



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
9083 Middletown Mall
White Hall, WV 26554

Joe Manchin III
Governor

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

April 14, 2010

-----for-----

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held March 29, 2010. Your hearing request was based on the Department of Health and Human Resources' action to deny your application for benefits and services through the Medicaid MR/DD Waiver Program.

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 and Community-Based 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 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). (West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07).

Information submitted at your hearing fails to demonstrate that you meet the criteria necessary to establish medical eligibility for participation in the MR/DD Waiver Program.

It is the decision of the State Hearing Officer to **uphold** the Department's action in denying your application for benefits and services through the Medicaid, Title XIX, MR/DD Waiver Program.

Sincerely,

Thomas E. Arnett
State Hearing Officer
Member, State Board of Review

Pc: Chairman, Board of Review
Carol Brawley, MR/DD Waiver

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

-----,

Claimant,

vs.

Action Number: 10-BOR-622

**West Virginia Department of
Health and Human Resources,**

Respondent.

DECISION OF THE STATE HEARING OFFICER

I. INTRODUCTION

This is a report of the State Hearing Officer resulting from a fair hearing concluded on April 14, 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 March 29, 2010 on a timely appeal filed January 19, 2010.

All persons giving testimony were placed under oath.

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

-----, Claimant's Mother/Representative

-----, Therapist, [REDACTED]

Carol Brawley, Hearings Representative, MR/DD Waiver Program (Participated telephonically)

Linda Workman, Psychologist Consultant, BMS (Participated telephonically)

Presiding at the hearing was Thomas E. Arnett, 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 action to deny the Claimant's application for benefits and services through the Medicaid MR/DD Waiver Program.

V. APPLICABLE POLICY

West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Department's Exhibits:

- D-1 West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07
- D-2 Notice of Denial/Termination dated June 8, 2009
- D-3 DD-2-A-ICF/MR Level of Care Evaluation dated May 27, 2009
- D-4 DD-3, Psychological Evaluation dated May 14, 2009
- D-5 Individualized Education Program (IEP) dated May 15, 2009
- D-6 Notice of Denial/Termination dated December 12, 2009
- D-7 Vocational Evaluation dated October 21, 2009
- D-8 Neuropsychological Evaluation dated July 8, 2009
- D-9 ██████████ County Schools Occupational Therapy Dismissal (May 15, 2009)
- D-10 ██████████ County Schools Physical Therapy Discharge Summary (May 15, 2009)

Claimant's Exhibits:

- C-1 Claimant's written argument with supporting documentation.

VII. FINDINGS OF FACT:

- 1) In response to an application completed for benefits and services through the Medicaid MR/DD Waiver Program, the Claimant was notified via a Notice of Denial/Termination (D-2) that Waiver services were denied. The June 8, 2009 notice states, in pertinent part:

Your Waiver Application is hereby denied.

Your application was Denied because:

While -----is diagnosed with TBI documentation submitted for review does not support that his condition is severe. The psychologist has not endorsed that ----- requires an ICF/MR level of care.

- 2) Additional information was submitted for review (Exhibits D-7 through D-10) and a second Notice of Denial/Termination notice (D-6) was issued on December 11, 2009. This notice states, in pertinent part:

Your Waiver Application is hereby denied.

Your application was Denied because:

Documentation does not support the need for active treatment.

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, Learning, Self-Direction, Receptive or Expressive Language and Mobility.

It should be noted that this notice indicates the Claimant is demonstrating a substantial adaptive deficit in his Capacity for Independent Living.

- 3) The Department conceded that the Claimant presents an eligible diagnosis of Traumatic Brain Injury (TBI), however, the Department contends that the Claimant's condition is not severe, and therefore, does not require the same level of care and services that is provided in an Intermediate Care Facility for individuals with Mental Retardation (ICF/MR level of care). Specifically, the Department noted that the evaluating psychologist (D-4) indicated the Claimant does not required an ICF/MR level of care further contends that the eligibility criteria in the area of Functionality has not been met – The Claimant is not demonstrating substantial adaptive deficits in three or more of the six major life areas and therefore does not require active treatment. Consistent with Exhibit D-6, the Department stipulated that the Claimant is demonstrating a substantial adaptive deficit in his Capacity for Independent Living. Because the Claimant is not demonstrating substantial adaptive deficits, he is not demonstrating the need for active treatment.
- 4) The Claimant, through his representative, contends that his condition is severe, and in

addition to his Capacity for Independent Living, he is also demonstrating a substantial adaptive deficit in Mobility, Learning, Self-Care and Self-Direction and submitted Exhibit C-1 in support of the Claimant's position. The following includes the evidentiary findings regarding each of the contested areas: It should be noted that an eligible Adaptive Behavior score (ABS) from the ABS-S:2 in Exhibit D-4, using the Non-Mental Retardation (Non-MR) Normative population, is less than one (1) percentile.

Mobility – Mobility was contested as the Claimant has a vision problem in his right eye. However, according to testimony presented by the Department, mobility is assessed based on the individual's ability to ambulate from one location to another. Exhibit D-2, page 3 indicates the Claimant is ambulatory. Page 2 of Exhibit D-4 (Section II.C.1) notes – “----- is ambulatory. He has adequate visual-motor skills.” Exhibit D-10 states that in 2007-2008 the Claimant could ambulate independently in the hallways and classrooms of the school environment but that he would require supervision for ramps, stairs, bleachers, gravel surfaces, and hills. Exhibits D-9 and D-10 were submitted to show that the Claimant was dismissed from Occupational and Physical Therapy by ██████████ County Schools in May 2009. The Claimant received an ABS percentile score of “16” in physical development (D-4) and this score further supports a physical functioning finding that is in excess of the eligibility standard (less than 1 percentile). The evidence reveals that while the Claimant may have to exercise caution when ambulating, he is not demonstrating a substantial adaptive deficit in mobility.

Learning – Exhibit D-4 (page 3, Section III) reveals that the Claimant scored a Verbal IQ of 84 and a Nonverbal IQ of 95. His overall IQ is 88 indicating intellectual functioning within the low-normal range. A Wide Range Achievement Test-4 (WRAT-4), administered on October 21, 2009 during the Vocational Evaluation (D-7) reveals that the Claimant's academic achievement in reading, sentence comprehension, spelling and arithmetic fall into the average range. The evidence is clear, the Claimant is not demonstrating a substantial adaptive deficit in the major life area of learning.

Self-Care – The Claimant's representative indicated that self-care was an issue because the Claimant would refuse to bathe. The Claimant has reportedly been better about bathing lately and he is able to manage most self-care tasks independently, although prompting is sometimes required. The information found in Exhibit D-4 is consistent with testimony provided at the hearing and indicates (Page 2, Section II.C.2) the Claimant can dress, eat, and toilet independently. The Claimant's ABS score in Independent Functioning is in the 9th percentile and his Personal Self-Sufficiency score was in the 97th percentile, which is rated as “Superior.” Exhibit D-8 (Neuropsychological Evaluation) further confirms that the Claimant is not demonstrating a substantial adaptive deficit in self-care as the report states – “Functionally, he is independent with very basic activities of daily living, but he refuses to bath.”

Self-Direction – According to the Claimant's representative, the Claimant is demonstrating a

substantial adaptive deficit in self-direction as demonstrated by his impulsive behavioral issues. The Department's representative testified that an assessment of self-direction includes the individual's ability to choose an active lifestyle as opposed to a passive lifestyle. Recognizing that there are choices and choosing to participate in social activities or initiating entertainment is an example of self-direction skills. This does not mean that the individual always chooses preferred options or exercises the best judgment, but the choices are self-initiated/self-directed without being prompted. The psychologist indicated in Exhibit D-4 that the Claimant is demonstrating a substantial adaptive deficit in this area and indicates on page 6 (Section IV.C) that the Claimant could benefit from effective counseling and behavioral management services to address his bullying behaviors. The Claimant has had an involuntary commitment hearing due to getting angry and hitting his disabled grandmother and it is documented that he bullies his mother and younger brother. In section II.C.5 & 6 of Exhibit D-4, the evaluating psychologist documented that the Claimant has a lot of anger due to not having a social life and having to spend a lot of time at home. The Claimant likes to spend his time watching TV, movies, and playing video games. He listens to heavy metal music and he likes to go out to eat. The Claimant's self-direction ABS score is one (1) percentile, and while that warrants a rating of "very poor," this score does not meet eligibility requirements. A review of the evidence reveals that the Claimant knows his likes and dislikes - he engages in entertainment activities and expresses his frustration when dissatisfied. The evidence fails to demonstrate a substantial adaptive deficit in self-direction.

- 5) West Virginia Medicaid Regulations, Chapter 513, – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07, includes the following pertinent medical eligibility criteria:

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:
 - o 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,
 - o A need for the ----- 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) 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 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. 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 [emphasis added].

- 2) The Claimant presents a program qualifying diagnosis of Traumatic Brain Injury (TBI), however, the clinical evidence fails to demonstrate that he has substantial adaptive deficits in three (3) or more of the major life areas. While the Department stipulated that the Claimant demonstrates a substantial adaptive deficit in his Capacity for Independent Living, the standardized measures of adaptive behavior, as well as the clinical and narrative documentation submitted for review, fails to confirm substantial adaptive deficits in the contested areas (Mobility, Learning, Self-Care and Self-Direction). In addition, the evaluating psychologist indicated the Claimant does not require an ICF/MR level of care.
- 3) Based on the evidence presented at the hearing, the Department was correct in denying the Claimant's application for participation in the Medicaid MR/DD Waiver Program.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the action of the Department in denying 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 April, 2010

**Thomas E. Arnett
State Hearing Officer**

