



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

March 25, 2009

-----for

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held March 4, 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 demonstrates 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 **reverse** 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-2284

**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 25, 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 March 4, 2009 on a timely appeal filed October 2, 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

-----, Claimant's father

Steve Brady, Program Coordinator, MR/DD Waiver, BMS (Participated telephonically)

Richard L. Workman, Psychologist Consultant, BMS (Participated telephonically)

Carol Brawley, Hearings Coordinator (Observed 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 7/30/08

D-3 DD-2-A-ICF/MR Level of Care Evaluation dated 11/5/07

D-4 Psychological Evaluation dated 10/29/07

D-5 Individualized Education Program (IEP) dated 5/20/08

Claimant's Exhibits:

C-1 Positive Behavior Support Plan – September 2007

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

It should be noted that a substantial adaptive deficit was identified in the major life area of 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. However, in addition to a substantial adaptive deficit in the major life area of Capacity for Independent Living, as noted in Exhibit D-2, the Department conceded during the hearing that the Claimant is also demonstrating a substantial adaptive deficit in Receptive or Expressive Language.
- 3) The Claimant, through his representatives, contends that he is demonstrating a third (3rd) substantial adaptive deficit in Self-Care, and therefore, he is medically eligible to participate in the MR/DD Waiver Program.
- 4) The following evidence was reviewed in determining a substantial adaptive deficit in Self-Care:

The evidence reveals that the Claimant was approximately 5 ½ years old when the evaluations (D-3 & D-4) were completed. Exhibit D-3 indicates that the Claimant is not toilet trained and that he needs assistance with eating. Exhibit D-4 provides contradictory information regarding the Claimant's ability to feed himself - "----- is able to feed himself with a spoon and a fork and can drink from a cup without spilling."- However, this document goes on to note the Claimant is not toilet trained and indicates that he needs help with dressing and undressing as well as bathing and tooth brushing. Page 7 of Exhibit D-4 (Section III,D) indicates the Claimant is not able to care for most personal care needs and that he cannot learn new skills without aggressive and consistent training. Section IV,A (Page 8 of Exhibit D-4) reveals that "Training in basic developmental skills should be the primary focus (i.e., toileting, eating, communication).

The Individualized Education Program (IEP) was completed on May 20, 2008 (Claimant was

6 years and 1 month old). Page 1 of 16, Part II, indicates that toileting is an expectation (goal) for the future in the home, school and community. Page 5 of 16 notes under Self-Help that the Claimant is able to transition to the restroom without behaviors; he will undress and dress self to use the toilet, but he does need assistance with buttons; He will change his pull-up if he is wet; he can wash his hands, but only if given verbal prompts but notes that he is unable to use the restroom on his own (requires verbal prompts) and unable to communicate the need to use the restroom.

The Behavior Support Plan (Exhibit C-1) addresses toileting and recommends that reinforcement and praise should be delivered for any attempts to independently use the bathroom. This document indicates that visuals should be used in conjunction with a chosen reinforcer to help the Claimant see the visual steps involved in bathroom procedures. Once the Claimant has completed all the steps involved in using the bathroom, his chosen reinforcer should be delivered with praise and social reinforcement.

Testimony received at the hearing reveals that the Claimant continues to require assistance with dressing and undressing, he is not toilet trained and must be told to pull his “pull-up” up. He requires assistance with eating, cutting food etc., and he cannot drink from a cup without spilling. He is total care for bathing and total care for tooth brushing as well.

While the Department’s psychologist indicated the Claimant’s participation in eating and dressing is inconsistent with individuals who require an ICF/MR level of care, the minimal level of participation noted is achieved with prompting and supervision. In the absence of a standardized measure of adaptive behavior indicating otherwise, the narrative information included in the evidence demonstrates a substantial adaptive deficit in Self-Care.

- 5) 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.

- 2) The Claimant's diagnosis of Autism meets the MR/DD Program medical eligibility criteria as a related condition. The Claimant's condition is chronic and was manifested prior to the

age of 22. The area of medical eligibility cited by the Department as a barrier to establishing eligibility is specific to functionality – Substantially limited functioning in three (3) or more of the major life areas. As a matter of record, the Department conceded the Claimant is demonstrating a substantial adaptive deficit in his Capacity for Independent Living and Receptive or expressive language. Evidence submitted at the hearing reveals that the Claimant is demonstrating a substantial adaptive deficit in the major life area of Self-Care. Based on that finding, the Claimant is demonstrating substantial adaptive deficits in three (3) major life areas as required by the medical eligibility criteria.

- 3) Based on the evidence presented at the hearing, the Claimant meets the medical eligibility criteria required for participation in the Medicaid MR/DD Waiver Program.

IX. DECISION:

It is the decision of the State Hearing Officer to **reverse** 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 25th Day of March, 2009

**Thomas E. Arnett
State Hearing Officer**