



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
1400 Virginia Street
Oak Hill, WV 25901

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

March 31, 2009

-----for -----

Dear ----- and -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held March 26, 2009. Your hearing request was based on the Department of Health and Human Resources' decision to deny your application for services for ----- under the Title XIX MR/DD Waiver program.

In arriving at a decision, the State Hearings 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 is based on current policy and regulations. Some of these regulations state as follows: 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).

The information submitted at your hearing revealed that the documentation submitted failed to demonstrate substantial deficits in three of the six major life areas. Therefore, the medical criteria to be eligible for the Title XIX MR/DD Waiver Services Program were not met.

It is the decision of the State Hearings Officer to **uphold** the decision of the Department to deny ----- services under the Title XIX MR/DD Waiver program.

Sincerely,

Kristi Logan
State Hearings Officer
Member, State Board of Review

Cc: Erika H. Young, Chairman, Board of Review
Steve Brady, MR/DD Waiver Program

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

-----,

Claimant,

v.

Action Number: 08-BOR-2444

**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 March 26, 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 26, 2009 on a timely appeal, filed November 19, 2009.

II. PROGRAM PURPOSE:

The Program entitled Title XIX MR/DD Waiver is set up cooperatively between the Federal and State governments and administered by the West Virginia Department of Health & 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 Father
-----, Claimant's Mother

Steve Brady, Program Coordinator, MR/DD Waiver, BMS (testified by phone)
Linda Workman, Psychologist Consultant, BMS (testified by phone)
Carol Brawly, BMS (observed by phone)

Presiding at the Hearing was Kristi Logan, State Hearing Officer and a member of the State Board of Review.

IV. QUESTIONS TO BE DECIDED:

The question(s) to be decided is whether or not the Department correctly denied Claimant services under 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 Denial Notification dated October 17, 2008
- D-3 ICF/MR Level of Care Evaluation/DD-2A dated October 8, 2008
- D-4 Psychological Evaluation dated August 20, 2008

Claimants' Exhibits:

None

VII. FINDINGS OF FACT:

- 1) An application for Title XIX MR/DD Waiver Services was submitted on Claimant's behalf to the Bureau of Medical Services (BMS). A denial letter dated October 17, 2008 was issued which read in part (D-2):

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, Mobility and Capacity for Independent Living.

- 2) Testimony from Linda Workman, consulting psychologist with BMS, revealed that Claimant has an eligible diagnosis of autism. However, 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). Additionally, the Claimant does not demonstrate at least three (3) substantial adaptive deficits of the six (6) major life areas.
- 3) The DD-2A reported no abnormalities found during the physical examination. Claimant was noted to be ambulatory, continent, alert and independent in feeding and personal hygiene. Claimant was not receiving any type of therapy nor was any recommended. Claimant was diagnosed with Attention Deficit Hyperactive Disorder (ADHD) and high level autism (D-3).
- 4) The Adaptive Behavior Scale School Second Edition II (ABS S:2) was administered to Claimant during a psychological evaluation on August 20, 2008. His scores as relative to the major life areas were (D-4):

Independent Functioning: 1%
Physical Development: 50%
Language Development: 25%
Self-Direction: 9%
Responsibility: 25%
Socialization: 1%

In order to have a deficit in one of the life areas, Claimant's scores would have to be three (3) standard deviations below the mean or less than one percent (1%). Claimant did not have any eligible scores in the major life areas.

- 5) The psychological evaluation indicated that Claimant was able to feed himself with a spoon and fork and drink from a glass without spilling. Claimant does not have toileting accidents but requires some assistance. He is able to wash himself, brush his teeth and dress himself with prompting. Claimant can read and write and is able to multiply and divide. He enjoys riding his bike and roller skating, playing video games and watching television.
- 6) Ms. Workman contends that according to the results of the ABS S:2 and the narrative of the psychological evaluation, Claimant does not have a deficit in any of the major life areas. Claimant is fully mobile and able to communicate his wants and needs appropriately. Claimant is able to read and write and is not enrolled in special education classes. He is independent in toileting, bathing, grooming and dressing. He has interests and enjoys activities such as bike riding and playing video games. Little information was given under capacity for independent living but Claimant had ineligible scores under the components of socialization and responsibility.
- 7) -----, Claimant's mother, testified that Claimant was getting ready to start special education classes at [REDACTED] School but transferred to [REDACTED] Elementary School where he has been attending for the last month. They are in the process of getting him enrolled in special education classes there. Because Claimant had

not been in special education classes at [REDACTED] there was no Individualized Education Plan (IEP) available to submit with his application.

----- stated Claimant does not socialize with others. He prefers to read or play video games and has little interaction with others. ----- states they must make him participate in other activities or he would not leave the house at all. He was enrolled in karate classes but was kicked out for bad behavior. Claimant antagonizes his siblings and grandmother, hitting and throwing things at them.

----- stated Claimant is mobile but is very clumsy. He can ride a bike but falls off frequently. He cannot pick out his own clothes or tie his own shoes. Claimant goes to the bathroom himself but cannot clean himself afterwards. He must be constantly reminded not to handle his own feces. Claimant must be told to bathe, change his clothes and brush his teeth or he would not do them at all. ----- also stated Claimant has no concept of danger and will run out into the road if unsupervised.

- 8) 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:

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 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) Claimant has an eligible diagnosis of autism that manifested prior to age twenty-two (22). However, medical documentation and testimony provided failed to support the presence of at least three (3) substantial deficits in the six (6) major life areas. Although Claimant received a recommendation for ICF/MR placement from a physician and psychologist, Claimant's test scores and narratives from the psychological evaluation failed to demonstrate the severity of Claimant's condition that would result in substantial deficits.
- 3) Claimant does not meet the medical criteria required for the MR/DD Waiver program.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the decision of the Department to deny Claimant services for the Title XIX 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 31st Day of March, 2009.

**Kristi Logan
State Hearing Officer**