



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

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

March 12, 2009

-----, Esq.

RE: -----

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on the hearing held January 15, 2009. The hearing request was based on the Department of Health and Human Resources' proposed termination 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 Facility). 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.

Information submitted at your hearing did not support a finding of sufficient deficits required to meet medical eligibility for participation in the MR/DD Waiver Program.

It is the decision of the State Hearing Officer to **uphold** the action of the Department in terminating 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
Mary McQuain, Esq., Assistant Attorney General
Steve Brady, Department Representative, BHHF
Linda Workman, Psychologist Consultant, BMS

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

-----,

Claimant,

v.

Action Number: 08-BOR-1434

**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 March 12, 2009 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 January 15, 2009 on a timely appeal, filed May 27, 2008.

All persons giving testimony were placed under oath.

It should be noted that the Claimant's benefits have been continued through the hearing process.

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 mother

-----, Esq., Claimant's Attorney

-----, Claimant's grandmother

Center

Center

Mary McQuain, Esq., Assistant Attorney General

Linda Workman, Psychologist Consultant, BMS

Steve Brady, Program Manager, Title XIX MR/DD Waiver Program

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 terminate the Claimant's Title XIX MR/DD Waiver Program services based on a finding that medical eligibility was not met.

V. APPLICABLE POLICY:

MR/DD Waiver Manual, Chapter 500 – *Covered Services, Limitations, and Exclusions, for MR/DD Waiver Services*, effective July 1, 2006
Code of Federal Regulations - 42 CFR §435.1010

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 Policy and Federal Regulations
- D-2* ICF/MR Level of Care Evaluation (DD-2A) dated June 27, 2006
- D-3 Psychological Evaluation (DD-3) dated July 27, 2006
- D-4 Psychological Evaluation dated March 21, 2007
- D-5 Individualized Education Program (IEP) dated April 2, 2007
- D-6 ICF/MR Level of Care Evaluation (DD-2A) dated April 18, 2007
- D-7 Memo dated May 7, 2007
- D-8 Termination notice dated June 5, 2007
- D-9 Psychological Evaluation (DD-3) dated August 13, 2007
- D-10 ICF/MR Level of Care Evaluation (DD-2A) dated April 10, 2008
- D-11 Termination notice dated May 12, 2008
- D-12 Psychological Evaluation (DD-3) dated May 30, 2008
- D-13 Termination notice dated June 10, 2008
- D-14 Individualized Education Program (IEP) dated March 14, 2008
- D-15 Termination notice dated July 7, 2008
- D-16 *AAMR Adaptive Behavior Scale – School, Examiner's Manual, Chapter 4*

* Exhibit was listed by the Department, but not received by the State Hearing Officer

VII. FINDINGS OF FACT:

- 1) The Claimant, who is a seven (7) year old child, was a participant in the MR/DD Waiver Program. After an annual reevaluation, notification was sent (Exhibit D-8) to the Claimant on or about June 5, 2007, advising that MR/DD Waiver services were to be terminated. The notice explains the reason for termination of services as:

Documentation submitted for re-certification review does not support the presence of substantial adaptive deficits as defined for Title XIX MR/DD Waiver eligibility in three or more of the six major life areas.

The notice continued to list the information (Exhibits D-3, D-4, D-5, and D-6) the Department relied on to make their determination. The Claimant requested a hearing, and additional information and notification letters were exchanged between the Claimant and the Department while the Claimant's benefits were continued. A second reevaluation packet was submitted to the Department comprising Exhibits D-9 and D-10. Notification was sent (Exhibit D-11) on or about May 12, 2008 to the Claimant, again indicating that services were terminated due to the lack of sufficient substantial adaptive deficits. The Claimant submitted a Psychological Evaluation (Exhibit D-12) dated May 30, 2008, and the Department responded with a third notice (Exhibit D-13), which provided the reason for terminating benefits as:

Additional documentation is requested. Please submit -----'s most current IEP and any current psycho-educational assessments conducted by the school system.

The Claimant provided an Individualized Education Program, or IEP (Exhibit D-14) dated March 14, 2008. After review and consideration of the documents provided, the Department issued a fourth notice (Exhibit D-15) on or about July 7, 2008, that the Claimant's services would be terminated. The underlying reason for termination continued to be the lack of substantial adaptive deficits in three (3) of the six (6) major life areas required by policy to meet medical eligibility for the MR/DD Waiver Program.

- 2) The MR/DD Waiver Manual, Chapter 500, effective July 1, 2006, includes the following pertinent medical eligibility criteria (*It should be noted that 42 CFR §435.1009 – referred to in the following policy – has since been changed to 42 CFR §435.1010*):

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.

- 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
 - Tuberos Sclerosis
- Additionally, 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.
- Must have the presence of a least three (3) substantial deficits as that term is defined in Title 42, Chapter IV, Part 435.1009 of the Code of Federal Regulations (CFR). 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 with no indication of a previous co-occurring history of mental retardation or developmental disability prior to age 22 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).

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).

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 (Informed Consent, DD-7).

- 3) There is no dispute between the Department and the Claimant that the Claimant has an eligible diagnosis of Autism, and one area – *Self-care* – meeting the policy definition of substantially limited functioning. The Claimant contended that the areas of *Receptive or expressive language, Self-direction, and Capacity for independent living* were additionally met, and that the Claimant required an ICF/MR level of care, meeting the medical eligibility requirements for the program.
- 4) The Claimant's physician completed the ICF/MR Level of Care Evaluation form, or DD-2A (Exhibit D-10), dated April 10, 2008. The Physician certified the Claimant's need for an ICF/MR level of care. The Department's Psychologist Consultant disagreed with this assessment of the Claimant, based on her review of the documents submitted. She noted that the physician diagnosed the Claimant with Mental Retardation, but did not indicate his expertise to provide this diagnosis. Psychological Evaluations (Exhibits D-3, D-4, D-9, and D-12) of the Claimant never gave a diagnosis of Mental Retardation. On exhibits D-3, D-9, and D-12 the Claimant's Psychologist certified his need for an ICF/MR level of care. Exhibit D-4 addressed the Claimant's needs in a school setting, and as such, did not consider the level of care certification for Title XIX MR/DD Waiver Services.
- 5) The Psychological report from August 2007 (Exhibit D-9) used the Adaptive Behavior Scale – School, Second Edition (ABS-S:2) to assess the Claimant's adaptive behavior, and was presented using both Mental Retardation, or MR, norms, and Non-mental Retardation, or non-MR, norms. The 2006 Psychological report (Exhibit D-3) and the

March 2007 (Exhibit D-4) Psychological evaluation used the Vineland Adaptive Behavior Scale (VABS:II) instrument to measure the Claimant's adaptive behavior. The 2008 Psychological report (Exhibit D-12) used both the ABS-S:2 and the VABS:II.

- 6) The ABS-S:2 from Exhibit D-12 revealed no score indicative of substantially limited functioning when using the non-MR norms, but all subtests except Physical Development indicated substantially limited functioning when using MR norms. The Part One Domain Scores using MR norms were as follows:

Subtest	Raw Score	%ile Rank	Std. Score	Age Equiv.	Rating
Independent Functioning	19	9	6	<3-0	Below Average
Physical Development	19	91	14	5-6	Above Average
Economic Activity	0	16	7	<3-0	Below Average
Language Development	14	37	9	<3-0	Average
Numbers and Time	4	50	10	4-0	Average
Pre/Vocational Activity	3	37	9	3-9	Average
Self-Direction	3	16	7	<3-0	Below Average
Responsibility	1	16	7	<3-0	Below Average
Socialization	3	5	5	<3-0	Poor

Using the MR norms, all scores except Physical Development were less than the seventy-fifth (75th) percentile. The Part One Domain Scores using non-MR norms were as follows:

Subtest	Raw Score	%ile Rank	Std. Score	Age Equiv.	Rating
Independent Functioning	19	1	1	<3-0	Very Poor
Physical Development	19	37	9	5-6	Average
Economic Activity	0	5	5	<3-0	Poor
Language Development	14	1	3	<3-0	Very Poor
Numbers and Time	4	25	8	4-0	Average
Pre/Vocational Activity	3	16	7	3-9	Below Average
Self-Direction	3	1	3	<3-0	Very Poor
Responsibility	1	2	4	<3-0	Poor
Socialization	3	1	1	<3-0	Very Poor

Using the non-MR norms, none of the subtest scores was less than one (1) percentile.

- 7) Exhibit D-9 revealed similar results for the Claimant when tested in 2007. Using MR norms, the ABS-S:2 Part One Domain Scores were as follows:

Subtest	Raw Score	%ile Rank	Std. Score	Age Equiv.	Rating
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Independent Functioning	17	9	6	<3-0	Below Average
Physical Development	19	91	14	5-6	Above Average
Economic Activity	0	25	8	<3-0	Average
Language Development	20	63	11	<3-0	Average
Numbers and Time	4	63	11	4-0	Average
Pre/Vocational Activity	2	25	8	3-6	Average
Self-Direction	3	16	7	<3-0	Below Average
Responsibility	1	25	8	<3-0	Average
Socialization	8	16	7	<3-0	Below Average

Using non-MR norms, the scores were as follows:

Subtest	Raw Score	%ile Rank	Std. Score	Age Equiv.	Rating
Independent Functioning	17	1	1	<3-0	Very Poor
Physical Development	19	50	10	5-6	Average
Economic Activity	0	9	6	<3-0	Below Average
Language Development	20	5	5	<3-0	Poor
Numbers and Time	4	37	9	4-0	Average
Pre/Vocational Activity	2	16	7	3-6	Below Average
Self-Direction	3	1	3	<3-0	Very Poor
Responsibility	1	5	5	<3-0	Poor
Socialization	8	1	3	<3-0	Very Poor

As with the Psychological evaluation in 2008, the ABS-S:2 scores revealed eligible scores for the Claimant in all subtests except Physical Development if MR norms are used, and no eligible scores if non-MR norms are used.

- 8) The Department’s Psychologist Consultant testified that it is incorrect to assess the Claimant using MR norms because he does not have a diagnosis of Mental Retardation. The Department presented Chapter 4 of the *AAMR Adaptive Behavior Scale – School, Examiner’s Manual* (Exhibit D-16), specifically, a table listing the demographic characteristics of the MR norm. The table listed IQ categories only for seventy (70) and below – corresponding with an MR diagnosis - and the entire sample is contained within this range. The Claimant’s attorney contended that the policy allows functionality to be met using the correct threshold for either norm. The Department’s Psychologist Consultant countered that the norm must be matched correctly to the individual, but, on cross-examination, could not present policy specifically stating that; she testified that professionals in the field of psychology know to match the test norms in this manner. The Claimant’s attorney responded that Autism is considered a “related condition” to Mental Retardation, and that it is appropriate for the Claimant to be assessed using MR norms for this reason.

- 9) The Code of Federal Regulations defines “Persons with related conditions,” at 42 CFR §435.1010, as follows:

Persons with related conditions means individuals who have a severe, chronic disability that meets all of the following conditions:

(a) It is attributable to—

(1) Cerebral palsy or epilepsy; or

(2) Any other 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 treatment or services similar to those required for these persons.

(b) It is manifested before the person reaches age 22.

(c) It is likely to continue indefinitely.

(d) It results in substantial functional limitations in three or more of the following areas of major life activity:

(1) Self-care.

(2) Understanding and use of language.

(3) Learning.

(4) Mobility.

(5) Self-direction.

(6) Capacity for independent living.

- 10) The Psychological evaluations from 2006 (Exhibit D-3), March 2007 (Exhibit D-4), and 2008 (Exhibit D-12) assessed the Claimant using the VABS:II. In 2006, the instrument was based on ratings provided by the Claimant’s mother and revealed a score in the Communication Domain at the first (1st) percentile; all of the other Domain scores – Daily Living Skills, Socialization, and Motor Skills – were less than one (1) percentile. In 2007, the instrument was based on ratings provided by the Claimant’s teacher and revealed no scores three standard deviations below mean. When the Claimant was assessed using this same instrument in 2008, all Domain scores were less than one (1) percentile (Exhibit D-12). Exhibit D-9 also discussed the difference between the teacher-rated and parent-rated results as follows:

An evaluation was completed through the ██████████ County School System in March 2007 for purposes of educational planning. Results of the

Vineland Adaptive Behavior Scale are included in the report; however, ---'s mother indicated that she was not involved in answering the questions or completing the survey and believes that the reported scores are an overestimate of his true adaptive functioning. The current evaluation will reflect scores on the ABS:S2 as interviewed with ----'s mother.

The Department's Psychologist Consultant testified that the standard scores should be favored over the percentiles on the VABS:II instrument, due to their greater sensitivity. With a mean of one hundred (100) and a standard deviation of fifteen (15), standard scores for this instrument should be at fifty-five (55) or lower to indicate substantially limited functioning. Using standard scores instead of percentile ranks, the Claimant did not meet substantially limited functioning in any domains on the 2006 or March 2007 evaluations, but did meet in the domains of Daily Living Skills and Socialization on the 2008 evaluation.

- 11) Narrative descriptions from documents submitted on the Claimant's behalf also describe his functional abilities and limitations in the major life areas. Both the 2007 (Exhibit D-6) and 2008 (Exhibit D-10) DD-2A forms note – with regard to *Mobility* – that the Claimant is ambulatory. With regard to *Learning*, the 2008 (Exhibit D-14, page 7 of 27) Individualized Education Program, or IEP, described the Claimant's academic abilities as follows:

---- academically is on level in math and reading as noted on his benchmark assessments and Dibel's scores.

The Department's Psychologist Consultant noted that the Claimant's IEP (Exhibit D-14) listed the Claimant as participating in a general education environment 90% of the time and a special education environment 10% of the time, and that this is not indicative of a person with substantially limited functioning in the general functioning area of *Learning*, or with the need for an ICF/MR level of care. The Claimant's mother testified that she was a member of the Claimant's IEP team, and that she wanted her son in a regular classroom to help with his delays in social skills and language.

- 12) With regard to the area of *Receptive or expressive language*, Amy Stamper - the Claimant's Service Coordinator - testified that the Claimant receives speech therapy services. The Psychological Evaluation from 2008 (Exhibit D-12) described the Claimant as follows, in pertinent part:

He engages in inappropriate rambling speech and rambles to himself frequently. Caregivers indicated that it appears that he cannot be reasoned with, and he does not always obviously respond when spoken to. He continues in speech therapy.

The 2008 IEP (Exhibit D-14, page 7 of 27) described the Claimant as follows, in pertinent part:

Socially ----- still exhibits delays in communicating effectively with his peers, maintaining a conversation, and understanding social cues. ----- gets direct speech services through ██████████ County as well as private therapy to address these delays.

The March 2007 Psychological Evaluation (Exhibit D-4) commented on the Claimant's receptive language skills – and how they affected the ability to measure the Claimant's intellectual ability – as follows:

Results indicated that relative to children of comparable age, ----- is currently functioning within the EXTREMELY LOW range of intelligence on a standardized measure of intellectual ability. Results are considered a low estimate of intellectual ability due to poor receptive language skills. On a test of nonverbal ability ----- is functioning in the AVERAGE range.

The Claimant's mother testified that the Claimant has a limited ability to communicate his wants and needs.

- 13) With regard to the area of *Self-direction*, the Psychological evaluation from 2008 (Exhibit D-12) offered the following narrative regarding the Claimant, in pertinent part:

He prefers solitary to group activities. He continues to play with puzzles, books, and long cylindrical items (preferably grouped in threes). He plays on computers, enjoys being outside, and water play.

- 14) With regard to the area of *Capacity for independent living*, Robert Meadows - the Claimant's Therapeutic Consultant – testified that the Claimant is delayed with his social skills. The Claimant's mother testified that her son does not know how to dress appropriately for the weather. She testified that because of his elopement tendency, the Claimant's school put locks on the door, fenced in the school, and changed the gate.

The Claimant's Psychological Evaluations provided narrative documentation of his delays in this functional area. The March 2007 (Exhibit D-4) report stated, in pertinent part:

His social interests and skills are also a weak area. ----- doesn't like loud noises and can become upset, but has adapted well to the classroom noise level. ----- participates in extracurricular activities such as gymnastics and kinder music. He is successful in those settings and did not receive specific training for the settings.

The 2008 Psychological Evaluation (Exhibit D-12) provided additional documentation of the Claimant's behavioral history, as follows, in pertinent part:

----- continues to exhibit self injurious behavior in the form of head banging. His mother indicated that his head banging occurs usually

when he is angry and that he bangs his head on glass items, doors, walls, the back of his car seat and/or anything he may be near at the time, with no awareness of possible danger...He has a history of screaming at times when touched; however, this behavior was reported to have decreased. He has a tendency to smell everything and hoard things, including food...Hyperactive tendencies include an inability to sit still for any length of time, constantly running or jumping around the room, and constant movement and fidgeting. Since entering Kindergarten, his behaviors have increased, particularly in the school setting. He makes frequent elopement attempts and requires constant protective oversight to ensure safety. He has recently made elopement attempts from his grandmother's house and through the gate at school. He runs, charges through doors and/or gates, yelling, screaming, crying [*sic*] kicking and throwing himself to the ground and rolling around. During an elopement attempt he accidentally blacked the eye of his Kindergarten Aide.

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 (3) standard deviations below the mean or equal to or below the seventy-fifth (75th) percentile when derived from MR normative populations. Substantially limited functioning must be supported by not only test scores, but by narrative descriptions contained in the documentation provided by the Claimant.
- 2) The Claimant has an eligible diagnosis of Autism, and substantially limited functioning in the life area of *Self care*. To meet the functionality requirement of the medical eligibility criteria, the Claimant must establish substantially limited functioning in at least two other major life areas.
- 3) Expert testimony established that adaptive functioning test scores must use norms that correspond correctly with the individual. The language of the policy does not suggest that the decision to use MR norms or non-MR norms is arbitrary. The policy allows for individuals with "related conditions" to be potentially eligible for the program, but does not indicate that a person with a condition related to MR may establish the functionality element by switching norms arbitrarily. MR/DD Waiver policy describes examples of related conditions, and the Code of Federal Regulations incorporates functionality into its definition of "Persons with related conditions." The *Normative Procedures* chapter of the *AAMR Adaptive Behavior Scale – School, Examiner's Manual* provides a table for the MR sample demographic characteristics showing all IQs in ranges of seventy (70) or below. The presence of other handicapping conditions is also listed, but these individuals have handicapping conditions in addition to an IQ in the range typical of persons with an MR diagnosis. With the use of non-MR norms clearly established as

correct for the Claimant, ABS:S-2 test results fail to establish substantially limited functioning in any additional life areas.

- 4) The Claimant's results on the 2008 VABS:II show both percentile ranks and standard scores sufficient to indicate substantially limited functioning in the test domains of Daily Living Skills and Socialization; these domains correspond closely with the major life area of *Capacity for independent living*. Testimony and narrative documentation clearly established the Claimant's delays in home living, social skills, safety, and leisure. With testimony and narrative to describe the Claimant's delayed functioning, and test scores to quantify it as "substantially limited," the evidence supports the presence of substantially limited functioning in the major life area of *Capacity for independent living* for the Claimant.
- 5) Narrative documentation and testimony in the remaining major life areas describe the Claimant's delays, but without the required test scores to define the extent of those delays as "substantially limited," there is no evidence to support the presence of substantially limited functioning in any further major life areas.
- 6) With only two (2) of the six (6) major life areas established, functionality has not been met, and medical eligibility for the MR/DD Waiver Program has not been established. The Department was correct in its proposed action to terminate 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 March, 2009.

Todd Thornton
State Hearing Officer