



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

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

March 10, 2010

c/o -----

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on -----'s hearing held December 3, 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 revealed the additional functional deficit in the major life area of capacity for independent living. With this deficit, the functionality component of medical eligibility, and medical eligibility as a whole, was met for participation in the MR/DD Waiver Program.

It is the decision of the State Hearing Officer to **reverse** the Department's proposed termination of -----'s 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
Carol Brawley, Department Representative
Linda Workman, Psychologist Consultant

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

-----,

Claimant,

v.

Action Number: 09-BOR-1631

**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 March 10, 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 December 3, 2009 on a timely appeal, filed August 13, 2009.

It should be noted that benefits have been continued through the hearing process.

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 witness

-----, Claimant's witness

-----, Claimant's witness

Carol Brawley, Department Representative

Linda Workman, Department's 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 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 §431.302(c)(2)(iii); 42 CFR §435.1010; 42 CFR §483.440; 42 CFR §440.150

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

D-1 MR/DD Waiver Manual, Chapter 513 – *Covered Services, Limitations, and Exclusions for MR/DD Waiver Services*, effective November 1, 2007

D-2 Notice of Denial/Termination, dated July 28, 2009

D-3 ICF/MR Level of Care Evaluation (DD-2A), dated September 19, 2008

D-4 Annual Psychological Evaluation (DD-3), dated June 23, 2009

D-5 Annual Psychological Evaluation Addendum (DD-3) dated August 19, 2009

D-6 Notice of Denial/Termination, dated September 23, 2009

D-7 Individualized Education Program (IEP), dated April 21, 2009

D-8 Evaluation Report, dated November 20, 2009

Claimant's Exhibits:

C-1 Children's Therapy Clinic Report, dated September 21, 2009

VII. FINDINGS OF FACT:

- 1) The Claimant, who is a 6-year old child, is a recipient of MR/DD Waiver Services. Upon re-evaluation of the Claimant's medical eligibility, the Department sent a notice of termination to the Claimant on or about July 28, 2009 (Exhibit D-2). The notice explains the reason for termination of services, in pertinent part, as:

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 an ICF/MR Level of Care Evaluation (DD-2A), dated September 19, 2008 (Exhibit D-3), and a Psychological Evaluation (DD-3), dated June 23, 2009 (Exhibit D-4).

- 2) A second notice of termination was sent to the Claimant on or about September 23, 2009 (Exhibit D-6). This notice stated that substantial limitations were only found in the areas of self-care and mobility, less than the minimum of three areas required for functionality and medical eligibility. In addition to the documents considered as part of the July 28, 2009, notice of termination, an August 19, 2009, psychological evaluation addendum (Exhibit D-5) was reviewed as part of the Department's September 23, 2009, decision to terminate services.
- 3) Carol Brawley, representative for the Department, presented the appropriate policy for this matter as the MR/DD Waiver Manual, Chapter 513, §513.3.1, effective November 1, 2007. *(It should be noted that 42 CFR §435.1009 – referred to in the following policy – has since been changed to 42 CFR §435.1010)* This policy states, in pertinent part:

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).

- 4) Linda Workman, Psychologist Consultant for the Department, testified regarding her background and experience, noting an extensive history with the underlying policy for the MR/DD Waiver Program, reviews of the applications for the program, and psychological evaluations of school-aged children.
- 5) Ms. Workman testified that the Claimant met all components of medical eligibility except for functionality. She testified that only two of the major life areas for functionality – self-care and mobility – were met. The decision to add mobility to self-care as an additional area of substantially limited functioning was after review of narrative found in Exhibit D-5. She testified that this additional information provided more detail on psychomotor skills and documented that the Claimant was unable to transfer. Based on this, mobility was added; however, a finding of two out of six major areas was insufficient to establish medical eligibility.
- 6) ----- and -----, the Claimant’s parents, both testified that the Claimant is substantially limited in the major life area of learning, or functional academics. The Claimant’s parents testified that they are both public school teachers, and witness daily the effects of students with learning problems.

-----noted a Teacher Evaluation Report included with the Claimant’s Individualized Education Program, or IEP (Exhibit D-7, page 20 of 21), with comments from the Claimant’s Kindergarten teacher stating that he was “making slow progress,” and an extensive checklist of learning and behavioral problems frequently observed.

-----referred to a report from Children’s Therapy Clinic (Exhibit C-1), and opined that the comments regarding the Claimant’s fine motor functioning illustrate his limitation in functional academics. The comments note that the Claimant “...has impaired fine motor skills to complete school tasks...” and “...uses an immature grasp...to write.”

- 7) The Claimant's adaptive behavior was measured on both his June 23, 2009, DD-3 (Exhibit D-4) and the updated August 19, 2009, DD-3 (Exhibit D-5) using the Adaptive Behavior Scale – School, 2nd Edition, or ABS-S:2. Both times, the results of the ABS-S:2 were based on the responses of the Claimant's parents. Ms. Workman testified that the only tested domain with an eligible score was independent functioning, which relates to the major life area of self-care awarded by the Department.
- 8) Ms. Workman testified that an additional Evaluation Report (Exhibit D-8), in the form of a DD-3, was completed on November 20, 2009, and submitted to the Department. This report evaluated the Claimant using the Adaptive Behavior Assessment System-II, or ABAS-II. She testified that the ABS-S:2 does not identify some areas as well as the ABAS-II, particularly in the sub-domains of the major life area of capacity for independent living. The report noted that the respondents for this test were the Claimant's teacher and the Claimant's mother. Ms. Workman testified that – within the sub-domains – the mean is ten, the standard deviation is three, and a score must be one to be eligible. The teacher-scaled results only identified an eligible score in the sub-domain of self-care, an area already awarded by the Department. The parent-scaled results gave eligible scores in the areas of self-care, as well as three areas that correspond with sub-domains of the capacity for independent living: community use, school and home living, and health and safety.

Ms. Workman testified that there were discrepancies between the teacher-scaled and parent-scaled results on this instrument. -----testified that she sees the Claimant more than his teacher. The discussion of the instrument in this report stated, in pertinent part:

Scores are derived from ratings of the student's skills by a parent, teacher, or other individual who knows the student well.

Ms. Workman also testified that the ABAS-II results under the area of functional academics were eight for the teacher-scaled score and six for the parent-scaled score – ineligible scores for rating the area of learning as substantially limited for the Claimant.

- 9) The Claimant's June 23, 2009, DD-3 (Exhibit D-4) included narrative discussing the Claimant's social interaction, use of time, and leisure activities, as follows, in pertinent part:

However, ----- is not aware of any environmental dangers [*sic*] therefore; safety is a major issue while he is at home or out in the community. ----- does not understand the appropriate way to interact with peers. ----- will participate in play occasionally but he does not initiate play at any time with peers.

Narrative discussion under the heading 'Affective' described the Claimant's behaviors at home, as follows, in pertinent part:

----- is very routine oriented and he becomes upset if this is changed in any way. His mother specifically reported that he has to listen to certain songs in the car, he only watches certain shows at home during certain

activities (like, while he is eating dinner), he will only drink a certain drink, he will only sit in a certain spot at the dinner table, etc. ----- also displays a sensitivity to broadband noises and he will become agitated when they occur...----- does not like to have his hands dirty and he will become very upset if this occurs. ----- also obsesses about where his parents are in the house when they are home.

Narrative in this document additionally reported that the Claimant assists with household chores. -----testified that the narrative may have been misleading, as the Claimant requires full assistance with any chores. ----- testified that the Claimant can not do chores without constant supervision and prompting. -----, the Claimant's grandfather, testified that the Claimant can not fold laundry, as noted in Exhibit D-4.

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 or more of the major life areas is required. Substantial limits is defined on standardized measures of adaptive behavior scores three standard deviations below the mean or equal to or below the 75th percentile when derived from MR normative populations.
- 2) The Claimant established a qualifying diagnosis and functionality in two major life areas – self-care and mobility – prior to this hearing. Areas asserted on the Claimant's behalf were the capacity for independent living, and learning, or functional academics. Testimony and evidence demonstrated the Claimant's limitations in the area of learning, but test scores failed to reveal substantial limitations in this area. The Claimant's ABAS-II results for functional academics, rated by either his teacher or parent, failed to yield an eligible score in this area. The Department was correct to not identify learning as a major life area with substantially limited functioning for the Claimant.
- 3) Three of the sub-domains of the capacity for independent living – home living, health and safety, and community and leisure use – were rated by the Claimant's teacher and parent on the ABAS-II equivalent areas. These areas yielded eligible scores when rated by the parent, but ineligible scores when rated by the Claimant's teacher. In the same way that the Claimant's teacher could provide a more accurate portrayal of the Claimant's abilities and limitations in the classroom (had there been a relevant discrepancy in the area of learning/functional academics), the Claimant's parent is in a better position to describe the Claimant's abilities and limitations in the home, the community, and with regard to health and safety. If the intent of the instrument is to have the Claimant rated by an "individual that knows the student well," for the purpose of accuracy, the assertion by the Claimant's mother that parent-rated scores are more accurate in these areas is a reasonable one. The parent-rated eligible scores in these areas must be considered more reliable. Narrative documentation underscored the Claimant's limitations from behavioral issues and obsessive tendencies in the home setting, lack of interaction or initiative in the community, and a total lack of safety awareness. With the majority of its sub-domains documented with both narrative and

supporting test scores, the capacity for independent living should have been awarded as a major life area in which the Claimant suffers substantial limitations.

- 4) With the required three of six major life areas met, the Claimant has met the functionality component of medical eligibility for the MR/DD Waiver Program. All other components of medical eligibility were met, according to testimony from the Department. The Department's proposed action to terminate services is incorrect.

IX. DECISION:

It is the decision of the State Hearing Officer to **reverse** 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 March, 2010.

Todd Thornton
State Hearing Officer