



State of West Virginia  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
Office of Inspector General

**Joe Manchin III**  
Governor

Board of Review  
P.O. Box 1736  
Romney, WV 26757

**Patsy A. Hardy, FACHE, MSN, MBA**  
Cabinet Secretary

January 4, 2010

-----for -----

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Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your son's hearing held November 16, 2009. Your hearing request was based on the Department of Health and Human Resources' decision to deny your son's application for Title XIX MR/DD Waiver Services.

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 & Community-Bases 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 related condition. The condition must be severe and chronic with concurrent substantial deficits in three (3) or more major life areas that require the level of care and services provided in an Intermediate Care Facility for individuals with mental retardation and/or related conditions and must have manifested prior to the age of 22. (West Virginia Title XIX MR/DD Home & Community-Based Waiver Revised Operations Manual, Chapter 513.

The information which was submitted at your hearing revealed that your son does not exhibit substantial deficits in three or more of the major life areas that are associated with the level of care and services provided in an Intermediate Care Facility.

It is the decision of the State Hearing Officer to Uphold the action of the Department to deny your son's application for benefits and services available through the Title XIX MR/DD Waiver Services program.

Sincerely,

Eric Phillips  
State Hearing Officer  
Member, State Board of Review

cc: Chairman, Board of Review  
Steve Brady, Operations Coordinator MRDD

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

-----,

**Claimant,**

v.

**Action Number: 09-BOR-1554**

**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 January 4, 2010 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 November 16, 2009 on a timely appeal, filed July 9, 2009.

**II. PROGRAM PURPOSE:**

The Medicaid Home and Community-Bases MR/DD Waiver Program (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 father

Carol Brawley, MRDD Hearings Coordinator

-----, Psychologist Consultant

Presiding at the Hearing was Eric L. Phillips, State Hearing Officer and a member of the 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 the Claimant's application for benefits and services through the MR/DD Waiver Program.

**V. APPLICABLE POLICY:**

Title XIX MR/DD Home and Community-Bases Waiver Program Revised Operations Manual Chapter 513.

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

**Department's Exhibits:**

- D-1 Title XIX MR/DD Home and Community-Based Waiver Program Operations Manual, Chapter 513.
- D-2 ICF/MR Level of Care Evaluation (DD-2A) dated July 16, 2008
- D-3 Psychological Evaluation dated July 28, 2008
- D-4 Notice of Denial/Termination dated October 16, 2008
- D-5 Individualized Education Program, ██████████ County Schools dated April 1, 2009
- D-6 Vineland-II, Psychological Evaluation results dated July 23, 2008
- D-7 Adaptive Behavior Scale-School Summary Report dated July 20, 2008
- D-8 Notice of Denial/Termination dated May 18, 2009

**Claimants' Exhibits:**

- C-1 Hearing Summary

**VII. FINDINGS OF FACT:**

- 1) The Claimant's parents submitted an application to determine their son's eligibility for benefits and services through the Title XIX MR/DD Waiver Services Program. It shall be noted that the Claimant's initial application was submitted in October 2008, many of the evaluations submitted were conducted over a year ago and may not reflect the Claimant's current condition.
- 2) -----, Psychologist Consultant, reviewed Exhibit D-2, ICF/MR Level of Care Evaluation. She testified that the Claimant was diagnosed with Autism and that the physician certified that the Claimant required the level of care and services provided in an Intermediate Care Facility. Ms. Workman purported that the diagnosis of Autism meets the diagnostic criteria associated with the Title XIX MR/DD Home and Community-Based Waiver Program Policy.
- 3) Ms. Workman reviewed Exhibit D-3, Psychological Evaluation completed on July 23, 2008. On some aspects of the evaluation the Claimant was considered untestable and most of the information for the evaluation was provided by the Claimant's parents ----- and ----- . Per the evaluation the Claimant was diagnosed with autistic disorder, attention deficit/hyperactivity

disorder, and mild mental retardation. The psychologist completing the evaluation documented that the Claimant “appeared” to be in need of an ICF/MR Level of Care.

A Slosson Intelligence Test was administered as part of the evaluation. The Claimant tested with a mental age of 2 years 5 months and had an IQ score of 41, which the Psychologist Consultant testified that the scores were extremely low.

The Claimant scored a 44.5 on the Childhood Autism Rating Scale (CARS) as part of the evaluation. The Psychologist consultant testified that this score was high and represented severe autism.

An Adaptive Behavior Scale using MR norms was implemented as part of the evaluation. The Claimant was scored against other children his age with mental retardation. The Claimants scores were documented as follows:

<u>Subtest</u>	<u>SS</u>	<u>Age Equiv</u>	<u>Rating</u>
Independent Functioning	9	<3-0	Average
Physical Development	17	13-3	Very Superior
Economic Activity	8	<3-0	Average
Language Development	10	<3-0	Average
Number and Time	11	4-0	Average
Pre-vocational Activity	9	3-9	Average
Self-Direction	8	<3-0	Average
Responsibility	8	<3-0	Average
Socialization	7	<3-0	Below Average
Pers. Self-sufficiency	106	<3-0	Average
Comm. Self-sufficiency	91	3-0	Average
Personal-Social Resp.	88	<3-0	Below Average
Social Behavior	10		Average
Conformity	6		Below Average
Trustworthiness	5		Poor
Ster. & Hyper. Behav	1		Very Poor
Self-Abusive Behav.	7		Below Average
Social Engagement	10		Average
Dist. Interp. Behav.	9		Average
Social Adjustment	70		Poor
Personal Adjustment	65		Very Poor

The Psychologist Consultant testified that the Claimant total scores were average using the MR Norm criteria.

A Vineland Adaptive Behavior Scale was also utilized as part of the Claimant’s Psychological Evaluation, Exhibit D-3. In order to meet eligibility criteria under this test an individual must have a standard score of 55 or below. The results of the test are as follows:

<u>Sub domain/Domain</u>	<u>SS</u>
Communication	69
Daily Living Skills	58
Socialization	66

Motor Skills	75
Adaptive Behavior Composite	64

- 4) In review of the evaluations, the Psychologist Consultant testified that a diagnosis of mental retardation was unclear and the Department issued Exhibit D-4-Notice of Denial/Termination on October 16, 2008. This Exhibit documents in pertinent part:

Your Waiver Application is hereby denied.

Your application was denied because-additional documentation is requested. Please submit any current psycho-educational assessments conducted by the school system.

Ms. Workman testified that additional information was requested to determine the presence of mental retardation. Any psycho-educational assessments were requested due to mental retardation having not been listed on Exhibit D-2, ICF/MR Level of Care Evaluation and the fact that the Psychologist had described the Claimant as untestable.

- 5) Ms. Workman stated that no psycho-educational assessments were received as part of the request, but Exhibit D-5 Individualized Education Program from ██████████ County Schools was submitted for review. As part of the Exhibit, no assessment tests were issued and the narrative descriptions were used during the evaluation. The presence of mental retardation could not be derived from the documentation.
- 6) Ms. Workman opined that the diagnosis of mental retardation was not confirmed through review of the Psychological Evaluations and Individualized Education Programs. Ms. Workman testified that the Claimant's school assessment did not confirm the presence of moderate mental retardation and that the Claimant's Individual Education Plan, Exhibit D-5, documented that the Claimant's abilities were inconsistent with children his age that suffer from mental retardation. Since the presence of mental retardation was not diagnosed, the Department determined it was unfair to the Claimant to compare him to children diagnosed with mental retardation. The Department decided to use non-MR norms as part of the Vineland Adaptive Scores to compare the Claimant to a random sample of children with various or no diagnoses. Upon review, the Department conceded a substantial adaptive deficit in the area of self-care as the Claimant's score of 58 along with the narrative descriptions available to the Department supported the Claimant's limitations in the life area.

Ms. Workman contended that upon review of test scores and narrative descriptions a substantial adaptive deficit could only be awarded in the area of self care. Additional deficits did not established based on narratives provided for review as they did not establish substantial limitations in the other health areas.

- 7) Based on all documentation submitted, the Department issued Exhibit D-8 Notice of Denial/Termination dated May 18, 2009. This notice documents in pertinent part:

Your Waiver Application is hereby denied.

Your application was denied 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, self-direction, receptive or expressive language, mobility, capacity for independent living.

- 8) The Claimant's parents ----- and -----presented testimony describing their experiences caring for their son, ----- . They purported that their son requires constant and persistent one on one attention. They contend that their son should have been granted additional deficits in the other five life areas.

**Learning**-The Claimant's parents testified that their son is drastically behind in learning and continues fall behind in academics. They further testified that -----has been held back in kindergarten and still continues to struggle at the present time.

**Self-Direction**-----, the Claimant's father testified that his some cannot make choices on his own and cannot exert any preferences. -----stated that her son cannot make a decision when choosing what to drink at meal time. Additional testimony from the ----- demonstrated that the only self-stimulation that their son participates in is running back and forth flapping his arms and making noises.

**Language**-----testified that her son can be verbal, but he only exemplifies this skill in a repetitive nature. ----- testified that his son has no independent thinking and cannot prompt conversation on his own. Both parents stated that Nathan's words are unclear and he is currently undergoing speech therapy. They purported that -----cannot answer basic questions and that his speech and thinking is of a repetitive nature.

**Capacity for Independent Learning**-The ----- testimony demonstrated their need to consistently monitor their son's actions. They purported that their son has a school aide that monitors and supervises him throughout the day. Testimony revealed that if a school aide was not present, the Claimant would "run away" and at times has placed himself in dangerous situations at various social activities. They stated that they have had to place alarms on their residence as their son has awoken in the middle of the night and left the house. They stated that during this instance a neighbor has located their son and returned him to the ----- residence.

- 9) The MR/DD Waiver Manual, Chapter 513, §513.3.1, 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).

**VIII. CONCLUSIONS OF LAW:**

- 1) Regulations governing the MR/DD Waiver Program require eligible individuals to have a diagnosis of mental retardation and/or related developmental conditions, which must be severe and chronic, in conjunction with substantial deficits (substantial limitations associated with the presence of mental retardation). The individual must exhibit substantial adaptive deficits in three (3) or more major life areas to qualify for the program.
- 2) The Department established that the Claimant has a diagnosis of Autism. The diagnosis of Autism allowed the Department to evaluate the functionality of the Claimant for eligibility purposes of the program. Testimony revealed that during the application process, the Claimant was awarded a substantial deficit in the area of self-care; other deficits could not be awarded from evidence (test scores and narrative descriptions) outlined in both of the psychological evaluations. The Claimant's parents contended that substantial deficits should be awarded in the area of language, self-direction, learning, and capacity for independent living.
- 3) MR/DD Waiver Services Policy Chapter 513 outlines that 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 evaluations, Occupational Therapy evaluations, etc.
- 4) Testimony revealed that the Claimant lacked the necessary test scores during the evaluation process to be awarded substantial deficits in the areas of capacity for independent living, language, self-direction, and learning. Policy stipulates that evaluations must demonstrate that an applicant meets the diagnostic criteria for medical eligibility with relevant test scores in order to be eligible for the program. Testimony illustrated that the Claimant has delays in the areas in which deficits can be awarded, but the test scores awarded did not support delays in the evaluations reviewed by the Department. The Department conceded a deficit in the area of

self-care to the Claimant and no other deficits could be awarded; therefore the Department was correct in its decision to deny the Claimant's application for benefits and services under the Title XIX Waiver program.

**IX. DECISION:**

It is the decision of the State Hearing Officer to uphold the Department's decision 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 \_\_\_\_\_ day of January 2010.**

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**Eric L. Phillips**  
**State Hearing Officer**