



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

August 17, 2009

-----, Esq.

RE: -----

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on the hearing held May 11, 2009. The hearing request was based on the Department of Health and Human Resources' proposed termination 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 Department's proposed termination of 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
Michael Bevers, Esq., Assistant Attorney General
Carol Brawley, Department Representative
Linda Workman, Psychologist Consultant

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

-----,

Claimant,

v.

Action Number: 09-BOR-927

**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 August 17, 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 May 11, 2009 on a timely appeal, filed March 18, 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
- , Esq., Claimant's attorney
- , Claimant's grandmother
- , Claimant's Special Education teacher
- , Claimant's Therapeutic Consultant, [REDACTED]
- Michael Bevers, Esq., Assistant Attorney General
- Carol Brawley, Hearings Coordinator
- Linda Workman, Psychologist Consultant
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- *
- *

* observing; did not offer testimony

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 terminate 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 ICF/MR Level of Care Evaluation (DD-2A) dated February 25, 2009
- D-3 Psychological Evaluation (DD-3) dated July 2, 2008
- D-4 Individualized Education Program (IEP) dated April 3, 2008
- D-5 Denial notice dated September 17, 2008
- D-6 Denial notice dated March 9, 2009

Claimant's Exhibits:

- C-1 Claimant's Packet (Letter from [REDACTED] Middle School, WESTEST results, Report of WIAT-II Testing, Psychological Evaluation Reports and Updates from 2001 through 2008)

VII. FINDINGS OF FACT:

- 1) The Claimant, who is a 14-year old child, is a recipient of MR/DD Waiver Services. Upon re-evaluation of the Claimant’s medical eligibility, the Department sent Notices of Termination to the Claimant on or about September 17, 2008 (Exhibit D-5) and on or about March 9, 2009 (Exhibit D-6). The first notice (Exhibit D-5) explains the reason for termination of services, in pertinent part, as:

Your application was Terminated because:

Documentation submitted does not support the presence of a severe related condition. While a diagnosis of pervasive developmental disorder, not otherwise specified, is provided, the documentation does not reflect that it is severe in degree as is required for eligibility. Additionally, the annual medical evaluation (DD-2A) is now outdated and the previously requested psycho-educational assessments have not been provided. These documents must be submitted for review.

- 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 Receptive or Expressive Language
- Learning Mobility
- Self-Direction Capacity for Independent Living

The notice indicated that the facts relied on in making the Department’s decision were a Psychological Evaluation, or DD-3, dated July 2, 2008 (Exhibit D-3), an Individualized Education Program, or IEP, dated April 3, 2008 (Exhibit D-4), a Denial Letter dated October 1, 2007, and a DD-2A dated May 28, 2007.

The Claimant’s benefits continued as a result of an appeal initiated in response to the September 17, 2008 Notice of Termination. Because there was additional information submitted for the Department’s review, this case was ultimately remanded to the Department to make a final eligibility determination. The March 9, 2009 Notice of Termination (Exhibit D-6) to the Claimant served as this determination, and stated, in pertinent part:

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:

- Self-Care Receptive or Expressive Language
- Learning Mobility
- Self-Direction Capacity for Independent Living

The notice indicated that the facts relied on in making the Department's decision were Notices of Termination dated October 1, 2007 and September 17, 2008 (Exhibit D-5), an ICF/MR Level of Care Evaluation, or DD-2A, dated March 4, 2008, and an ICF/MR Level of Care Evaluation, or DD-2A, dated February 25, 2009 (Exhibit D-2).

- 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 Department’s Psychologist Consultant testified that the Claimant did not meet medical eligibility for two reasons: the lack of an eligible diagnosis and the lack of substantially limited functionality in at least three of the major life areas defined by policy.
 - 4) The Department’s Psychologist Consultant noted that both the February 25, 2009 DD-2A (Exhibit D-2) and the July 2, 2008 DD-3 (Exhibit D-3) provided the Claimant with a diagnosis of Pervasive Developmental Disorder – Not Otherwise Specified, or PDD-NOS. She testified that PDD-NOS is a potentially eligible diagnosis on the Autism spectrum; however, the Claimant did not demonstrate the severity necessary for this to be an eligible diagnosis. She testified that she made this determination based on the lack of school interventions noted in the Claimant’s IEP (Exhibit D-4) and the adaptive behavior test results from his Psychological Evaluation (Exhibit D-3).
 - 5) The Claimant’s Adaptive Behavior was measured on his July 2, 2008 Psychological Evaluation (Exhibit D-3) using the Adaptive Behavior Scale – School, 2nd Edition, or ABS-S:2. Using Mental Retardation, or MR, norms, the results are as follows:

Subtest	Raw Score	%ile Rank	Std. Score	Age Equiv.	Rating
Independent Functioning	71	63	11	4-6	Average
Physical Development	21	84	13	9-0	Above Average
Economic Activity	2	9	6	<3-0	Below Average
Language Development	29	63	11	5-0	Average
Numbers and Time	9	63	11	6-3	Average
Pre/Vocational Activity	3	16	7	3-9	Below Average
Self-Direction	9	37	9	<3-0	Average
Responsibility	5	50	10	4-9	Average
Socialization	14	25	8	<3-0	Average

Using the MR norms, all scores except Physical Development were less than the seventy-fifth (75th) percentile. The Part One Domain Scores using non-MR norms were as follows:

Subtest	Raw Score	%ile Rank	Std. Score	Age Equiv.	Rating
Independent Functioning	71	1	3	4-6	Very Poor
Physical Development	21	25	8	9-0	Average
Economic Activity	2	1	1	<3-0	Very Poor
Language Development	29	2	4	5-0	Poor
Numbers and Time	9	16	7	6-3	Below Average
Pre/Vocational Activity	3	5	5	3-9	Poor
Self-Direction	9	2	4	<3-0	Poor
Responsibility	5	16	7	4-9	Below Average
Socialization	14	1	3	<3-0	Very Poor

Using the non-MR norms, none of the subtest scores was less than one percentile. The Department’s Psychologist Consultant testified that the *Economic Activity* subtest result was an eligible score because the standard score was only one; however, she indicated that this subtest is related to – but only one aspect of – the major life area of *Capacity for independent living*. This area was not awarded to the Claimant because none of the other subdomains were confirmed by testing and narratives.

- 6) The Department’s Psychologist Consultant testified that it is incorrect to use MR norms for an individual – such as the Claimant – without a diagnosis of Mental Retardation. Upon cross-examination, she testified that there is nothing in policy requiring this matching of diagnosis to normative group. She further explained in testimony that policy could not possibly address all areas of testing, and that the matching of normative group to the corresponding diagnosis is standard practice of professionals in the field; that basic psychometrics dictates this.
- 7) Testimony was offered by the Claimant’s grandmother, Special Education teacher, and Therapeutic Consultant, indicating his need for prompting and constant supervision. The Department noted that, according to policy, prompting is not considered active treatment. Testimony further provided qualitative descriptions of the Claimant’s adaptive deficits.

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 does not have a qualifying diagnosis, and failed to document functionality with eligible test scores. The Department clearly showed that PDD-NOS, although a potentially eligible diagnosis, must be severe to be considered a qualifying diagnosis. The Department showed that test scores, when related to the correct normative group, failed to demonstrate substantially limited functioning in any of the major life areas required by policy. The Department's expert witness testified that the correct normative group must be used for the ABS-S:2 scores to have any meaning. Policy requires both an eligible diagnosis and for functionality to be established through test scores and narrative; without eligible test scores, narrative alone cannot meet functionality.

- 3) Without functionality or an eligible diagnosis, medical eligibility for the MR/DD Waiver Program has not been established. The Department was correct 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 August, 2009.

**Todd Thornton
State Hearing Officer**