**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**

**Rocco S. Fucillo**
**Cabinet Secretary**

August 2, 2012

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Dear ------:

Attached is a copy of the Findings of Fact and Conclusions of Law on your hearing held August 1, 2012. Your hearing request was based on the Department of Health and Human Resources' proposal to terminate your benefits and services through the Medicaid I/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 I/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 I/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 – Applicant Eligibility and Enrollment Process for I/DD Waiver Program]

Information provided during the hearing reveals that you do not meet the medical eligibility criteria required for participation in the Medicaid I/DD Waiver Program.

It is the decision of the State Hearing Officer to **uphold** the Department's proposal to terminate your benefits and services through the Medicaid I/DD Waiver Program.

Sincerely,

Thomas E. Arnett
State Hearing Officer
Member, State Board of Review

cc: Chairman, Board of Review

Tiffany Angel, APS Healthcare

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

**IN RE: ------,**

**Claimant,**

**vs.** **Action No.: 12-BOR-1280**

**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 August 1, 2012, on a timely appeal filed May 7, 2012. I/DD Waiver benefits and services have continued pending the hearing decision.

## II. PROGRAM PURPOSE:

The Intellectual and Developmental Disabilities (I/DD) Waiver Program is West Virginia's home and community-based services program for individuals with intellectual and/or developmental disabilities. It is administered by the Bureau for Medical Services pursuant to a Medicaid waiver option approved by the Centers for Medicare and Medicaid (CMS). The I/DD Waiver Program reimburses for services to instruct, train, support, supervise, and assist individuals who have intellectual and/or developmental disabilities in achieving the highest level of independence and self-sufficiency as possible. The I/DD Waiver Program provides services in natural settings, homes and communities where the individual resides, works and shops.

## III. PARTICIPANTS:

------, Claimant
------, Claimant's mother/representative
------, Services Coordinator, ------
Richard Workman, Psychologist Consultant, Bureau for Medical Services

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 I/DD Waiver Program.

## V. APPLICABLE POLICY:

West Virginia Medicaid Regulations, Chapter 513.4 – Member Annual Re-Determination of Eligibility Process

## VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

**Department's Exhibits:**

D-1 West Virginia Medicaid Regulations, Chapter 513.4 - Member Annual Re-Determination of Eligibility Process
D-2 Notice of Denial/Termination dated January 26, 2012
D-3 Independent Psychological Evaluation dated December 22, 2011

## VII. FINDINGS OF FACT:

1) On or about January 26, 2012, the Claimant was notified via a Notice of Denial/Termination (D-2) that his Medicaid I/DD Waiver Program benefits were terminated. This notice states, in pertinent part:

> Your Waiver services have been terminated.
>
> Your application was denied/terminated because:
>
> Documentation submitted does not support the presence of an eligible diagnosis for the I/DD Waiver program nor [sic] the need for active treatment or ICF/MR level of care.
>
> 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: Self-Care, Self-Direction, Mobility and Capacity for Independent Living.

It should be noted that the Claimant was awarded substantial adaptive deficits in the areas of Learning and Receptive or Expressive Language.

2) Richard Workman, Psychologist Consultant with the Bureau for Medical Services (BMS), reviewed the clinical findings in the Independent Psychological Evaluation (IPE) completed on December 22, 2011 (D-3), and cited relevant scores and narrative documentation to support the Department's findings. Mr. Workman purported that while the Claimant was previously diagnosed with mild mental retardation, the current IPE, as well as the previous psychological evaluation, resulted in an Axis II diagnosis of Borderline Intellectual Functioning. Mr. Workman testified that clinical testing results documented in the IPE support the diagnosis provided by the evaluating psychologist. Mr. Workman concluded that medical eligibility could not be established because the Claimant does not present an eligible diagnosis and his condition is not severe, as he demonstrating substantial adaptive deficits in only two (2) of the major life areas – Learning and Language.

3) The Claimant's mother indicated that she has concerns regarding her son's capacity for independent living, as he cannot remember when to take prescription medications and is unable to manage money. Prompting an individual, however, is not considered active treatment (the level of care required for this program), and while managing money is a concern, clinical documentation fails to identify a substantial adaptive deficit in his capacity for independent living. With regard to the diagnostic criteria, the Claimant's mother purported that he was diagnosed with mental retardation when he was evaluated by the Social Security Administration, but acknowledged she did not have any clinical documentation to refute the current Borderline Intellectual Functioning diagnosis provided in the IPE (D-3).

4) ------, the Claimant's service provider, purported that APS Healthcare recently completed an assessment on the Claimant and established a budget that indicates he is eligible. The Department countered by noting that an APS assessment is typically reviewed during a re-evaluation, but the assessment cited by ------ was not part of the re-evaluation and was completed only because the Claimant continued to receive benefits while in appeal status.

5) West Virginia Medicaid Regulations, Chapter 513 - Applicant Eligibility and Enrollment Process for I/DD Waiver Services (D-1), includes the following pertinent medical eligibility criteria:

**513.4 MEMBER ANNUAL RE-DETERMINATION OF ELIGIBILITY PROCESS**

In order for a member to be re-determined eligible, the member must:

- Meet medical eligibility;
- Meet financial eligibility;

- Be a resident of West Virginia; and
- Have chosen Home and Community-Based Services over services in an institutional setting (ICF/MR).

The member must also have substantial deficits in at least three of the six identified major life areas listed below:

- Self-care;
- Receptive or expressive language (communication);
- Learning (functional academics);
- Mobility;
- Self-direction; and
- Capacity for independent living (home living, social skills, employment, health and safety, community and leisure activities).

**513.4.1 Annual Re-determination of Medical Eligibility**

In accordance with federal law, re-determination of medical eligibility must be completed at least annually. The anchor date of the member's medical re-determination is the anniversary date of the first month after the initial medical eligibility was established by the MECA.

At a minimum, annual redetermination of eligibility will include one annual functional assessment which includes standardized measures of adaptive behavior in the six major life areas completed by the ASO and the results provided to the MECA. The MECA will determine medical eligibility annually based on this assessment of functioning as defined in Section 513.3.

Substantial deficits are defined as standardized scores of three standard deviations below the mean or less than one percentile when derived from a normative sample that represents the general population of the United States, or the average range or equal to or below the 75 percentile when derived from MR normative populations when mental retardation has been diagnosed and the scores are derived from a standardized measure of adaptive behavior. The scores submitted must be obtained from using an appropriate standardized test for measuring adaptive behavior that is administered and scored by an individual properly trained and credentialed to administer the test.

The ASO will conduct the functional assessment up to 90 days prior to each member's anchor date. At the time of the annual functional assessment by the ASO, each member or legal representative must complete the Freedom of Choice Form (WV-BMS-I/DD-2) indicating their choice of level of care settings, service coordination agency and service delivery options. If determined medically eligible, the member and Service Coordination provider will also receive the individual budget allocation that was calculated by the ASO based upon the member's assessed needs.

If a member is determined not to be medically eligibility a written Notice of Decision, a Request for Hearing form and the results of the functional assessment are sent by certified mail by the ASO to the member or their legal representative. The member's service coordinator is also notified by the ASO. The denial of medical eligibility may be appealed through the Medicaid Fair hearing process if the Request for Hearing form is submitted by the member or their legal representative to the Board of Review within 90 days of receipt of the Notice of Decision. The Notice of Decision letter also allows the member or their legal representative to request a second medical evaluation.

The second medical evaluation is completed within sixty (60) days by a member of the IPN at the expense of BMS.

If the member's medical eligibility is terminated and the member or legal representative wishes to continue existing services throughout the appeal process, the Request for Hearing form must be submitted within 13 days of the member or their legal representative's receipt of the Notice of Decision.

If the member is determined to be medically eligible as a result of a Medicaid Fair Hearing, then services will continue if the member or their legal representative requested this within 13 days of the receipt of the Notice of Decision Letter. If services were terminated due to the member or their legal representative not requesting their continuance within 13 days of the receipt of the Notice of Decision letter, then services will begin again on the date of the Hearing Officer's decision.

At any time prior to the Medicaid Fair hearing, the member or legal representative may request a pre-hearing conference. At the pre-hearing conference, the member and/or their legal representative, the ASO and a representative from the MECA will review the information submitted for the medical eligibility determination and the basis for the termination.

## VIII. CONCLUSIONS OF LAW:

1) Regulations that govern the I/DD Waiver Program require medically 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) Clinical evidence submitted at the hearing reveals that the Claimant no longer presents an eligible diagnosis of mental retardation, or a related condition. In addition, evidence fails to confirm that the Claimant is demonstrating substantial adaptive deficits in three (3) or more of the major life areas. While the Department conceded that the Claimant is demonstrating substantial adaptive deficits in Language and Learning, the standardized measures of adaptive behavior scores, as well as the clinical and narrative documentation found in the evaluations, fail to confirm a substantial adaptive deficit in any of the other functional areas reviewed for eligibility.

3) Whereas the Claimant does not meet the functionality requirements in the medical eligibility criterion, medical eligibility for participation in the Medicaid I/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 I/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 August 2012.**

**Thomas E. Arnett**
**State Hearing Officer**