



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
P.O. Box 970
Danville, WV 25053

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

January 26, 2009

Dear _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held January 14, 2009. Your hearing request was based on the Department of Health and Human Resources' action to deny your application for _____ benefits and services through the 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 Title XIX MR/DD Waiver Home & Community-Based Policy Manual, Chapter 500).

Information submitted at your hearing fails to demonstrate that at the time of application you met the criteria necessary to establish medical eligibility for participation in the 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 Title XIX MR/DD Waiver Program.

Sincerely,

Cheryl Henson
State Hearing Officer
Member, State Board of Review

Pc: Chairman, Board of Review
Steve Brady, BHBF

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

_____,

Claimant,

vs.

Action Number: 08-BOR-1558

**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 concluded on January 14, 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 14, 2009 on a timely appeal filed June 13, 2008.

All persons giving testimony were placed under oath.

II. PROGRAM PURPOSE:

The program entitled MR/DD Home and Community-Based Waiver is set up cooperatively between the Federal and State Government and administered by the West Virginia Department of Health and Human Resources.

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
_____, Licensed Psychologist, Claimant's witness
_____, Program Coordinator, _____ Claimant's witness
_____, Executive Director of _____ Claimant's witness
_____, Service Coordinator, Claimant's witness
_____, School Psychologist, Claimant's witness
_____, Claimant's sister
_____, Claimant's mother
_____, Claimant's brother

Steve Brady, BHHF, Department Representative
_____, Workman, Licensed Psychologist, Department's witness

It should be noted that all individuals participated in the hearing telephonically.

Presiding at the hearing was Cheryl Henson, State Hearing Officer and a member of the State Board of Review.

IV. QUESTION(S) TO BE DECIDED

The question to be decided is whether the Department was correct in its action to deny the Claimant's application for services through the MR/DD Waiver Program.

V. APPLICABLE POLICY

West Virginia Medicaid Regulations, Chapter 500, Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, dated October 1, 2003.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Department's Exhibits:

- D -1 West Virginia Medicaid Regulations, Chapter 500, Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 10-01-03
- D-2 Notice of Denial/Termination dated April 10, 2008

- D-3 Denial Notice dated July 23, 2008
- D-4 DD-2A dated December 6, 2007
- D-5 ██████████ County Schools Confidential Report dated October 14, and October 16, 1980
- D-6 Letter from Dr. _____ dated September 5, 2008
- D-7 Mountain State Psych. Services Psychological Evaluation dated December 11, 2007
- D-8 Mountain State Psych. Services Psychological Evaluation dated June 25, 2008
- D-9 WV Department of Health and Human Resources Initial Social History 11/29/07
- D-10 Mineral County IEP dated October 18, 1985 – illegible

Claimant's Exhibits:

- C-1 Letter from Dr. _____ dated September 5, 2008 – also Dept. exhibit D-6
- C-2 WV DHHR Initial Social History 11/29/07 – also Dept. exhibit D-9
- C-3 ██████████ Psychological Eval. 6/25/08 – also Dept. exhibit D-8
- C-4 ██████████ County Schools Confidential Report 10-14 and 10-16-80 – also Dept. exhibit D-5
- C-5 ██████████ Primary Middle School letter dated January 29, 1982

VII. FINDINGS OF FACT:

- 1) In response to an application for benefits and services through the Medicaid MR/DD Waiver Program, the Claimant was notified on April 10, 2008 (D-2) that his application was denied due to the DD-3 being beyond 90 days upon receipt by the Waiver office. The Department, after reviewing additional information provided by the Claimant, again notified him on July 23, 2008 via a Notice of Denial/Termination (D-3) that Waiver services were denied. This notice states, in pertinent part:

Your Waiver services have been denied.

Your application was Denied because:

Documentation reveals mild mental retardation and does not support the need for active treatment at an ICF/MR institutional level [sic] of care. He has been employed and lived independently after the age of twenty-two. Additionally [sic], as a thirteen year old the psychological report indicated “_____s intellectual difficulties seem to be primarily due to the severe verbal processing learning disabilities.” Also, it was recommended that he be placed in a “self-contained Learning Disability Classroom,” which is incompatible with mental retardation.

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

Learning

Self-Direction

Mobility

It should be noted that the Department established the Claimant met the substantial deficit requirement in the areas of “Language” and “Capacity for Independent Living”.

- 2) The DD-2a dated December 6, 2007 (D-4) indicates in the “MEDICAL ASSESSMENT” section that all areas fall within “NORMAL” ranges, and indicates the Claimant is ambulatory, continent, feeds self, and independent with personal hygiene and self care. Under the diagnostic section, the physician indicates the Claimant has an AXIS I diagnosis of Mild Mental Retardation, and AXIS II diagnosis of “MR”. Prognosis is listed as fair. The physician also indicates the Claimant requires the level of care and services provided in an “INTERMEDIATE CARE FACILITY” for individuals with mental retardation and/or related conditions.

The Department contends that this document particularly shows the Claimant does not meet the deficit required for “Mobility” as he is listed as “ambulatory”, and does not meet the deficit for “Self Care” as he is listed as being able to perform personal hygiene “independently”. The Department also notes that the physician has listed a diagnosis of Mild Mental Retardation but does not support a diagnosis before age eighteen (18).

- 3) The Confidential Report from ██████████ County Schools completed by Dr. _____ (D-5) shows that the Claimant was tested on October 14, and October 16, 1980. On the Wechsler Intelligence Scale for Children-Revised (WISC-R) the Claimant scored a Verbal Scale IQ in the Mentally Deficient Range (50-69); his Performance Scale IQ was in the Borderline Defective Range (70-79) and his Full Scale IQ was near the upper end of the Mentally Deficient Range. There was a 15 point IQ discrepancy between his Verbal Scale and Performance Scale scores, favoring the Performance Scale. The examiner reports this is “highly significant and reflects the fact that (Claimant’s) perceptual/non-verbal skills are more advanced than his auditory/verbal skills.” On the “Object Assembly Test” he was asked to assemble four different puzzles. He not only assembled all puzzles correctly but was able to assemble them in a fairly rapid time span, allowing him to gain “bonus points”. On the Bender-Visual Motor Integration Test he had no difficulty accurately reproducing the nine designs. On the Arithmetic portion of the Wide Range Achievement Test (WRAT) he was able to do multiple digit addition and subtraction when borrowing and carrying was not involved. On the WRAT Reading subtest, he scored in the mid-sixth grade range. He showed a good ability to sound out some fairly complex words. On the Diagnostic Reading Scales he also showed a good ability to sound out words, with a grade level score at the mid-sixth grade. When presented with a fourth grade three paragraph story to read he showed he was a slow but competent reader. He had a great deal of difficulty answering comprehension

questions on what he had read. Comprehension was very poor. Also, under SUMMARY AND RECOMMENDATIONS, it states the Claimant's "intellectual difficulties seem to be primarily due to the severe verbal processing learning disability.

The Department contends this document shows the Claimant does not have a severe deficit in the area of "Learning", and adds the Claimant's test scores show he is functioning "above" basic academic skills, which is not consistent with ICF/MR level of care. The Department contends the test scores also bring in to question the diagnosis of Mental Retardation.

4) The September 5, 2008 letter from Dr. _____ (D-6, C-1) states in pertinent part:

I have known _____ professionally for nearly 30 years. _____ came to our school system with a family who was determined to have us treat him as a general education student to every extent possible. Even with this obvious parental pressure, the IEP team agreed early in the 1980-81 school year that _____ required full time especial education services in a self-contained special education classroom. _____'s cognitive profile at that time, as determined by me, suggested language based reasoning skills that were approximately three standard deviations below the mean in combination with visual skills that were approximately two standard deviations below the mean. _____'s achievement in reading was higher than what would be expected of a mentally impaired student. _____ evidenced severe adaptive behavior difficulties. Applying today's knowledge base to information that is approximately 30 years old allows me, in hindsight, to suggest that _____ suffered from an Autism Spectrum Disorder.

This disorder severely complicated _____'s social interaction skills while also putting great strains on his language based cognitive processing.

_____ 's parents advocated very strongly on his behalf during his lifetime to help him to be as functional as he could possibly be. I know that they worked on utilizing connections with relatives to provide them with other "protected jobs" in other settings.

_____ 's family needs assistance in supporting him. He cannot support himself.

The Department Psychologist stated he is in agreement that the Claimant's achievement in reading was higher than expected for a mentally impaired student. He went on to add that if we were to consider the Claimant had Autism Spectrum Disorder it still is not severe enough

to be considered for the Waiver program.

- 5) The [REDACTED] Comprehensive Psychological Evaluation completed December 11, 2007 (D-7) shows under “RELEVANT HISTORY” that the Claimant was hospitalized when he was in middle school due to “aggressive gestures”, and was placed on medication to control his impulses. He presently lives with his mother. Testing showed him to be functioning in the Mild range of Mental Retardation, with significant deficits noted in all areas of adaptive functioning. He graduated from high school in 1985 or 1986 and was able to obtain employment with a family member, working for approximately seven (7) years. He resided in a room which was converted into a small efficiency apartment for him during this time. He was terminated due to poor work habits. He has periodic bouts of anger and aggressive/threatening behaviors, and has pushed his mother on at least one occasion resulting in her being fearful of him. Under “CURRENT STATUS” it states he ambulates independently with no significant difficulty in posture or gait. He does exhibit a slight shuffle and stamping of his feet when walking. He is able to feed himself with a spoon and fork; however he requires supervision to ensure he utilized appropriate table manners. He is continent of bowel and bladder and able to perform most self-care at the toilet. He tends to use excessive amount of toilet tissue, He can dress and undress himself; however, he requires supervision to ensure he does not rewear [sic] dirty clothing or clashing color combinations. He is able to perform laundry chores, but again, requires supervision as he tends to utilize too much detergent. He attempts to clean his living area, but does not do a thorough job. He is unable to mix/cook simple foods; however, he is able to get his own cereal and make his own sandwiches. Under “Mental Status” it states he is able to state his name and address, when asked and can state the correct date and time as well. He exhibits poor judgment and impulse control. He scored sixty-nine (69) on his WAIS-III Full Scale IQ.

The Department acknowledged that although the Claimant does require services and training due to his conditions, he does not require the level of care provided in an ICF/MR facility. The Department also points out that mental illness issues are not considered eligible related conditions for the Waiver program. In addition, the Department points to the fact that the Claimant lived alone and worked for seven years after graduating high school as evidence that he is capable of self-care.

- 6) The [REDACTED] Psychological Evaluation (Addendum) dated June 25, 2008 (D-8, C-3) states the results of the assessments indicate the Claimant functions in the Mild Range of Mental Retardation and are substantiated by a psycho-educational evaluation report which indicates he functions in the Mild range of Mental Impairment (WISC-R/1980). This report also states the Claimant has been found to exhibit substantial limitations in learning, self-direction, self-care, and capacity for independent living, and that an ICF/MR level of care is warranted. The report also indicates the Claimant is able to take care of most personal care needs, understand simple commands, and communicate basic needs and wants. He is unable to be employed at a productive wage level without systematic long term support, unable to learn new skills without aggressive and consistent training, and

unable to apply skills learned without aggressive and consistent training. Under “Developmental Findings/Conclusions” it states the Claimant is a 41 year old male who exhibits significant deficits in cognitive functioning and in all areas of adaptive behavior skills. In addition to these deficits, he presents with a history of significant maladaptive behaviors – hostility, verbal aggression, impulsivity, excessive talking, etc. The intensity and frequency of these behaviors appear cyclical in nature and they are accompanied by a sense of grandiosity. A diagnosis of Bipolar I Disorder should be ruled-out. A relative weakness is noted in self direction. He is noted to require constant encouragement to complete tasks and he has to be made to do things. His ambition is rather low. He is able to feed himself with a spoon and fork and he generally exhibits appropriate table manners. He is continent of bowel and bladder and he is able to perform all self-care while toileting. He bathes himself; however, he is often very excessive in his use of soaps, cloths, and shampoos. He must be supervised/monitored to use these products in an appropriate manner. He brushes his teeth, but requires supervision/assistance due to his tendency to use excessive amounts of toothpaste. He dress/undresses himself, but requires supervision to ensure he wears appropriate clothing.

The Department points out that the mental illness behavior is not considered for this program, and states that no evidence has been provided to show substantial delays in the developmental period for the areas in question.

- 7) The WVDHHR Initial Social History dated November 29, 2007 (D-9, C-2) shows under the section marked “Emotional” that the Claimant can display about four or five moods. He is reported to be in a sense a hypochondriac when it comes to illness. He will dwell on events from one to the next such as planning vacation, trips, shopping, etc. He enjoys teasing and jokes, however is quick to get angry letting his moods change fast. He can be very talkative, but then when asked about something that he is lying about will become aggressive verbally and sometimes physically. Under “Family” it is again reported that he has lived on his own for a period of time, with his uncle providing oversight. It is noted that he was exposed to a side of life not accustomed to by peers and made poor choices during this timeframe. Under “Recreation/Leisure Activities” it is noted he is a huge sports fan and loves to watch sports on televisions. His favorite teams are North Carolina, Redskins and the Yankees. He loves to bowl and actively participates in the Special Olympics. He enjoys going to different sporting events, and sometimes enjoys shopping for music, hats, sports jerseys, shoes and shaving items.

The Department points to this as evidence the Claimant is not severely deficient in the areas of self-care and self-direction.

- 8) The ██████████ County IEP dated October 18, 1985 (D-10) is not legible and will not be used in my decision.
- 9) Testimony from the Claimant’s witnesses supports that although he has been employed and lived on his own for seven years, he was always under the supervision of a family member.

He functioned as a dishwasher for a family member and he received modified wages. He lived in an apartment that was connected to his uncle's home. At times he engaged in inappropriate behavior, choosing to go to inappropriate activities. Testimony also supports that unless he is supervised he will become obsessive and his safety is at risk. When he goes out shopping, a family member always supervises to ensure he does not make bad choices that could endanger his safety. He requires constant prompting and supervision in order to complete tasks. The Claimant's Service Coordinator stated that she believes the evaluations the physician made on the DD-2A (D-4) could be inaccurate since he does not spend as much time with the Claimant as other individuals.

- 10) West Virginia Medicaid Regulations, Chapter 500, Volume 13 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07, includes 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) 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 (75) percentile when derived from MR normative populations. Additionally, policy states that the individual must require and _____ benefit from continuous active treatment and need the same level of care and services that is provided in an ICF/MR institutional setting.
- 2) Although the evidence shows the Claimant has a qualifying condition, the totality of the documentation submitted for review fails to identify substantial adaptive deficits in three of the major life areas. The Department originally found qualifying deficits in the areas of language and capacity for independent living. The evidence as presented is not sufficient to support the finding of deficits in the remaining major life areas.
- 3) Based on the evidence, the Department was correct in denying the Claimant's application for participation in the Medicaid MR/DD Waiver Program.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the Department's decision 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 26th Day of January, 2009

**Cheryl Henson
State Hearing Officer**