



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 15, 2009

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c/o -----  
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Dear -----:

Attached is a copy of the findings of fact and conclusions of law on the hearing held April 8, 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 Facility). 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  
-----, WV Advocates  
Carol Brawley, Department Representative  
Rick Workman, Psychologist Consultant

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

-----,

**Claimant,**

v.

**Action Number: 09-BOR-680**

**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 15, 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 April 8, 2009 on a timely appeal, filed February 12, 2009.

**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's mother  
-----, Claimant's Advocate, WV Advocates  
Carol Brawley, Department Representative  
Rick Workman, Psychologist Consultant

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 February 5, 2008
- D-3 ICF/MR Level of Care Evaluation (DD-2A) dated October 11, 2007
- D-4 Psychological Evaluation (DD-3) dated December 12, 2007
- D-5 Letter from -----Center dated May 8, 2007
- D-6 Gilliam Autism Rating Scale Summary Sheet dated May 8, 2007
- D-7 Denial notice dated June 5, 2008
- D-8 Letter from -----, MS/CCC-SP, dated April 16, 2008
- D-9 Denial notice dated July 30, 2008
- D-10 Psychological Evaluation (DD-3) dated May 5, 2008
- D-11 Individualized Education Program (IEP) dated September 10, 2007

**Claimant's Exhibits:**

- C-1 MR/DD Waiver Manual, Chapter 513
- C-2 Denial notice dated February 5, 2008
- C-3 ICF/MR Level of Care Evaluation (DD-2A) dated October 11, 2007
- C-4 Psychological Evaluation (DD-3) dated December 12, 2007
- C-5 Letter from -----Center dated May 8, 2007
- C-6 Gilliam Autism Rating Scale Summary Sheet dated May 8, 2007
- C-7 Individualized Education Program (IEP) dated September 10, 2007
- C-8 Denial notice dated June 5, 2008
- C-9 Letter from -----, MS/CCC-SP, dated April 16, 2008
- C-10 Denial notice dated July 30, 2008
- C-11 Psychological Evaluation (DD-3) dated May 5, 2008
- C-12 Scheduling notice dated March 17, 2009
- C-13 Scheduling notice dated August 20, 2008
- C-14 Hearing Request dated December 15, 2008
- C-15 Remand Order dated October 1, 2008

**VII. FINDINGS OF FACT:**

- 1) The Claimant, who is a six (6) 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 February 5, 2008, advising that MR/DD Waiver services were denied. The notice explains the reason for denial of services, in pertinent part, as:

Additional documentation is requested. Please submit any psycho-educational assessments conducted by the school system. Also, please reconcile the differing diagnosis offered by the physician and the psychologist.

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.

The notice continues to note that only one of the six areas – *Self-Care* – was recognized as substantially deficient. This 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 October 11, 2007 (Exhibit D-3), a Psychological Evaluation, or DD-3, dated December 12, 2007 (Exhibit D-4), a letter from -----Center dated May 8, 2007 (Exhibit D-5), and the Individualized Education Program, or IEP, from the [REDACTED] County School System dated September 10, 2007 (Exhibit D-11).

A second denial notice was sent to the Claimant on or about June 5, 2008 (Exhibit D-7). The notice indicated the reason for denial was solely the lack of substantial adaptive deficits. The notice stated that the Claimant was recognized as substantially deficient in two of the six areas – *Self-Care* and *Receptive or Expressive Language*. In addition to all the documentation reviewed in the previous application, the Department indicated in

this notice that it also considered a letter from -----, MS/CCC-SP, dated April 16, 2008 (Exhibit D-8) in making its determination.

A third denial notice was sent to the Claimant on or about July 30, 2008 (Exhibit D-9). The notice again provided the denial reason as the lack of deficits – again only two, in *Self-Care* and *Receptive or Expressive Language* – and indicated that the Department relied on all previous documentation, as well as a new DD-3, dated May 5, 2008 (Exhibit D-10), in making its decision to deny.

- 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
  - 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 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 Claimant's Advocate contended that substantial adaptive deficits in the areas of *Self-direction* and *Capacity for independent living* were additionally met, and that the Claimant is medically eligible for the MR/DD Waiver Program. Although the first denial (Exhibit D-2) noted an unresolved discrepancy between diagnoses listed on the DD-2A (Exhibit D-3) and the first DD-3 (Exhibit D-4) – one presented a diagnosis of Mild Mental Retardation that the Department contended was not supported by the documentation – the Department did accept that the Claimant had an eligible diagnosis of Autism. There was no disagreement that the Claimant was substantially delayed in the major life areas of *Self-Care* and *Receptive or Expressive Language*, as noted in the Department's two most recent denial notices (Exhibits D-7 and D-9).



- 4) The Psychological Evaluations (Exhibits D-4 and D-10) from December 12, 2007 and May 5, 2008 both evaluated the Claimant's level of adaptive behavior using the AAMR Adaptive Behavior Scale – School, 2<sup>nd</sup> Edition, or ABS-S:2. The resulting scores for this instrument were identical; testimony from the Claimant's mother indicated that she provided the responses for the ABS-S:2, and that the evaluations were only a few months apart. The Claimant's Advocate contended that with little time between evaluations, there would not be significant changes in the Claimant's adaptive behavior to result in a different outcome from this instrument. The ABS-S:2 Part One and Two Domain Scores using non-MR norms were as follows:

<b>Part I Domains</b>	%ile Score	Std. Score	Age Equiv.	Rating
Independent Functioning	1	1	<3-0	Very Poor
Physical Development	50	10	<3-0	Average
Economic Activity	16	7	<3-0	Below Average
Language Development	2	4	<3-0	Poor
Numbers and Time	9	6	<3-0	Below Average
Pre/Vocational Activity	37	9	3-9	Average
Self-direction	1	3	<3-0	Very Poor
Responsibility	5	5	<3-0	Poor
Socialization	1	2	<3-0	Very Poor

<b>Part II Domains</b>	%ile Score	Std. Score	Age Equiv.	Rating
Social Behavior	16	7	X	Below Average
Conformity	1	3	X	Very Poor
Trustworthiness	16	7	X	Below Average
Ster. And Hyper. Beh.	1	1	X	Very Poor
Self Abusive Behavior	2	4	X	Poor
Social Engagement	63	11	X	Average
Dist. Interpersonal Beh.	16	7	X	Below Average

Testimony from the Department's Psychologist Consultant clarified that the *Independent Functioning* score related to the major life area of *Self-Care*, which was awarded to the Claimant as an area of substantially limited functioning. Further testimony from the Department's Psychologist Consultant noted that the only other domain scores in the range to be considered substantially weak were *Socialization* and *Stereotyped and Hyperactive Behavior*, which relate to an aspect of the major life area of *Capacity for independent living*; however, the Department also noted the average-rated *Social Engagement* score and testified that a child the age of the Claimant is not expected to have the *Capacity for independent living*.

- 5) The Claimant's Advocate contended that the ABS:S-2 score (Exhibits D-4 and D-10) in the Domain of *Self-direction* supported substantially limited functioning in the same major life area for the Claimant. Testimony from the Department's Psychologist Consultant confirmed that with a percentile rank of one (1) and a standard score of three (3), the policy definition of "substantially limited" was not met.

Narrative presented by the Claimant's Advocate in support of substantially limited functioning in the major life area of *Self-direction* included the "Developmental Findings/Conclusions" section of the first DD-3 (Exhibit D-4, page 5), which described the Claimant as "...unable to complete any of the activities necessary for daily living without physical assistance and supervision," and stated that he displayed deficits in all six major life areas – including *Self-direction*. Additionally, the "Cognition skills" section of the September 10, 2007 IEP (Exhibit D-11) stated that the Claimant "...exhibits a very short attention span and does not engage with toys or objects very long or very appropriately." The Department's Psychologist Consultant responded that this narrative indicated that the Claimant has some degree of *Self-direction*, and noted that it was more than what he has observed in individuals requiring an ICF/MR level of care.

- 6) Narrative was presented by the Claimant's Advocate to describe the Claimant's delays in the *Health and Safety* aspect of the major life area of *Capacity for independent living*.

She noted that the on the October 11, 2007 DD-2A (Exhibit D-3), the Claimant's physician marked that the Claimant "needs close supervision." In the December 12, 2007 DD-3 (Exhibit D-4, page 3), the Claimant is noted to "...display self-abusive behavior," and that he "...will place inedible objects in his mouth like toys if he is unsupervised." Under the heading of "Others (social interaction, use of time, leisure activities)," this evaluation stated, in pertinent part:

----- is also not aware of any environmental dangers therefore, safety is a major issue while he is not at home or out in the community. ----- has a history of eloping and he will run off if he is not supervised for any length of time. ----- also displays a no fear response and he will climb and jump off anything.

- 7) The *Social Skills* aspect of the major life area of *Capacity for independent living* for the Claimant was also addressed in review of the narrative and in testimony. The Claimant's mother testified that her son displays inappropriate behavior in public places. A letter from -----Center (Exhibit D-5) described the Claimant, at the time of their evaluation, as a child with a chronological age of forty-nine (49) months, but noted a "Personal/Social" age-equivalent of less than twelve (12) to eighteen (18) months. The Claimant's IEP (Exhibit D-11, page 5) described a goal to "...interact in small group activity (handing and receiving, moving with buddy, responding to peer) without aggression." The most recent Psychological Evaluation (Exhibit D-10, page 3) stated that the Claimant "...does not play with other children."

- 8) The Claimant's Advocate noted a goal for the Claimant listed on his IEP (Exhibit D-11, page 5) as follows:

----- will follow simple directions to "point to", "show me" and/or "give me" when requested by adults in his educational environment.

The Claimant's Advocate contended that this goal indicated the Claimant's delays in the *Capacity for independent living*. The Department's Psychologist Consultant confirmed in expert testimony that this instead described delays in the major life area of *Receptive or Expressive Language*, an area already awarded to the Claimant.

### 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 (75<sup>th</sup>) 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 areas of *Self care* and *Receptive or Expressive Language*. To meet the functionality requirement of the medical eligibility criteria, the Claimant must establish substantially limited functioning in at least one (1) other major life area.
- 3) Representation for the Claimant stated that substantially limited functioning was met by the Claimant in the major life areas of *Self-direction* and the *Capacity for independent living*. Testimony from the Claimant's mother and review of narrative from the evidence clearly described delays in *Self-direction* and some, but not all, aspects of the *Capacity for independent living*. Expert testimony clarified that there is no expectation of the *Capacity for independent living* for a child the Claimant's age.
- 4) Test scores did not support substantially limited functioning in the areas of *Self-direction* or *Capacity for independent living*. Narrative documentation and testimony described the Claimant's delays, but without the required test scores to define the extent of those delays as "substantially limited," there is no evidence to support the presence of substantially limited functioning in any further major life areas.

- 5) With only two (2) 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 in its proposed action to terminate 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.**

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**Todd Thornton  
State Hearing Officer**