



State of West Virginia  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
Office of Inspector General  
Board of Review  
P.O. Box 2590  
Fairmont, WV 26555-2590

Joe Manchin III  
Governor

Martha Yeager Walker  
Secretary

July 14, 2008

\_\_\_\_\_ and \_\_\_\_\_ for

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dear Mr. \_\_\_\_\_:

Attached is a copy of the findings of fact and conclusions of law on your hearing held June 30, 2008. Your hearing request was based on the Department of Health and Human Resources' action to deny your application for benefits and services through the 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 Title XIX MR/DD Waiver Home & Community-Based Policy, Medicaid Chapter 500, Volume 13 effective 11/1/07).

Information submitted at your hearing demonstrates 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 **reverse** 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

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

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**Claimant,**

**vs.**

**Action Number: 08-BOR-1258**

**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 July 14, 2008 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 June 30, 2008 on a timely appeal filed April 10, 2008.

All persons giving testimony were placed under oath.

**II. PROGRAM PURPOSE:**

The program entitled MR/DD Home and Community-Based Waiver is set up cooperatively between the Federal and State Government and administered by the West Virginia Department of Health and 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/representative

\_\_\_\_\_, Claimant's mother/representative

Linda Workman, Psychologist Consultant, BMS (Participated telephonically)

Mekell Golden, Hearings Coordinator, MR/DD Program (Participated telephonically)

Presiding at the hearing was Thomas E. Arnett, State Hearing Officer and a member of the State Board of Review.

### **IV. QUESTION(S) TO BE DECIDED**

The question to be decided is whether the Department was correct in its action to deny the Claimant's application for benefits and services through the MR/DD Waiver Program.

### **V. APPLICABLE POLICY**

West Virginia Medicaid Regulations, Chapter 500, Volume 13 – 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 500, Volume 13 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07
- D-2 Notice of Denial/Termination dated 3/7/08
- D-3 ICF/MR Level of Care Evaluation (DD-2-A) dated 2/19/08
- D-4 Initial Comprehensive Psychological Evaluation dated 2/21/08

#### **Claimant's Exhibits:**

- C-1 Statement of Claimant's medical condition – signed by the Claimant's physician
- C-2 Individualized Education Program (IEP) dated 5/29/08

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

- 1) In response to an application for benefits and services through the Medicaid MR/DD Waiver Program, the Claimant was notified via a Notice of Denial/Termination (D-2) dated March 7, 2008 that Waiver services have been denied. This notice states, 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 and Capacity for Independent Living.

It should be noted that *Self-Care* and *Mobility* have been identified as substantial adaptive deficits.

- 2) The Claimant presents a program qualifying diagnosis of Cerebral Palsy, however, the Department contends that his condition, although chronic, is not severe as the documentation submitted for review identifies only two (2) substantial adaptive deficits (*Self-Care* and *Mobility*) in the major life areas. In order to establish medical eligibility, an individual must demonstrate substantial adaptive deficits (at the time of application) in three (3) or more of the major life areas.
- 3) The Claimant's representatives contend that the Claimant should have been determined medically eligible to participate in the MR/DD Waiver Program as he is not only substantially deficient in *Self-care* and *Mobility*, but also in his *Capacity for independent living*.
- 4) The Department's position is that it is difficult to determine and/or predict a younger individual's *Capacity for independent living*. Eligibility determinations are based on his capacity at the time of application – not what it might be like in the future. The Claimant was 7 years, 3 months old when he was evaluated (Exhibit D-4) and according to the Department, children this age rely upon their caregivers for most of the components that are reviewed in this area (home living, social skills, employment, health and safety, community and leisure activities). Accordingly, the Department contends that the Claimant, when compared to same-age peers, is not demonstrating a substantial adaptive deficit in his *Capacity for independent living*. The Department cited the findings in Exhibit D-4, page 3, Section III.B.2 (Results of ABS-S:2, Non MR Norms) specific to the Claimant's *Capacity for independent living* and indicated a score of less than 1 percentile rank is an eligible score. The following scores were noted: Pre/Vocational Activity (employment) is a 9<sup>th</sup> percentile, Responsibility – 9<sup>th</sup> percentile, and Socialization is at the 2<sup>nd</sup> percentile.

- 5) Exhibit C-1 was submitted as a general statement by the Claimant's parents and was "signed off" on and/or agreed upon by the Claimant's neurosurgeon and pediatrician. This document was not submitted as part of the application packet but was accepted into evidence without objection from the Department. This document states, in pertinent part – "In summary \_\_\_\_\_ [sic] capacity for Independent living is obtained through the dilligance [sic] of his parents and not his abilitys [sic]."
- 6) The evidence provides the following information when reviewing the Claimant's *Capacity for independent living*:

Home living – Although there is limited information provided in the application packet regarding chores and household responsibilities, testimony received at the hearing reveals that the Claimant is completely dependent upon caregivers for transferring and ambulation. He is unable to reposition himself while in the seated position due to poor trunk, head and neck control. The Claimant's physical limitations render him unable to participate in household responsibilities.

Social skills – While the Claimant is dependent upon caregivers to place him in social settings (like most 7 year olds), Exhibit D-4 fails to identify socialization deficits and Exhibit C-2 states on page 5 of 19 that the Claimant is a sociable first grader. He gets along with the other students as well as his teachers. Not only does \_\_\_\_\_ get along with his peers but they respond very well to him. He understands the correct way to act in different social situations. The evidence demonstrates that the Claimant's social skills are not substantially deficient.

Employment – In addition to transferring and ambulation, Exhibit C-2, page 7 of 19, indicates that the Claimant presents with poor trunk control which has impacted his ability to maintain stability at his shoulder, elbow and wrist joints. This has impacted his ability to fully gain the dynamic finger movements needed for writing. While it is difficult to assess a 7-year-old for employment potential, based on the Claimant's current physical limitations, employment opportunities will clearly be limited.

Health and safety – The Claimant is completely dependent upon his parents for matters relating to health and safety. This, however, is not substantially different from individuals within his age group.

Community and leisure activities – The Claimant engages in leisure activities and has community involvement with the assistance of his parents, however, his physical limitations substantially decrease the level of participation. ABS-S:2 Factor Scores (page 4 of D-4) indicate a percentile rank of 1 in personal self-sufficiency and community self-sufficiency, which further demonstrate a weakness in this area.

When considering the sum of these components, the preponderance of evidence indicates that the Claimant is demonstrating a substantial adaptive deficit in his *Capacity for independent living*.

- 7) West Virginia Medicaid Regulations, Chapter 500, Volume 13 – 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 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) 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. Additionally, policy states that the individual must require and benefit from continuous active treatment and need the same level of care and services that is provided in an ICF/MR institutional setting.
- 2) The Claimant was denied on the basis that he was substantially deficient in only two (2) of the major life areas – *Self-care* and *Mobility*.
- 3) Evidence submitted at the hearing reveals that the Claimant is demonstrating a substantial adaptive deficit in his *Capacity for independent living*.
- 4) Whereas the evidence reveals that the Claimant is demonstrating substantial adaptive deficits in three (3) of the major life areas, medical eligibility for participation in the Medicaid MR/DD Waiver Program is therefore established.

### **IX. DECISION:**

It is the decision of the State Hearing Officer to **reverse** the Department's action 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 14<sup>th</sup> Day of July, 2008**

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**Thomas E. Arnett**  
**State Hearing Officer**