



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

May 11, 2011

-----for -----

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on -----'s hearing held May 9, 2011. The hearing request was based on the Department of Health and Human Resources' denial of Title XIX MR/DD Waiver services for -----.

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 the hearing revealed neither the diagnostic requirement, nor the ICF/MR level of care certification requirement, nor the functionality requirement were met, and program eligibility could not be established.

It is the decision of the State Hearing Officer to **uphold** the Department's denial of 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, Department Representative
Linda Workman

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

-----,

Claimant,

v.

Action Number: 11-BOR-827

**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 May 11, 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 May 9, 2011 on a timely appeal, filed March 17, 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 representative
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

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 December 14, 2010
- D-3 ICF/MR Level of Care Evaluation (DD-2A) dated June 30, 2010
- D-4 Psychological Evaluation dated September 30, 2010

VII. FINDINGS OF FACT:

- 1) The Claimant, who is an 8-year old applicant for MR/DD Waiver Services, received notification of denial for the program (Exhibit D-2) on or about December 14, 2010. This notice stated, "Neither the physician nor the psychologist has offered an eligible diagnosis for the MR/DD Waiver program and the psychologist has not endorsed the need for an ICF/MR level of care." The notice additionally stated that the Claimant's documentation failed to demonstrate functionality in any of the six major life areas identified in program policy.

- 2) Jennifer Eva, representative for the Department, testified that the appropriate policy for this matter was the MR/DD Waiver Manual, Chapter 513, §513.3.1, effective November 1, 2007 (Exhibit D-1). 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).

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).

- 3) Linda Workman, Psychologist Consultant for the Department, testified regarding her background and experience as a licensed psychologist, noting her reviews of the program applications and extensive history with the underlying eligibility criteria for the MR/DD Waiver Program and the population of individuals eligible for the program.
- 4) Ms. Workman testified that the Claimant did not present an eligible diagnosis. Neither the ICF/MR Level of Care Evaluation (Exhibit D-3) nor the Psychological Evaluation (Exhibit D-4) listed a diagnosis for the Claimant that would meet the program requirements.
- 5) Ms. Workman testified that the Psychological Evaluation (Exhibit D-4) of the Claimant did not include the psychologist's certification of the Claimant's need for an ICF/MR level of care. In this document, [REDACTED] Psy.D, the reviewing psychologist, stated, under the section for placement recommendations, "Tyler does not meet the criteria for Waiver Title XIX services."
- 6) Ms. Workman testified that the Claimant's adaptive behavior was tested during the September 2010 Psychological Evaluation using the Adaptive Behavior Scale – School, Second Edition (ABS-S:2). This instrument was scored using non-mental retardation norms, which Ms. Workman testified was appropriate, and the resulting subtest scores were used to determine functionality in the corresponding major life areas identified by policy. To establish functionality, Ms. Workman testified that the scores must result in ranks below the first percentile. None of the Claimant's scores were below the first percentile, and Ms. Workman testified that, as a result, functionality could not be met in any of the six major life areas.
- 7) -----, representative and foster parent to the Claimant, testified that the Claimant's speech is delayed, and that the Claimant cannot cross a street, make a sandwich, or shower without assistance. -----testified that the Claimant requires constant redirection. She testified that the Claimant's Individualized Education Program (IEP) placed him in special education at school, and that the basis for this is his mental retardation. Ms. Workman testified that the school system has a different threshold for special education purposes than the MR/DD Waiver program, and that the Claimant did not present a mental retardation diagnosis.

VIII. CONCLUSION OF LAW:

- 1) The regulations that govern the MR/DD Waiver Program require eligible individuals to have an eligible diagnosis, require an ICF/MR level of care, and present severe functionality limits established through testing and narrative. Testimony and evidence clearly showed that the Claimant did not meet these program requirements. The Department was correct to deny the Claimant MR/DD Waiver services.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** 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 May, 2011.

Todd Thornton
State Hearing Officer