



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

February 5, 2008

\_\_\_\_\_ for  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dear Mr. & Mrs. \_\_\_\_\_:

Attached is a copy of the findings of fact and conclusions of law on your hearing held January 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 Manual, Chapter 502.1).

The information submitted at your hearing confirms that your son 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 **reverse** the Department's decision to deny 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

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

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**Claimant,**

**vs.**

**Action Number: 07-BOR-1585**

**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 February 5, 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 originally scheduled to convene on September 24, 2007 but was rescheduled and convened on January 30, 2008 on a timely appeal filed June 14, 2007.

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 / Co-Representative  
\_\_\_\_\_, Claimant's Grandfather  
\_\_\_\_\_, Claimant's Aunt  
Steve Brady, Operations Coordinator, MR/DD Waiver Program  
Linda Workman, Psychologist Consultant, BMS  
Kristi Logan, State Hearing Officer, (Observing)

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**

Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500-8.

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

- D-1 Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500-8.
- D-2 Notice of Denial / Termination dated 5/23/07
- D-3 DD-2A, ICF/MR Level of Care Evaluation dated 2/20/07
- D-4 DD-3, Comprehensive Psychological Evaluation, dated 3/29/07
- D-5 Individualized Education Program (IEP) dated 5/26/06

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

- 1) On or about May 23, 2007, the Claimant was notified via a Notice of Denial / Termination (Exhibit D-2) that his application for participation in the MR/DD Waiver Program was denied. This 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 substantial adaptive deficits as defined for Title XIX MR/DD Waiver eligibility in three or more of the six major life areas.

- 2) As a matter of record, the Department stipulated that the Claimant presents a program qualifying diagnosis of Cerebral Palsy, and that his condition, manifested prior to the age of 22, is likely to continue indefinitely. However, the Department contends that the evidence fails to demonstrate substantial adaptive deficits in three (3) of the six (6) major life areas as required by policy.
- 3) The Department acknowledged that while the clinical evidence reviewed for eligibility identified substantial adaptive deficits in two (2) of the six (6) major life areas (Mobility and Self-Care), a third deficit could not be confirmed. As a result, the Department indicated that eligibility for participation in the MR/DD Waiver Program could not be established.
- 4) The Claimant's representatives contend that the Claimant demonstrates substantial adaptive deficits in Self-Direction, Receptive or Expressive Language (communication) and Capacity for Independent Living.
- 5) The Claimant's Self-Direction skills are clearly delayed when compared to same-age peers. The clinical evidence found in Exhibit D-4 reveals that an AMAR Adaptive Behavior Scale-School, Second Edition, reveals a score of one (1) percentile and a standard score of three (3). According to the MR/DD Waiver eligibility criteria, a standard score of one (1) (and a percentile score of less than 1%) indicate a substantial adaptive deficit. The narrative information in Exhibit D-4 further demonstrates delays in Self-Direction, however, there is also information to indicate developed Self-Direction skills (see page 3 of Exhibit D-4) – "When he is angry he will throw items, bang items, scream and lung [sic] himself backwards. He is routine oriented and he becomes upset if this is changed in any way. His mother 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 from a certain cup, etc. [REDACTED] also displays sensitivity to broad band noises and he will become agitated when they occur." It is also noted that the Claimant enjoys being with familiar people and he is also a picky eater. Testimony received at the hearing reveals that the Claimant is typically given several choices for activities and that he is permitted to choose the activity or T.V. show he wants to watch. While the Claimant's Self-Direction skills are clearly delayed, the Claimant demonstrates the ability to express his likes and dislikes and chooses to manipulate his environment and initiate some activities. Based on the evidence, the Claimant is not demonstrating a substantial adaptive deficit in Self-Direction.
- 6) The Vineland-II Adaptive Behavior Scales were administered during the psychological evaluation (Page 4 of Exhibit D-4) and the Claimant's communication skills were assessed resulting in a Standard Score of 69. An eligible Standard Score in this area (three standard deviations below the mean) is 55. While the Claimant's Standard Score indicates delays in communication, it fails to demonstrate a substantial adaptive deficit. Furthermore, narrative

information included in the Psychological Evaluation (Exhibit D-4) and the IEP (Exhibit D-5) are consistent with the Claimant's Vineland assessment results. It was noted that articulation and drooling are often a barrier to effective communication. Although communication skills are clearly delayed, there is insufficient evidence to demonstrate a substantial adaptive deficit in this area.

- 7) The Claimant's Capacity for Independent Living is clearly limited. The Department noted that same-age children are not expected to have Capacity for Independent Living skills (home living, social skills, employment, health and safety, community and leisure activities) and for this reason it is difficult to determine a substantial deficit in this area.

According to testimony provided by the Department, home living includes the individual's ability to complete domestic tasks/chores. The evidence indicates that the Claimant is ambulatory only with the assistance of a wheelchair that must be operated for him. His fine and gross motor skills are significantly delayed. He is unable to sit up, pull to stand, stand, four-point crawl, walk, run, climb, maneuver stairs or ride a tricycle. Page 3 of Exhibit D-4 further states that the Claimant is also physically unable to complete any household chores at this time.

With regard to social skills, the Claimant reportedly enjoys being with familiar people, however, he does not understand the appropriate way to interact with peers. He is also not aware of any environmental dangers and safety is a major issue while he is at home or out in the community. Testimony presented at the hearing indicates that the Claimant requires supervision and physical assistance and/or active treatment to complete each and every task 24 hours a day. He cannot participate in any community or leisure activities without his caregiver's assistance. While children the Claimant's age (3 years & 9 months at the time of the psychological evaluation) are not expected to possess some of these skills, when these areas are considered in conjunction with the challenges present in Receptive and Expressive Language and Self-Direction, as well as the noted substantial adaptive deficits in Self-Care and Mobility, it is both reasonable and prudent to conclude the Claimant's Capacity for Independent Living is substantially deficient. Based on the evidence, the Claimant is demonstrating a substantial adaptive deficit in his Capacity for Independent Living.

- 8) The ICF/MR Level of Care Evaluation (Exhibit D-3) and the Comprehensive Psychological Evaluation (Exhibit D-4) certify/recommend an ICF/MR level of care for the Claimant.
- 9) Eligibility Criteria for the MR/DD Waiver Program are outlined in Chapter 500 of the Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual (Effective 7/1/05).

The level of care criteria for medical eligibility is outlined in this chapter and reads as follows:

## **Diagnosis**

- Must have a diagnosis of mental retardation, which must be severe and/or chronic, in conjunction with substantial deficits (substantial limitations associated with the presence of mental retardation), and or
  - Must have a related developmental condition, which constitutes a severe, 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
  - Autism
  - Traumatic brain injury
  - Cerebral Palsy
  - Spina Bifida
  - Tuberous Sclerosis
- Additionally, 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

## **Functionality**

- Substantially limited functioning in three or more of the following major life areas: (Substantial limits is defined on standardized measures of adaptive behavior scores three (3) standard deviations below the mean or less than 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 by the documentation submitted for review, i.e., the IEP, Occupational Therapy evaluation, narrative descriptions, etc.)
- 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 use, leisure).

### **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 and increase independence in activities daily living.
  - A need for the same level of care and services that is provided in an ICF/MR institutional setting.

## **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 as three (3) standard deviations below the mean or less than 1 percentile when derived from non-MR normative populations. The presence of substantial deficits must be supported by the documentation submitted for review, i.e., the IEP, Occupational Therapy evaluation, narrative descriptions, etc.). The documentation must demonstrate that the individual needs the same level of care and services that is provided in an ICF/MR institutional setting.
- 2) The Department acknowledged that the Claimant presents a program qualifying diagnosis,

and that his condition, manifested prior to age 22, is chronic. However, the Department indicated that the evidence demonstrates substantial adaptive deficits in only two (2) of the six (6) major life areas - Mobility and Self-Care.

- 3) The evidence submitted at the hearing supports the finding of a third (3<sup>rd</sup>) substantial adaptive deficit in the Claimant's Capacity for Independent Living.
- 4) Whereas the evidence demonstrates substantial adaptive deficits in three (3) of the six (6) major life areas, and the need for an ICF/MR Level of Care, eligibility for participation in the MR/DD Waiver Program is therefore established.

#### **IX. DECISION:**

It is the decision of the State Hearing Officer to **reverse** the Department's action 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 February, 2008**

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