



State of West Virginia  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
Office of Inspector General  
Board of Review  
4190 Washington Street, West  
Charleston, WV 25313

Joe Manchin III  
Governor

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

October 5, 2010

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RE: -----MR/DD Hearing

Dear -----:

Attached is a copy of the findings of fact and conclusions of law regarding the hearing held on this matter on September 20, 2010. The hearing request was based on the Department of Health and Human Resources' action to deny his 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 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. 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 the hearing failed to demonstrate that the Claimant meets 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,

Cheryl Henson  
State Hearing Officer

Member, State Board of Review

cc: Chairman, Board of Review / Carol Brawley, MR/DD Waiver / Michael Bevers, Asst. Atty. General

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

-----,

**Claimant,**

vs.

**Action Number: 10-BOR-645**

**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 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 September 20, 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's Representative  
-----, Claimant's witness

Michael Bevers, Asst. Atty. General, Department's Representative  
Linda Workman, Psychologist Consultant, Department's witness  
Patricia Nisbet, Program Manager, MR/DD Program, Department's witness

Presiding at the hearing was Cheryl Henson, 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**

#### **Joint Exhibits (Both Department and Claimant):**

- J-1 West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07
- J-2 DD-2A form ICF Level of Care Evaluation dated October 20, 2009
- J-3 DD-3 Initial Psychological Evaluation completed October 30, 2009
- J-4 Notification letter dated December 7, 2009
- J-5 [REDACTED] Speech/Language Update Report dated August 26, 2010
- J-6 Report from Evaluator [REDACTED] MA
- J-7 [REDACTED] Psychological Evaluation dated December 3, 2009

### **VII. FINDINGS OF FACT:**

- 1) In response to an application submitted for benefits and services through the Medicaid MR/DD Waiver Program, the Claimant, a four (4) year old child, and his guardian were

notified via a Notice of Denial/Termination (J-4) dated December 7, 2009 that Waiver services were denied. The notice states, in pertinent part:

Your Waiver Application is hereby denied.

Your application was Denied because:

Documentation submitted for review does not support the presence of an eligible diagnosis for the Title XIX MR/DD Waiver program of mental retardation or a related condition.

Reviewer(s) relied on the following facts:  
10/20/09 DD-2A, 10/30/09 DD-3

- 2) The West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations, and Exclusions for MR/DD Waiver Services Policy Manual (J-1) states in pertinent part:

#### MEDICAL ELIGIBILITY

##### Medical Eligibility Criteria

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.

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 [sic] least three (3) substantial deficits out of five of the major life areas

- 3) The Department's denial was based on its determination that the Claimant does not have a qualifying diagnosis. The parties agree that the Claimant does not have a diagnosis of mental retardation; therefore according to policy, the submitted evaluations must show that the Claimant has a related 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.
- 4) There were numerous medical diagnoses listed for the Claimant on the submitted evaluations, and of these, the Claimant purports that his diagnosis of Klinefelter's syndrome meets the criteria to be considered a qualifying diagnosis. The Department contends Klinefelter's does not meet the criteria. The scope of this hearing will deal with whether Klinefelter's syndrome meets the criteria to be considered a "related condition" which results in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons."
- 5) The Department's denial notice did not address the second part of the eligibility process which deals with whether the Claimant has substantial deficits in three (3) out of five (5) of the major life areas; therefore, this area will not be considered or addressed.
- 6) The Department's witness, Linda Workman, functions as a psychological consultant for the Department. She testified that she has been a licensed psychologist since 1981, and is licensed in the State of West Virginia. She stated she has a Bachelor's degree and Master's degree in psychology from Marshall University. She testified that she is very familiar with the MR/DD Waiver policy, and has been conducting eligibility determination evaluations for the Department regarding this program since 2001. She added that she has, throughout that course of time, reviewed thousands of applications for the Title XIX MR/DD Waiver program.

- 7) The evaluations submitted by the Claimant at application listed several diagnoses. Ms. Workman determined that only one of the diagnoses, Klinefelter's syndrome, was a potentially related condition. She testified that she is somewhat familiar with this diagnosis, and that she conducted additional research in order to determine whether individuals with this disorder typically also manifest mental retardation. She stated that she reviewed her research documentation several times in order to determine if it supports that this chromosomal disorder would cause that sort of mental functioning, and was unable to find that the disorder was closely related to mental retardation. Ms. Workman testified that she also reviewed additional documents recently (J-5, J-6, and J-7) submitted by the Claimant which did not change her determination. None of these documents offer any new information regarding potential qualifying diagnoses.
- 8) On cross examination, Ms. Workman testified that the packet submitted for review of eligibility did demonstrate that the Claimant was substantially delayed in some areas.
- 9) The Claimant's witness, ----, testified that he is the Claimant's pediatrician. He has been a physician outside of residency since the year 2000. He attended undergraduate and Medical School at Marshall University, completing his residency at the University of Virginia. Dr. [REDACTED] testified that he has seen five (5) cases of Klinefelter's syndrome throughout his medical practice.

Dr. [REDACTED] provided testimony indicating he believes the Department was wrong in the decision not to classify Klinefelter's as an "eligible diagnosis". He testified that the condition is a "real disease" which affects every cell of the body, and that it almost universally causes some neuro-cognitive defects. He added that some individuals with Klinefelter's also have mental retardation. He testified that in the Claimant's case the disorder has resulted in impairments in the areas of receptive and expressive language as well as social adaptation and that it affects him every day in every aspect of his life. He testified that, although he did not believe the Claimant should be institutionalized, he did believe he "meets immediate care facility management" and that if he did not receive "these resources" he would have long term problems.

Dr. [REDACTED] did not provide definitive or science-based testimony addressing the question of whether Klinefelter's results in either the impairment of general intellectual functioning similar to that of mentally retarded persons or adaptive behavior similar to that of mentally retarded persons.

## **VIII. CONCLUSIONS OF LAW:**

- 1) According to policy, the evaluations submitted at application must demonstrate that an applicant has a diagnosis of mental retardation and/or a related developmental condition which constitutes a severe and chronic disability with concurrent substantial deficits. This includes 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.

- 2) The Claimant did not have a diagnosis of mental retardation.
- 3) The Department's psychologist, in her research, was unable to find any evidence to support that Klinefelter's is closely related to mental retardation.
- 4) Testimony from the Claimant's treating physician also failed to establish that the condition is related to mental retardation.
- 5) 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 5<sup>th</sup> Day of October, 2010.**

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**Cheryl Henson  
State Hearing Officer**