



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
4190 W Washington St.
Charleston, WV 25313
304-746-2360 ext 2227

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

December 22, 2008

For _____

Dear Mr. _____”

Attached is a copy of the findings of fact and conclusions of law on your hearing held August 29 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 500-8).

The information submitted at your hearing fails to demonstrate that you meet the eligibility criteria necessary 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,

Jennifer E Butcher
State Hearing Officer
Member, State Board of Review

Cc: Chairman, Board of Review
Steve Brady, MR/DD Waiver Program
Rick Workman, Psychologist Consultant for DHHR

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

_____ ,

Claimant,

vs.

Action Number: 08-BOR1606

**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 December 22, 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 scheduled to convene on August 29, 2008 on a timely appeal filed on June 4, 2008.

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 mother
Steve Brady, MR/DD Waiver Program
Rick Workman, Psychologist Consultant, BMS

Presiding at the hearing was Jennifer Butcher, 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 or not 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

Department's Exhibits:

DHS-1	West Virginia MR/DD Waiver Service Manual Chapter 500
DHS-2	Denial letter with request for a Birth to Three Assessment dated April 2, 2008
DHS-3	DD-2A ICF/MR Level of Care Evaluation, by Dr. [REDACTED] dated January 9, 2008
DHS-4	DD-3 Comprehensive Psychological Evaluation dated January 31, 2008

VII. FINDINGS OF FACT:

- 1) The Claimant is a 5 month old child who has applied via his mother for the Title XIX MR/DD Waiver Program in 2007, but did not meet three or more of the six major life areas identified for Waiver eligibility.
- 2) On or about January 8, 2008 the Claimant was notified via a Notice of Denial (Exhibit D-2) that his application for the Medicaid MR/DD Waiver Program was denied. This notice states:
Your application was denied because:
The application packet lacked the Birth to Three Assessments.
Documentation submitted does not support the presence of substantial adaptive deficits in three or more of the six major life areas indicated 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
- 3) The Birth to Three Assessment was later received and evaluated by the Department.
- 4) The Department was unable to determine a diagnosis from the DD-2A dated January 9, 2007, (Exhibit D-3). According to the Diagnostic Section of the report on AXIS I (List all Emotional and/or psychiatric conditions), Claimant was noted as having none. AXIS II (List all Cognitive, Developmental conditions and personality disorders), he was noted as having Global Developmental Delay. The Department Psychologist, Rick Workman testified the information in the DD-3 (Exhibit D-4) document confirmed a diagnosis of Fukuyama Congenital Muscular Dystrophy (herein after FCMD) and in other information submitted for review, the diagnosis was labeled as severe FCMD as

associated with mental retardation and substantial delay or mental deficiency.

- 5) Mr. Workman referred to Exhibit-D4 (DD-3 Psychological Evaluation) dated January 31, 2008 indicating the Claimant is “beginning to hold his head erect for approximately 45 seconds. He attempts to turn his head to both sides and nod up and down.... He does not appear to have any difficulties with auditory, tactile, or olfactory functioning.”
- 6) Mr. Workman indicated the instrument used to evaluate _____’s Intellectual /Cognitive Level was the Developmental Assessment of Young Children (herein after DAYC). These test scores must be three (3) standard deviations below the mean; or a score of fifty-five (55) or lower to be considered. _____’s standard scores were above fifty-five (55).

<u>Subtest</u>	<u>Standard Score</u>	<u>Age Equivalent</u>
Cognitive	94	4 months
Communication	93	3 months
Social-Emotional	93	4 months
Physical Development	74	Birth
Adaptive Behavior	80	1 month
General Development Quotient	84	

- 7) According to Exhibit D-4, the “DAYC is a battery of five (5) subtest, which is designed for use with children from birth to age five (5) years, eleven (11) month. _____ obtained scores in the average range of functioning on all subtest, with the exception of Adaptive Behavior (low average) and Physical Development (borderline).”
- 8) The Vineland Adaptive Behavior test was also administrated to the Claimant to evaluate his adaptive behavior skills and are as follows:

Communication	99	Adequate
Daily Living Skills	103	Adequate
Socialization Skills	95	Adequate
Motor Skills	79	Moderately-Low
Adaptive Behavior Composite 91		Adequate

According to the report, _____ obtained an Adaptive Behavior Composite score of 91, which would place him within the average of functioning. All the standard scores and ratings are based on comparisons with the national standardization sample of individuals of similar ages.

- 9) Mr. Workman stated, “even though _____ does have a diagnosis, the overall evaluation of the Vineland Adaptive Behavior test that was administered to him at the age of five months does not have substantial delays that would allow the Department to approve him for the program.”
- 10) The Psychological Evaluation (Exhibit D-4) indicated the “delays have not shown significant impact on his development at this time due to his young age; however, as he ages, there will be a more significant gap shown in his level of functioning as compared with where he should be developmentally, especially in the areas of mobility, gross motor skills, fine motor skills, and independent functioning.”
- 11) _____ believed a deficit should have been awarded in the area of Mobility. She testified her son

cannot hold his head up, stand without assistance of others, or push himself up with his arms. The Department testified that it is hard to establish a substantial delay at the age of five (5) months.

- 12) 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 (3) or more of the major life areas is required. Substantial limits is defined on standardized measures of adaptive behavior scores three (3) standard deviations below the mean or equal to or below the seventy fifth (75th) percentile when derived from MR normative populations.
- 2) The evidence submitted in this case demonstrates Claimant has an eligible diagnosis of Fukuyama Congenital Muscular Dystrophy. The diagnostic criterion was provided in the information from the Birth to Three and the Comprehensive Psychological Evaluation.
- 3) None of the six deficits in the major life areas have been substantiated by documentation presented for evaluation of the Title XIX MR/DD Waiver Program. As a result of the child being five months old, it was difficult to establish substantial delays in three out of the six major life areas. Therefore, eligibility for the MR/DD Waiver Program cannot be established.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** 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 22 day of December, 2008

**Jennifer Butcher
State Hearing Officer**

Cc: Erika Young, Chairman BOR
Steve Brady, BMS
Rick Workman, Psychologist Consultant for DHHR