



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

August 3, 2009

-----for -----  
-----  
-----

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held July 20, 2009. Your hearing request was based on the Department of Health and Human Resources' decision to deny ----- services through the 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 program is based on current policy and regulations. These regulations provide 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 or MR/DD Waiver Policy Manual § 513.1).

The information which was submitted at your hearing revealed that ----- does not have an eligible diagnosis or substantial deficits as required by policy to be eligible for MR/DD Waiver services.

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

Sincerely,

Kristi Logan  
State Hearings Officer  
Member, State Board of Review

cc: Board of Review  
Carol Brawley, MR/DD Waiver Program

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

-----,

**Claimant,**

v.

**Action Number: 09-BOR-937**

**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 July 20, 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 July 20, 2009 on a timely appeal, filed March 19, 2009.

**II. PROGRAM PURPOSE:**

The Program entitled MR/DD Waiver is 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  
Carol Brawley, Hearing Coordinator, MR/DD Waiver Program  
Linda Workman, Consulting Psychologist, Bureau of Medical Services

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

All participants testified by phone.

**IV. QUESTIONS TO BE DECIDED:**

The question to be decided is whether or not the Department's decision to deny Claimant MR/DD Waiver services is correct.

**V. APPLICABLE POLICY:**

MR/DD Waiver Services Policy Manual § 513.3.1

**VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:**

**Department's Exhibits:**

- D-1 MR/DD Waiver Services Policy Manual § 513.3.1
- D-2 Denial Notification Letter dated March 4, 2009
- D-3 Physical Examination (Form DD 2-A) dated February 2, 2009
- D-4 Psychological Evaluation (Form DD 3) dated February 23, 2009
- D-5 Individualized Education Program (IEP) dated January 28, 2009

**Claimants' Exhibits:**

None

**VII. FINDINGS OF FACT:**

- 1) An application was made on Claimant's behalf for the MR/DD Waiver program. A denial notification letter dated March 4, 2009 was issued and read in pertinent parts (D-2):

Your application was Denied because: ----- has not been awarded an eligible diagnosis for the Tile XIX MR/DD Waiver program nor endorsed that she requires an ICF/MR level of care.

- 2) Linda Workman, consulting psychologist for the Bureau of Medical Services, testified to the reasons why Claimant was denied for MR/DD Waiver services. Ms. Workman stated that according to the physical examination from February 2, 2009, Claimant lacked any physical or neurological problems. She was noted to be ambulatory, continent, able to feed herself but required assistance with personal hygiene. There were no recommendations for any type of therapy. Claimant was diagnosed with Attention Deficit Hyperactive Disorder (ADHD) and mild mental retardation (MR) (D-3).
- 3) Claimant was given the Wechsler Intelligence Scale for Children Fourth Edition (WISC-IV) in 2006 and received a full scale IQ score of 48. She was diagnosed with Oppositional Defiant Disorder (ODD), ADHD and moderate MR (D-4).

Claimant was also given the Slosson Intelligence Test Revised (SIT-R) in 2006. Claimant received an IQ score of 50, which is in the mild MR range. The psychologist however felt Claimant had not performed to her potential due to environmental or cultural reasons (D-4).

- 4) Ms. Workman testified that according to the psychological evaluation from February 23, 2009, Claimant's language skills were adequate and her mental status was age appropriate. She is able to complete all daily living skills but requires prompting. These findings are inconsistent with a diagnosis of MR (D-4).

The Kaufman Brief Intelligence Test, Second Edition (KBIT-2) was administered and Claimant received a full IQ score of 45, again falling into the moderate MR range. The psychologist who administered the test felt "the assessment is a slight underestimate of her abilities due to being depressed by environmental and/or cultural factors, and lack of commitment to the assessment process, as indicated by providing responses without looking at the choices provided. Therefore, the results are considered to be invalid" (D-4).

- 5) The Adaptive Behavior Scale (ABS) was also administered using MR and non MR norms. Claimant's only eligible score was in independent functioning (< 1%) using non MR norms. The psychologist reiterated that she felt the scores from the ABS were not accurate due to environmental and/or cultural factors as well as symptoms resulting from ADHD and oppositional behaviors. She also felt Claimant may have learning disabilities that would account for her difficulties in school (D-4).

Claimant was diagnosed with Oppositional Defiant Disorder and ADHD. Claimant was not given a recommendation for ICF/MR level of care from this psychologist (D-4).

- 6) Ms. Workman contends that Claimant does not have an eligible diagnosis as required by policy. Although her testing indicated moderate MR, it is believed that her scores are inaccurate due to behaviors stemming from her ADHD and ODD. She did not

receive a recommendation from the psychologist for ICF/MR level of care, nor did she received at least (3) substantial adaptive deficits in the six (6) major life areas.

- 7) -----testified that Claimant has been having difficulties with sexual behaviors causing problems with her ability to make friends. She needs better hygiene as she will not bathe or wash her hair.

She has a learning disability and will have problems as an adult. She has problems concentrating and cannot keep up with her peers. They work with her daily and need help.

- 8) MR/DD Waiver Services Policy Manual § 513.3.1 states:

**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) Policy dictates the MR/DD Waiver Program requires 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.
- 2) Claimant is diagnosed with Attention Deficit Hyperactive Disorder and Oppositional Defiant Disorder, which are not eligible diagnoses as dictated by policy. Claimant also does not have at least three (3) adaptive deficits in the six (6) major life areas.
- 3) Claimant does not meet the medical criteria to be eligible 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 under 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 3<sup>rd</sup> day of August 2009.**

---

**Kristi Logan  
State Hearing Officer**