



State of West Virginia  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
Office of Inspector General  
Board of Review  
4190 W Washington St.  
Charleston, WV 25313  
304-746-2360 ext 2227

Joe Manchin III  
Governor

Martha Yeager Walker  
Secretary

March 23, 2009

-----for

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Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held November 14, 2008. 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 500-8)

The information submitted at your hearing fails to demonstrate that you meet the eligibility criteria necessary 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,

Jennifer E Butcher  
State Hearing Officer  
Member, State Board of Review

cc: Chairman, Board of Review  
Steve Brady, MR/DD Waiver Program  
Rick Workman, Psychologist Consultant for DHHR

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

-----,

**Claimant,**

vs.

**Action Number: 08-BOR-1873**

**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 March 23, 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 scheduled to convene on November 14, 2009 on a timely appeal filed August 4, 2008.

All persons giving testimony were placed under oath.

**II. PROGRAM PURPOSE:**

The program entitled MR/DD Home and Community-Based Waiver Program 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 Program* (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 (hereinafter 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 grandmother  
Steve Brady, MR/DD Waiver Program  
Rick Workman, Psychologist Consultant, BMS

Presiding at the hearing was Jennifer Butcher, 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**

Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500-8.

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

##### **Department's Exhibits:**

- 1) West Virginia MR/DD Waiver Service Manual Chapter 500
- 2) First denial letter with request for additional information dated June 25, 2008.
- 3) Final denial letter dated August 27, 2008
- 4) ICF/MR Level of Care Evaluation, by Dr. [REDACTED] dated April 28, 2008
- 5) ICF/MR Level of Care Evaluation, by Drs. [REDACTED] and [REDACTED] dated August 21, 2008
- 6) Client Needs Summary for the ICF/MR Waiver Program dated June 2, 2008
- 7) DD-3 Comprehensive Psychological Evaluations dated April 28, 2008; May 1, 2008; and May 6, 2008
- 8) Individualized Education Program (IEP) from [REDACTED] County schools dated June 6, 2008

#### **VII. FINDINGS OF FACT:**

- 1) The Claimant is a four (4) year-old child who applied for the Title XIX MR/DD Waiver Program in 2008 and did not meet three (3) or more of the six (6) major life areas identified for waiver eligibility.
- 2) On or about June 25, 2008, the Claimant was notified via a Notice of Denial (Exhibit D-2) that his application for the Medicaid MR/DD Waiver Program was denied. This notice states:  
Your application was denied because:  
The physician has not certified need for an ICF/MR level of care on the DD-2A. The IEP submitted with the packet was outdated at the time of receipt by

the waiver office.

Documentation submitted does not support the presence of substantial adaptive deficits in three (3) of the six (6) major life areas indicated 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

- 3) The same DD-2A was submitted again after changes were made by another physician, Dr. Thacker, who initialed the changes and checked the block “yes” to needs the ICF/MR level of care and dated the form August 21, 2008, (Exhibit-D-5).
- 4) In response to the additional information received from the Claimant, a second Notice of Denial (Exhibit-D-3) advised the Claimant that his application was again denied. This notice states:

Your application was denied because:

Documentation submitted does not support the presence of substantial adaptive deficits in three (3) of the six (6) major life areas indicated 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

- 5) The Department was able to determine a diagnosis from the ICF/MR Level of Care Evaluation dated April 28, 2008 (Exhibit D-4). The medical assessment indicates the Claimant is mobile, continent, can feed himself, and has age appropriate personal hygiene. As well as under the Mental, Behavioral, and Other Difficulties categories, he is alert and has limited communication. AXIS II (List all Cognitive, Developmental Conditions and Personality Disorders), he was noted as having autism. Dr. [REDACTED] conducted the evaluation and certified that the patient’s developmental disability, mental condition, and related health needs are as documented above and the patient’s level of care and services provided in an “intermediate care facility” for individuals with mental retardation and/or related conditions were not warranted.
- 6) The Claimant resubmitted the same evaluation after the second physician reviewed the findings of April 28, 2008 (Exhibit D-5). The second physician, Dr. [REDACTED] made changes and initialed the changes and returned the paperwork as an updated ICF/MR evaluation. Dr. [REDACTED] indicated the Claimant is presently incontinent, needs assistance with personal hygiene, and he recommended the ICF/MR level of care for the Claimant.

- 7) The Comprehensive Psychological Evaluation, DD-3 (Exhibit D-7) was administered by [REDACTED], Licensed Psychologist on three different dates of April 28, 2008; May 1, 2008; and May 6, 2008. According to the report, the Wechsler Preschool and Primary Scale of Intelligence (WPPSI) which measures intelligence was administered with an intelligence quotient (IQ) scores -Verbal IQ of eighty-six (86), Performance IQ of eighty-two (82), and Full Scale IQ of eighty-three (83). Mr. Workman stated these scores were in the low average range, but were above the seventy-fifth percentile (75%).
- 8) After each deficit was evaluated, it was established that the Claimant meets the criteria under self-help. The Claimant is totally dependant when it comes to bathing, dressing, and brushing his teeth. He is also diaper dependent. His vocabulary consists of about thirty (30) words. He can not identify shapes, colors, letters, or numbers.
- 9) -----, the Claimant's grandmother, testified that she has other grandchildren about the same age as ----- and he is not as advanced as the other grandchildren. She states he repeats things that he has heard. The Department agrees with the Claimant's grandmother that he has some delays, but not severe enough for the ICF/MR level of care the program offers.
- 10) Eligibility criteria for the MR/DD Waiver Program are outlined in Chapter 500 of the Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual (Effective 7/1/05).

The level of care criteria for medical eligibility is outlined in this chapter and reads as follows:

### **Diagnosis**

- Must have a diagnosis of mental retardation, which must be severe and/or chronic, in conjunction with substantial deficits (substantial limitations associated with the presence of mental retardation); and/or
- Must have a related developmental condition, which constitutes a severe, 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

- 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

### **Functionality**

- Substantially limited functioning in three (3) or more of the following major life areas: (Substantial limits are defined on standardized measures of adaptive behavior scores 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 by the documentation submitted for review, i.e., the IEP, occupational therapy evaluation, narrative descriptions, etc.)
  - 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 use, leisure).

### **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 and increase independence in activities daily living.

- A need for the same level of care and services that are provided in an ICF/MR institutional setting.

**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 (3) or more of the major life areas is required. Substantial limits are 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.
- 2) The evidence submitted in this case demonstrates Claimant has an eligible diagnosis of Autistic Disorder. Diagnostic criterion is provided in the Comprehensive Psychological Evaluation (DD3).
- 3) The deficit for self-help is the only one of the six (6) deficits in the major life areas that has been substantiated by documentation presented for evaluation of the Title XIX MR/DD Waiver Program
- 4) Upon considering the facts of this case, there is insufficient evidence to establish additional deficits in the other five (5) major life areas. Therefore, eligibility for the MR/DD Waiver Program cannot be established.

**IX. DECISION:**

It is the decision of the State Hearing Officer to **uphold** the Department's action 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 23rd day March, 2009.**

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**Jennifer Butcher**  
**State Hearing Officer**