated by only seven months, produced test scores rating the Claimant – a 21-year old during these assessments, near the end of developmental period and without the benefit of possible improvement through ongoing waiver services – in such a way that one evaluation led the Department to conclude that the Claimant was not substantially limited in *self-care*, and the other led to the conclusion that he was. Without reason to believe that there was significant change in the Claimant in the interim, one assessment of the Claimant must be correct and the other must be incorrect.
- 3) The Department testimony that more recent test scores must hold precedence is considered; however, with testimony from both the test administrator and one of the raters – the Claimant's mother – indicating concerns that the ratings could be inflated, the more recent assessment of *self-care* does not merit significant weight. Removing the potentially inflated test score from consideration leaves the narrative and favorable test score, in addition to the testimony of the Claimant's mother. The testimony of the Claimant's mother portrays the Claimant with considerable limitations in areas requiring fine motor control, such as self-care. The testimony additionally provides convincing support to the argument that the Claimant was overrated due to the pride or enthusiasm of the Claimant's parents. The Department was incorrect to not find the Claimant substantially limited in the functionality area of *self-care*.
- 4) With the required three of six major life areas met, the Claimant has met the functionality component of medical eligibility for the MR/DD Waiver Program. All other components of medical eligibility were met, according to testimony from the

Department. The Department's proposed action to deny MR/DD Waiver services is incorrect.

**IX. DECISION:**

It is the decision of the State Hearing Officer to **reverse** the decision of the Department that documentation submitted on behalf of the Claimant did not support a finding of medical eligibility for MR/DD Waiver services.

**X. RIGHT OF APPEAL:**

See Attachment

**XI. ATTACHMENTS:**

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

**ENTERED this \_\_\_\_ Day of April, 2011.**

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**Todd Thornton  
State Hearing Officer**