



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
P.O. Box 2590
Fairmont, WV 26555-2590

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

February 10, 2009

-----for

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held January 26, 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 Medicaid Regulations, Chapter 513 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07).

Information submitted at your hearing fails to demonstrate that you meet 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 Medicaid, Title XIX, MR/DD Waiver Program.

Sincerely,

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

Pc: Chairman, Board of Review
Steve Brady, MR/DD Waiver

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

-----,

Claimant,

vs.

Action Number: 08-BOR-1590

**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 February 10, 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 26, 2009 on a timely appeal filed June 19, 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's mother/representative

_____, CM, [REDACTED]

_____, Speech Therapist, [REDACTED] County Board of Education

_____, Teacher, [REDACTED] County Board of Education

John Sassi, Program Manager, MR/DD Waiver, BMS (Participated telephonically)

Linda Workman, Psychologist Consultant, BMS (Participated telephonically)

Presiding at the hearing was Thomas E. Arnett, 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 or not the Department was correct in its action to deny the Claimant's application for benefits and services through the MR/DD Waiver Program.

V. APPLICABLE POLICY

West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Department's Exhibits:

D -1 West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07

D-2 Notice of Denial/Termination dated 5/21/08

D-3 DD-2-A-ICF/MR Level of Care Evaluation dated 4/9/08

D-4 Psychological Evaluation dated 4/21/08

D-5 Individualized Education Program (IEP) dated 4/26/07

D-6 Correspondence from _____, MD, Associated Professor of Pediatric, [REDACTED]
[REDACTED] Hospital

D-7 Individualized Education Program (IEP) dated 4/17/08

D-8 Education Assessment Report dated 9/24/01

Claimant's Exhibits:

C-1 Written collaborative argument by -----, [REDACTED] and _____ – signed
1/26/09

VII. FINDINGS OF FACT:

- 1) In response to an application completed for benefits and services through the Medicaid MR/DD Waiver Program, the Claimant was notified via a Notice of Denial/Termination (D-2) that Waiver services were denied. This notice states, in pertinent part:

Your Waiver Application is hereby denied.

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: Learning, Self-Direction, Receptive or Expressive Language and Mobility.

Substantial limitations were identified in Self-Care and Capacity for Independent Living.

- 2) The Department conceded that the Claimant presents an eligible diagnosis of Autism, however, the Department contends that the Claimant's condition is not severe, and therefore, does not require the same level of care and services that is provided in an Intermediate Care Facility for individuals with Mental Retardation (ICF/MR level of care). Specifically, the Department contends that the eligibility criteria in the area of Functionality has not been met – The Claimant is not demonstrating substantial adaptive deficits in three or more of the six major life areas. Consistent with Exhibit D-2, the Department stipulated that the Claimant is demonstrating a substantial adaptive deficit in Self-Care and Capacity for Independent Living.
- 3) The Claimant, through his representatives, contends that he is also demonstrating a substantial adaptive deficit in Language and Self-Direction and he is, therefore, medically eligible to participate in the MR/DD Waiver Program.

Exhibit C-1 provides anecdotal information submitted to show specific instances of the Claimant demonstrating substantial adaptive deficits in the contested areas. Specifically, the Claimant's representatives purported that while the Claimant has language, his conversations are not usually appropriate to time, place, person or situation. His conversation is usually one-sided and he becomes upset when attempts are made to redirect conversation.

With regard to Self-Direction, the Claimant's representatives indicated that he demonstrates inappropriate and offensive behaviors as well as poor impulse control. He will wander away

and cannot get from place to place in the school without prompting. He is reportedly obsessed with the size of his head and will often “get lost” staring at his reflection.

- 4) Evidence reviewed in Exhibit D-4, pages 3 & 4, indicates that the Claimant has significant difficulty with expressive language skills. His speech is described as tangential. It is usually hurried and he speaks with blocking, halting, or irregular interruptions. Speech is often irrelevant. The Claimant scored a Standard Score of 4 on the ABS-S:2, and according to the Department’s psychologist, a standard score of “2 or less” is indicative of a qualifying score of less than 1 percentile. Exhibit D-5 indicates that the Claimant has a very good vocabulary and is quick to pick up new words and meaning. The current IEP (Exhibit D-7) indicates that the Claimant communicates verbally with select peers and adults. Exhibit D-6 notes that the Claimant is unable to initiate or sustain communicative conversation, however, Exhibit D-8 (Educational Assessment Report) notes that testing scores indicate overall speaking (language usage) and grammatical usage (verbal and written) are strengths. This document goes on to note that his weaknesses include staying on topic and fragmented thoughts when expressing himself.

While the narrative information clearly demonstrates challenges in expressive language, the clinical data found in the ABS results, as well as the Educational Assessment Report, fail to support a substantial adaptive deficit in Receptive or Expressive Language.

- 5) The evidence reviewed for Self-Direction skills clearly demonstrates the Claimant has poor impulse control - He often says and does inappropriate things. Exhibit D-5 notes that the Claimant likes to be the center of attention and goes to great lengths to achieve that (passing gas, interrupting, pointing out faults in others). This document goes on to say (page 2 of 11) “If anticipated and explained, he will adjust behavior, if only temporarily.”

Exhibit D-7, page 3 of 12, indicates the Claimant communicates with select peers and adults. Exhibit D-6 notes that “-----is able to focus on only what is important to him, and then he will hyper-focus on that topic, with perseveration and inability to move on to other questions.”

The current psychological evaluation (Exhibit D-4, page 4) notes that the Claimant enjoys watching television, movies and playing video games. It goes on to states that he used to enjoy participating in sports, but became very compulsive when engaging in this activity, which resulted in maladaptive behaviors. The ABS-S:2 scores in Self-Direction reflect a Standard Score of 3 and a percentile score of 1 - (A Standard Score of 2 or below is eligible and indicative of less than 1 percentile).

The narrative information clearly indicates that the Claimant is easily distracted and has poor impulse control, however, there is also evidence demonstrating that he is often self-directing, albeit not in the manner believed to be in his best interest. In addition, the clinical data found on the ABS-S:2 fails to reveal an eligible score. Based on the evidence, the Claimant is not demonstrating a substantial adaptive deficit in Self-Direction.

- 6) West Virginia Medicaid Regulations, Chapter 513, – 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 in three (3) or more of the 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 [emphasis added].
- 2) The Claimant presents a program qualifying diagnosis of Autism, however, the clinical evidence fails to demonstrate that he has substantial adaptive deficits in three (3) or more of the major life areas. While the Department conceded that the Claimant demonstrates a substantial adaptive deficit in Self-Care and Capacity for Independent Living, the standardized measures of adaptive behavior scores, as well as the clinical and narrative documentation found in the evaluations, fail to confirm substantial adaptive deficits in Language and Self-Direction.
- 3) Based on the evidence presented at the hearing, 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 action of the Department in denying 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 10th Day of February, 2009

**Thomas E. Arnett
State Hearing Officer**