



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

January 14, 2009

Dear _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held December 19, 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
Michael Bevers, Assistant Attorney General for DHHR, BMS
_____, Attorney for Claimant

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

_____,

Claimant,

Vs.

Action Number.: 07-BOR-2581

**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 January 14, 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 December 23, 2008, on a timely appeal filed December 7, 2007.

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
_____, Claimant's mother
_____, Claimant's Attorney
_____, Therapeutic Consultant from _____ Services
Michael Bevers, Assistant Attorney General for DHHR, BMS
Jon Sassi, 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 recertification 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:

- D-1 West Virginia MR/DD Waiver Service Manual Chapter 500
- D-2 Notice of denial letter dated November 21, 2007
- D-3 DD-2A ICF/MR Level of Care Evaluation, dated September 19, 2007
- D-4 Psychological Evaluation-Triennial last date October 9, 2006
- D-5 Written Closing Argument dated January 9, 2009

Claimant's Exhibits:

- C-1 Vineland ABS dated February 18, 2008
- C-2 Letter from _____, Psychologist, dated March 14, 2008
- C-3 Notice of Denial dated November 21, 2007
- C-4 Medical Evaluation (DD-2A) dated September 19, 2007
- C-5 Psychological Evaluation (Triennial) dated October 9, 2006

VII. FINDINGS OF FACT:

1) The Claimant is eighteen (18) years of age who had a review for the Title XIX MR/DD Waiver Program in 2007 and was found not meeting substantial limited functions in three or more of the six major life areas identified for Waiver eligibility.

2) On or about November 21, 2007, 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 terminated 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 | Receptive or Expressive Language |
| Self-Direction | Capacity for Independent Living |
| Mobility | |

3) According to testimony from Mr. Workman, Department’s Psychologist Consultant, the DD-2A dated September 19, 2007 (Exhibit D-3) indicated in the Diagnostic Section of the report on AXIS I (List all Emotional and/or Psychiatric conditions) Claimant was diagnosed with having Pervasive Development Disorder (hereinafter PDD) and Attention-Deficit Disorder (hereinafter ADD). Under AXIS II (List all Cognitive, Developmental conditions and Personality Disorders) _____ was noted as Mild Mental Retardation.

4) The Claimant is advocating he should be awarded deficits for Learning, Self-Direction, Receptive or Expressive Language, and Capacity for Independent Living.

5) **Learning: (Functional Academics)**

Testimony from _____, _____’s mother, indicated that _____ gets confused when trying to apply new information. He gets frustrated when he is trying to complete a task or learning something new. _____ and _____, Therapeutic Consultant from _____ Services, testified that _____ can read with little comprehension, spell, and has a very large vocabulary, but _____ has a tendency to use words out of context and becomes very frustrated when asked to explain what he means when he uses words or phrases that have been used out of context.

Mr. Workman indicated the instruments used to evaluate _____’s Intellectual /Cognitive level was the Wechsler Adult Intelligence Scale-Third Edition, (Exhibit D-4). Standard scores have a mean of one-hundred (100) and a standard deviation of fifteen (15) points. Subtest scores have a mean of ten (10) and standard deviation of three (3) points. Scores

within the range of ninety (90) to one hundred- nine (109) are considered to be within the average range. The Claimant's scores were Verbal one hundred- one (101), Performance eighty-nine (89), and full scale IQ ninety-six (96). Verbal Comprehension Index one hundred-twenty (120). Under the Verbal Subtests; Vocabulary was fourteen (14). It was noted due to fine motor difficulty, the Claimant's scores were low, but were within the low average to average range.

The Wide Range Achievement Test, Revision 3 (WRAT-3) (Exhibit D-4) was administered to obtain an estimate of Claimant's levels of academic functioning. The standards scores are the same as the Wechsler Adult Intelligence test. According to the subtest Reading, standard score was one hundred-six (106) Grade Level Post-High School, Spelling, ninety-one (91) grade Level seventh (7th), Arithmetic, eighty (80), Grade Level sixth (6th). It was noted in the report that this assessment does not measure reading comprehension, but rather the ability to read words as presented.

Also the Adaptive Behavior Scale-School, Second Edition (hereinafter ABS-S: 2) was administered with non-mental retardation norms being used with standard scores on the domain scales with a mean of 10 and standard deviation of three (3) points. The percentile of the score needs to be less than one percent in order to be considered for a deficit. According to the Domain Scores for Language Development, the Claimant was a one (1) percentile. The narrative and the results of the test scores did not provide enough factual evidence to award a substantial adaptive deficit in the area of learning by functional academics.

6) **Self Direction:**

Testimony from both _____ and Ms. [REDACTED] indicated the Claimant is not capable of making daily choices for himself. _____ testified that _____ could not make a decision on what he would like to do on any given day. She stated that his day is structured for him. It was indicated by Ms. [REDACTED] "all he wanted to do was to try to seek revenge on the people who have done things to him in he his past." According to the documentation from Exhibit D-4, _____ is motivated to make improvements such as trying to improve his communication skills. It was also stated in the Psychological Evaluation (ExhibitD-4) "that _____ does not like to give up on anything" his Mom usually has to force him to stop whatever he is doing. The ABS-S: 2 test standard score for Self-Direction was three (3) and the percentile was one (1) percent. The percentage must be less than one (1) percentile in order to qualify as a substantial adaptive deficit in three of the six major life areas.

7) **Receptive and Expressive Language:**

According to testimony from _____, _____ has a large vocabulary but has difficulty when he uses the words out of context. He sometimes struggles when trying to express himself. Ms [REDACTED] testified that _____ communicates fairly well compared to other individuals that she has observed at [REDACTED]

Mr. Workman concluded form the documentation presented for evaluation that _____'s

language according to Exhibit D-4 “utilizes an excellent vocabulary, he tended to interrupt others’ conversations, blurt out answers, speak at a rapid pace and in a loud, monotone manner, and to possess a poor understanding of spoken instructions and social norm in conversations with others.” The ABS-S: 2 test standard score for Language Development was three (3) with a rating of one (1) percentile.

8) **Capacity for Independent Living:**

Testimony from _____ and Ms. [REDACTED] indicated the _____ is unable to manage his own finances, do his own shopping, travel by public transportation, or go out into the community alone without constant supervision. According to _____, _____ has no concept of safety or when someone is taking advantage of him.

The documentation associated with this category from Exhibit D-4 reveals that _____ shows interests in swinging, watching movies, eating out, going to the mall and playing computer games with his cousin. It also stated _____ has tried to expose _____ to different social events such as church and weddings. The scores from the ABS-S: 2 under Part One Domain Economic Activity standard score was a one (1) and the percentile of less than one (<1), Numbers and Time standard score of eight (8) and percentile twenty-five (25), and Responsibility standard score of four (4) and percentile two (2). Under Part One Factors for personal self-sufficiency, community self-sufficiency, and personal-social responsibilities were all less than one percentile (<1). These scores along with the documentation provided and the convincing testimony from the Claimant’s witnesses indicate that the Capacity for Independent Living merits consideration as a substantial adaptive deficit.

9) 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 or more of the following major life areas: (Substantial limits is defined on standardized measures of adaptive behavior scores three (3) standard deviations below the mean or less than 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 is 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 six 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. Only the current medical information provide is used when evaluating for re-determination.
- 2) The evidence submitted in this case demonstrates the Claimant has an eligible diagnosis of Pervasive Development Disorder, NOS.
- 3) Self-Care was the only deficit awarded out of the six major life areas that was substantiated by documentation presented for evaluation of the Title XIX MR/DD Waiver Program.
- 4) Upon consideration of the facts of this case, there is sufficient evidence to establish one additional deficit in the area of Capacity for Independent living. Consequently, 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 14th Day of January, 2009

Jennifer Butcher
State Hearing Officer

Cc: Erika Young, Chairman BOR
Michael Bevers, Assistant Attorney General for DHHR, BMS
_____, Attorney for Claimant