



State of West Virginia  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
Office of Inspector General  
Board of Review  
2699 Park Avenue, Suite 100  
Huntington, WV 25704

Joe Manchin III  
Governor

Martha Yeager Walker  
Secretary

August 14, 2008

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

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

Attached is a copy of the findings of fact and conclusions of law on your hearing held July 14, 2008. Your hearing request was based on the Department of Health and Human Resources' proposed termination of Title XIX MR/DD Waiver services.

In arriving at a decision, the State Hearings 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, in pertinent part, "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." (West Virginia Title XIX MR/DD Waiver Home & Community-Based Policy, Medicaid Chapter 500, Volume 13 effective 7/1/06).

Information submitted at your hearing did not support a finding of medical eligibility for participation in the MR/DD Waiver Program.

It is the decision of the State Hearings Officer to **uphold** the action of the Department in terminating Title XIX MR/DD Waiver services.

Sincerely,

Todd Thornton  
State Hearings Officer  
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review  
Mekell Golden, Department Representative

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

\_\_\_\_\_,

**Claimant,**

**v.**

**Action Number: 07-BOR-1759**

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

**Respondent.**

**DECISION OF STATE HEARING OFFICER**

**I. INTRODUCTION:**

This is a report of the State Hearing Officer resulting from a fair hearing concluded on August 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 July 14, 2008 on a timely appeal, filed July 25, 2007.

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 mother  
\_\_\_\_\_, Claimant's father  
\_\_\_\_\_, Claimant\*  
\_\_\_\_\_, Claimant's grandmother and Respite Worker\*  
\_\_\_\_\_, \_\_\_\_\_  
\_\_\_\_\_, Therapeutic Consultant, \_\_\_\_\_  
Mekell Golden, Hearings Coordinator, BBHMF  
Linda Workman, Psychologist Consultant, BMS

\* indicates that the individual was not present for the entire hearing

Presiding at the Hearing was Todd Thornton, State Hearing Officer and a member of the State Board of Review.

#### **IV. QUESTIONS TO BE DECIDED:**

The question(s) to be decided is whether or not the Department was correct in its decision that medical eligibility was not met for Title XIX 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 7/1/06.

#### **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 7/1/06
- D-2 Notice of Denial dated July 3, 2007
- D-3 DD-2-A ICF/MR Level of Care Evaluation dated February 14, 2007
- D-4 DD-3 Psychological Evaluation dated September 19, 2006

##### **Claimants' Exhibits:**

None

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

- 1) The Claimant, who is a 7 year old child, was a participant in the MR/DD Waiver Program. An annual reevaluation was completed for the Claimant on July 3, 2007. Notification was sent (Exhibit D-2) to the Claimant, advising that waiver services were to be terminated. The notice explains the reason for termination of services as:

“Documentation submitted for recertification 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) Testimony from the Department listed the six major life areas as *Self Care*, *Receptive or expressive language* (communication), *Learning* (functional academics), *Mobility*, *Self-Direction*, and *Capacity for independent living* (home living, social skills, employment, health and safety, community and leisure activities).
- 3) Further testimony from the Department explained that the Claimant only met the requirement of a substantial adaptive deficit in one (1) of the six (6) major life areas: *Self Care*.
- 4) The DD-3 Psychological Evaluation (Exhibit D-4) shows the results of the AAMR Adaptive Behavior Scale School Edition (ABS:S-2) administered to the Claimant to assess his relative abilities. Testimony from the Psychologist Consultant for BMS revealed that a non MR normative population was used, and that only one score – for Independent Functioning – met the criteria. The Independent Functioning score corresponds with major life area of *Self Care*. This area was awarded, but was the only one (1) of six (6) areas to meet the requirements.
- 5) The West Virginia Medicaid Regulations, Chapter 500, Volume 13 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 7/1/06, 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.

- 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, mental retardation and/or related conditions and associated concurrent adaptive deficits:

- Were manifested prior to the age of 22, and
- Are likely to continue indefinitely.
- Must have the presence of a least three (3) substantial deficits as that term is defined in Title 42, Chapter IV, Part 435.1009 of the Code of Federal Regulations (CFR). 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 with no indication of a previous co-occurring history of mental retardation or developmental disability prior to age 22 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).

### 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).

Refer to Code of Federal Regulation (CFR): 42 CFR 435.1009.

### 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:

- 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,
- A need for the same level of care and services that is provided in an ICF/MR institutional setting.

The applicant or legal representative must 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 (Informed Consent, DD-7).

- 6) The test scores for all areas of the AAMR Adaptive Behavior Scale School Edition (ABS:S-2) from Exhibit 2 are as follows:

**ABS-S:2 Part One Domain Scores:**

	Raw Score	%ile Rank	Std Score
Independent Functioning	32	<1	1
Physical Development	13	37	9
Economic Activity	1	16	7
Language Development	30	37	9
Numbers and Time	4	37	9
Pre/Vocational Activity	5	37	9
Self-Direction	10	5	5
Responsibility	2	9	6
Socialization	15	5	5

**ABS-S:2 Part Two Domain Scores:**

	Raw Score	%ile Rank	Std Score
Social Behavior	17	37	9
Conformity	4	50	10
Trustworthiness	2	50	10
Ster. And Hyper. Behavior	10	16	7
Self-Abusive Behavior	14	1	3
Social Engagement	7	16	7
Dist. Interp. Behavior	19	9	6

- 7) Testimony from the Claimant's parents, as well as from the Claimant's Therapeutic Consultant, asserted that the Claimant had substantial limitations in the major life areas of *Receptive or expressive language, Learning, Mobility, and Capacity for independent living*. They offered extensive anecdotal evidence to support their assertion.

## VIII. CONCLUSIONS OF LAW:

- 1) Medical eligibility for the MR/DD Waiver Program requires, in the area of functionality, that there must be substantial limitations in at least three (3) of the six (6)

major life areas defined by policy. The presence of substantial limitations must be supported by both the test scores and the narratives. Test scores, when compared with a non MR normative population, must be three (3) standard deviations below the mean, or less than one (1) percentile.

- 2) Test scores from the AAMR Adaptive Behavior Scale School Edition (ABS:S-2) show only one area with a score less than one (1) percentile when compared with non MR normative populations. This area - Independent Functioning - corresponds with the major life area of *Self Care*, which was awarded by the Department.
- 3) While testimony and narratives may indicate the presence of substantial limitations in other major life areas, policy clearly dictates that both test scores and narratives are required to support this. Without test scores to support the presence of substantial limitations, functionality was not met, and the Department was correct to deny medical eligibility for the program.

**IX. DECISION:**

It is the decision of the State Hearings Officer to **uphold** the decision of the Department that documentation submitted at the July 3, 2007 reevaluation did not support a finding of medical eligibility for MR/DD Waiver services.

**X. RIGHT OF APPEAL:**

See Attachment

**XI. ATTACHMENTS:**

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

**ENTERED this \_\_\_\_ Day of August, 2008.**

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**Todd Thornton**  
**State Hearings Officer**