



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

June 16, 2009

c/o -----

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on the hearing held March 23, 2009. The hearing request was based on the Department of Health and Human Resources' denial of Title XIX MR/DD Waiver services for -----.

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). Individuals must meet the diagnostic criteria for medical eligibility not only by the relevant test scores, but also by the narrative descriptions contained in the documentation. (MR/DD Waiver Manual, Chapter 513 – *Covered Services, Limitations, and Exclusions for MR/DD Waiver Services*, effective November 1, 2007)

Information submitted at your hearing did not support a finding of sufficient deficits 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
Linda Workman, Psychologist Consultant

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

-----,

Claimant,

v.

Action Number: 08-BOR-2593

**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 June 16, 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 23, 2009 on a timely appeal, filed December 16, 2008.

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

-----*

-----, Claimant's mother

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

Carol Brawley, Hearings Coordinator

Linda Workman, Psychologist Consultant

* Not present during the entire hearing

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 Title XIX MR/DD Waiver Program services to the Claimant 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

D-2 Denial notice dated August 5, 2008

D-3 ICF/MR Level of Care Evaluation (DD-2A) dated June 26, 2008

D-4 Psychological Evaluation (DD-3) dated June 10, 2008

D-5 Individualized Education Program (IEP) dated July 16, 2007

D-6 (omitted)

D-7 ICF/MR Level of Care Evaluation (DD-2A) dated June 26, 2008 – First revision

D-8 Psychological Addendum dated August 28, 2008

D-9 Individualized Education Program (IEP) dated May 20, 2008

D-10 Denial notice dated September 22, 2008

D-11 ICF/MR Level of Care Evaluation (DD-2A) dated June 26, 2008 – Second revision

D-12 Denial notice dated November 19, 2008

VII. FINDINGS OF FACT:

- 1) The Claimant, who is a four (4) year old child, has applied for the MR/DD Waiver Program multiple times. The Department sent notification (Exhibit D-2) to the Claimant on or about August 5, 2008, advising that MR/DD Waiver services were denied. The notice explains the reason for denial of services, in pertinent part, as:

Your application was Denied because:

The physician has not certified the need for an ICF/MR level of care on the DD-2A. The psychological evaluation did not include an assessment for Autism such as the GARS or CARS. Also, -----'s current (2008) IEP is requested when available.

- 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:
- | | |
|--|---|
| <input checked="" type="checkbox"/> Self-Care | <input type="checkbox"/> Receptive or Expressive Language |
| <input checked="" type="checkbox"/> Learning | <input checked="" type="checkbox"/> Mobility |
| <input checked="" type="checkbox"/> Self-Direction | <input checked="" type="checkbox"/> Capacity for Independent Living |

The notice indicated that the facts relied on in making the Department's decision were an ICF/MR Level of Care Evaluation, or DD-2A, dated June 26, 2008 (Exhibit D-3), a Psychological Evaluation, or DD-3, dated June 10, 2008 (Exhibit D-4), and the Individualized Education Program, or IEP, from the Mason County School System dated July 16, 2007 (Exhibit D-5).

A revision of the DD-2A was submitted to the Department (Exhibit D-7), marked to indicate that the physician certified the Claimant's need for the level of care in an Intermediate Care Facility for individuals with Mental Retardation and/or related conditions, or ICF/MR. Testimony from the Department explained that they could not be certain who marked the document. A second denial notice was sent to the Claimant on or about September 22, 2008 (Exhibit D-10). The notice stated that the Claimant was still recognized as substantially deficient in only (1) of the six (6) areas – *Receptive or Expressive Language*. The notice additionally addressed the amended DD-2A as follows:

Your application was Denied because:

Page 3 of the DD-2A was amended (ICF/MR certification) without physician's signature and date.

This notice indicated that the Department relied on the previous DD-2A and DD-3, the amended DD-2A (Exhibit D-7), a Psychological Addendum dated August 28, 2008 (Exhibit D-8), and the May 20, 2008 IEP (Exhibit D-9). Testimony from the Department's Psychologist Consultant explained that the Psychological Addendum provided the Claimant's results on the Childhood Autism Rating Scale, or CARS,

instrument. She noted that the Claimant's score of 41.5 on this instrument indicated a severe enough degree of Autism for the Claimant to have an eligible diagnosis, allowing further review of his medical eligibility.

A third denial notice was sent to the Claimant on or about November 19, 2008 (Exhibit D-12). A second amended DD-2A (Exhibit D-11) resolved the Department's issue with physician certification of the Claimant's need for an ICF/MR level of care, and the remaining denial reason was insufficient substantial adaptive deficits, with only *Receptive or Expressive Language* identified. The notice stated that Exhibit D-11 was reviewed by the Department in making this decision to deny, as well as the documents previously submitted and reviewed in the August 2008 (Exhibit D-2) and September 2008 (Exhibit D-10) denials.

- 2) The MR/DD Waiver Manual, Chapter 513, effective November 1, 2007, 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.

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).

- 3) The Department's Psychologist Consultant explained that test scores and narrative failed to show substantial limitations in any of the major life areas other than *Receptive or Expressive Language* for the Claimant. She reviewed the remaining five (5) major life areas in her testimony.

In *Self-Care*, she noted that the Claimant demonstrated delays, but not delays meeting the policy definition of "substantially limited" delays. She explained that the June 2008 Psychological Evaluation (Exhibit D-4) of the Claimant used the Vineland Adaptive Behavior Scales – II, or VABS-II, instrument to measure the Claimant's adaptive behavior. The standard score for the domain corresponding with *Self-Care – Daily Living Skills* – was sixty (60). The Psychologist Consultant for the Department explained that with a mean of one hundred (100) and a standard deviation of (15), the Claimant's score indicated delays but not "substantially limited" functioning because it was not three (3) standard deviations below the mean.

In *Mobility*, the Department noted that the DD-2A (Exhibit D-11) indentified the Claimant as ambulatory. The Claimant's VABS-II score for *Motor Skills* (Exhibit D-4) was seventy (70), which the Psychologist Consultant reiterated was not a score indicative of "substantially limited" functioning.

In *Learning*, testimony from the Department's Psychologist Consultant explained that there is no expectation of functional academics for a child the Claimant's age; however, it was noted, under the heading of "Narrative Descriptions of Present Levels of Academic Achievement and Functional Performance" in the Claimant's May 2008 IEP (Exhibit D-9, page 5), "----- has demonstrated excellent progress this school year."

In the *Capacity for independent living*, expert testimony again stressed that there are no expectations in this area for a child as young as the Claimant. The sub-domain of

employment was noted as not applicable for the Claimant by the Department's Psychologist Consultant, and there was no information for the Department to review in the sub-domain of *home living*. She testified that there was no way to assess the sub-domain of *health and safety* for the Claimant, as all children the age of the Claimant require all-day supervision and protective oversight. She testified that children the age of the Claimant are also dependent on their parents to engage in *community and leisure* activities, leaving this sub-domain additionally unable to assess. She noted that in the sub-domain of *social skills*, she would expect the Claimant to be delayed due to his diagnosis of Autism, but that the Claimant's VABS-II score (Exhibit D-4) of sixty-one (61) for Socialization did not support that the delays were severe enough to be defined as "substantially limited."

The Department's Psychologist Consultant testified that the Claimant was not tested in the major life area of *Self-direction*. Narrative from the May 2008 IEP (Exhibit D-9, page 4) stated that the Claimant "...is able to demonstrate appropriate trust in adults and is able to make choices."

- 4) The Claimant's mother offered testimony describing the Claimant's limitations in four (4) of the six (6) major life areas: *Self-care*, *Learning*, *Self-direction*, and the *Capacity for independent living*. With regard to *Self-care*, she testified that the Claimant does not dress himself or practice hygiene on his own, that he is not toilet-trained, and that he still uses his hands to eat sometimes instead of using silverware. Addressing the area of *Learning*, or functional academics, she testified that the Claimant is not yet spelling his own name, does not know the alphabet or numbers, and does not talk – although he does use some sign language. Regarding *Self-direction*, she testified that the Claimant does demonstrate some preferences for outdoor play and riding around in a car. She testified regarding the *social skills* sub-domain of the *Capacity for independent living*, stating that her son does not play correctly with other children; regarding the *health and safety* sub-domain, she testified that the Claimant does not listen, has no concept of safety, and bangs his head to the extent that he has to wear a helmet for protection.

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 is defined on standardized measures of adaptive behavior scores three (3) standard deviations below the mean or equal to or below the seventy-fifth (75th) percentile when derived from MR normative populations. Substantially limited functioning must be supported by not only test scores, but by narrative descriptions contained in the documentation provided by the Claimant.
- 2) The Claimant has an eligible diagnosis of Autism, and substantially limited functioning in the life area of *Receptive or Expressive Language*. To meet the functionality

requirement of the medical eligibility criteria, the Claimant must establish substantially limited functioning in at least two (2) other major life areas.

- 3) The Claimant's mother offered testimony describing the Claimant's delays in *Self-care, Learning, Self-direction*, and the *Capacity for independent living*. Testimony from the Department's expert witness clearly demonstrated that adaptive behavior test scores failed to show "substantially limited" functioning in any major life areas, aside from *Receptive or Expressive Language*.
- 4) With only one (1) of the six (6) major life areas established, functionality has not been met, and medical eligibility for the MR/DD Waiver Program has not been established. The Department was correct to deny MR/DD Waiver services.

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 June, 2009.

**Todd Thornton
State Hearing Officer**