



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

February 6, 2009

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Dear -----:

Attached is a copy of the findings of fact and conclusions of law on the hearing held January 9, 2009. The hearing request was based on the Department of Health and Human Resources' denial of Title XIX MR/DD Waiver services.

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). (MR/DD Waiver Manual, Chapter 500)

Information submitted at your hearing did not support the presence of an eligible diagnosis 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 denying 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  
Steve Brady, Department Representative  
Rick Workman, Psychologist Consultant, PC&A, Inc.  
[REDACTED]

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

-----,

**Claimant,**

v.

**Action Number: 08-BOR-1756**

**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 February 6, 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 9, 2009 on a timely appeal, filed July 21, 2008.

All persons giving testimony were placed under oath.

**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

\_\_\_\_\_, Claimant's witness, [REDACTED]

\_\_\_\_\_, Claimant's witness, [REDACTED]

Rick Workman, Psychologist Consultant, PC&A, Inc.

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

Presiding at the Hearing was Todd Thornton, State Hearing Officer and a member of the State Board of Review.

**IV. QUESTION TO BE DECIDED:**

The question to be decided is whether or not the Department was correct in its decision to deny the Claimant's Title XIX MR/DD Waiver Program application based on a finding that medical eligibility was not met.

**V. APPLICABLE POLICY:**

MR/DD Waiver Manual, Chapter 513 – *Covered Services, Limitations, and Exclusions for MR/DD Waiver Services*, effective November 1, 2007

Code of Federal Regulations - 42 CFR §435.1010

**VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:**

**Department's Exhibits:**

D-1 MR/DD Waiver Manual, Chapter 513 – *Covered Services, Limitations, and Exclusions for MR/DD Waiver Services*, effective November 1, 2007

D-2 Notice of Termination dated February 9, 2007

D-3 Notice of Termination dated November 24, 2008

D-4 Diagnostic criteria for Mental Retardation, *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition*

D-5 ICF/MR Level of Care Evaluation (DD-2A), dated May 7, 2008

D-6 Psychological Evaluation by \_\_\_\_\_, M.S., School Psychologist, dated September 25, 2003

D-7 Psychological Evaluation by [REDACTED] M.A., dated June 26, 2006

D-8 Psychological Update by [REDACTED] M.A., dated January 15, 2007

D-9 Individualized Education Program (IEP), dated April 28, 2004

D-10 Psychological Update by [REDACTED] M.A., dated March 24, 2008

**Claimant's Exhibit:**

C-1 Psychological Evaluation by [REDACTED] Services, dated August 26, 2008

**VII. FINDINGS OF FACT:**

- 1) The Claimant, who is a twenty-two (22) year old male, submitted multiple applications for the MR/DD Waiver Program. The Department sent notification to the Claimant (Exhibits D-2 and D-3) advising that his MR/DD Waiver applications were denied. The notice regarding the first application states, in pertinent part:

**Your application was Denied because:**

The documentation submitted does not reveal an eligible diagnosis as there is not a diagnosis of mental retardation nor a related condition noted on the psychological report. Attention Deficit Hyperactivity Disorder (combined type), Borderline Intellectual Functioning and Legal Blindness are not eligible diagnoses for the Title XIX Waiver Program.

The notice regarding the second application states, in pertinent part:

Your application was Denied because:

The previously requested comprehensive psychological evaluation has not been received.

- 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             Receptive or Expressive Language
  - Learning             Mobility
  - Self-Direction     Capacity for Independent Living

- 2) Testimony from Department's Psychologist Consultant confirmed that Mild Mental Retardation is an eligible diagnosis, but that Borderline Intellectual Functioning, Attention Deficit/Hyperactivity Disorder, and Legal Blindness are not eligible diagnoses.
- 3) An ICF/MR Level of Care Evaluation (Exhibit D-5), or DD-2A form, dated May 7, 2008, was submitted to the Department and reviewed by the Department's Psychologist Consultant. The physician certified on the DD-2A that the Claimant requires the level of care and services provided in Intermediate Care Facility for individuals with mental retardation and/or related conditions (ICF/MR).
- 4) Testimony from the Department's Psychologist Consultant and evidence submitted in the form of diagnostic criteria (Exhibit D-4) asserted that a diagnosis of Mental Retardation requires onset prior to the age of eighteen (18). Diagnoses provided for the Claimant have varied with psychological evaluations and updates over time.

- 5) The Psychological Evaluation completed by the Claimant's School Psychologist, \_\_\_\_\_, M.S., in 2003 (Exhibit D-6), administered the Wechsler Adult Intelligence Scale – III (WAIS-III) and revealed a Full Scale IQ of 70, and described the Claimant's scores at "...consistent in the borderline range (70-79)." The Claimant was noted as seventeen years, ten months old at the time.
- 6) A 2006 Psychological Evaluation (Exhibit D-7) by \_\_\_\_\_ M.A., was completed when the Claimant was age nineteen (19). This evaluation also administered the WAIS-III, revealed a Full Scale IQ of 72 for the Claimant, and diagnosed the Claimant with Attention Deficit/Hyperactivity Disorder, Borderline Intellectual Functioning, and Legal Blindness. In 2007, \_\_\_\_\_ completed a Psychological Update (Exhibit D-8) of the Claimant. At the time of this update, the Claimant was age twenty (20). This document noted that no new instruments were used to assess the Claimant's intellectual and cognitive functioning, and repeated the diagnoses from her prior report.
- 7) In March 2008, \_\_\_\_\_ M.A., completed a Psychological Update (Exhibit D-10) of the Claimant at age twenty-one (21). In this update, the Slosson Intelligence Test – Revised, 3<sup>rd</sup> Edition, was used to assess the Claimant's intellectual and cognitive functioning, and resulted in a total standard score of forty-nine (49), which is noted to be equivalent to a Wechsler IQ of fifty-two (52). On this document, \_\_\_\_\_ diagnosed the Claimant with Mild Mental Retardation. The Department noted that the Slosson Intelligence Test is not preferred because it is not as thorough as the WAIS-III, and indicated that \_\_\_\_\_ was aware that the purpose of the evaluation was to determine eligibility for MR/DD Waiver Services (page 2 of Exhibit D-10). The Department's Psychologist Consultant also testified that no good reason was provided to explain the drop in the Claimant's IQ results.
- 8) Testimony indicated that while he was in school, the Claimant received special education services, and was in structured environment with supports and prompts to assist him. Testimony on behalf of the Claimant asserted that the drop in test scores is explained by the removal of the Claimant from that supportive environment.
- 9) Two additional documents provided diagnoses of Mild Mental Retardation for the Claimant at the age of twenty-one (21). On the May 2008 DD-2A (Exhibit D-5), the Claimant's physician listed a diagnosis of Mild Mental Retardation. An August 2008 Psychological Evaluation (Exhibit C-1) administered the WAIS-III – resulting in a Full Scale IQ of sixty-seven (67) for the Claimant – and diagnosed the Claimant with Mild Mental Retardation. The Department's Psychologist Consultant noted that the Claimant scored a Performance IQ of eighty-one (81) on this instrument, and that this discrepancy is unusual.

- 10) 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. 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
- Tuberos Sclerosis

Additionally, the member who has a diagnosis of mental retardation and/or related conditions and associated concurrent adaptive deficits must have the following:

- Manifested prior to the age of 22, and
- Likely to continue indefinitely.
- Must have the presence of a least three (3) substantial deficits out of five of the major life areas (term is defined in Title 42, Chapter IV, Part 435.1009 of the Code of Federal Regulations or CFR. Refer to Section 513.3.1, Functionality section for a list of the major life areas). 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).

For applicable major life functioning areas, refer to Code of Federal Regulation (CFR): 42 CFR 435.1009.

#### **Active Treatment**

- Requires and would benefit from continuous active treatment.

#### **Medical Eligibility Criteria: Level of Care**

- To qualify for ICF/MR level of care, evaluations of the applicant must demonstrate:
  - A need for intensive instruction, services, assistance, and supervision in order to learn new skills, maintain current level of skills, and increase independence in activities of daily living,
  - A need for the same level of care and services that is provided in an ICF/MR institutional setting.

The applicant or legal representative must be informed of the right to choose between ICF/MR services and home and community-based services under the MR/DD Waiver Program and informed of his/her right to a fair hearing at the time of application (Informed Consent, DD-7).



### **Conditions Ineligible**

- Substantial deficits associated with a diagnosis other than mental retardation or a related diagnosis do not meet eligibility criteria.
- Additionally, any individual needing only personal care services does not meet the eligibility criteria.
- Individuals diagnosed with mental illness whose evaluations submitted for medical eligibility determination indicate no previous history of co-occurring mental retardation or developmental disability prior to age 22. The member's clinical evaluators must provide clinical verification through the appropriate eligibility documentation that their mental illness is not the primary cause of the substantial deficits and the mental retardation or developmental disability occurred prior to the age of twenty-two (22).

### **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. Without an eligible diagnosis, program eligibility cannot be met. The diagnoses of Attention Deficit/Hyperactivity Disorder and Legal Blindness are not eligible diagnoses for the program. The diagnosis of Borderline Intellectual Functioning indicates that the Claimant is functioning at a level above that of persons who would be eligible for the program.
- 2) Three documents were presented diagnosing the Claimant with Mild Mental Retardation, an eligible diagnosis. These diagnoses were all in 2008, when the Claimant was age twenty-one (21). The Department clearly showed that the diagnostic criteria for Mental Retardation requires onset be established before age eighteen (18). All testing of the Claimant before age eighteen (18) reflected Borderline Intellectual Functioning. No convincing explanation was provided for the Claimant's sudden drop in IQ scores. The Department indicated that, in one instance, the examiner was aware of the purpose of the testing, and that a less thorough instrument was used to assess the Claimant. In a second instance, the Department noted an unusual discrepancy between the Claimant's Full Scale IQ and his Performance IQ. The Department also clearly demonstrated the superior reliability of the earlier testing over the Claimant's test results at age twenty-one (21) and their resulting diagnoses.

- 3) Without evidence to support an eligible diagnosis, the Department was correct to deny medical eligibility for the program.

**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 February 2009.**

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**Todd Thornton  
State Hearing Officer**