



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

December 18, 2008

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

Dear \_\_\_\_\_:

Attached is a copy of the findings of fact and conclusions of law on your hearing held December 10, 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 Medicaid Regulations, Chapter 513 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07).

Information submitted at your hearing fails to demonstrate 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 **uphold** 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

Pc: Chairman, Board of Review  
Steve Brady, MR/DD Waiver

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

\_\_\_\_\_

**Claimant,**

**vs.**

**Action Number: 08-BOR-2107**

**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 18, 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 December 10, 2008 on a timely appeal filed September 16, 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 mother/representative  
West Virginia State Senator \_\_\_\_\_, friend of the family  
Steve Brady, Program Coordinator, MR/DD Waiver, BMS (Participated telephonically)  
Richard L. Workman, Psychologist Consultant, BMS (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 513 – 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 513 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07
- D-2 Notice of Denial/Termination dated 8/11/08
- D-3 Notice of Denial/Termination dated 9/8/08
- D-4 DD-2-A-ICF/MR Level of Care Evaluation dated 7/24/08
- D-5 Child Development Unit Evaluation dated 6/6/08
- D-6 Initial Psychological Evaluation dated 7/24/08
- D-7 Individualized Education Program (IEP) dated 4/16/08

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

- C-1 Correspondence from [REDACTED] MD dated 10/20/08
- C-2 AMENDMENT TO THE IEP WITHOUT CONVENING AN IEP TEAM MEETING dated 10/24/08

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

- 1) In response to an application completed for benefits and services through the Medicaid MR/DD Waiver Program, the Claimant was notified via a Notice of Denial/Termination (D-

2) that Waiver services were denied. This notice states, in pertinent part:

Your Waiver Application is hereby denied.

Your application was Denied because:

Additional documentation is requested. Please re-submit \_\_\_\_\_'s ABS-S:2 profile with scores derived from non-mental retardation norms since mental retardation has not been diagnosed in this case. Please submit any psycho-educational assessment conducted by the school system.

- 2) Additional documentation was received and reviewed by the Department and a subsequent Notice of Denial/Termination (D-3) was sent to the Claimant. This notice again indicates the Claimant's application for MR/DD Waiver services was denied and notes the following explanation:

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.

This notice goes on to indicate that only Self-Care was identified as a substantial adaptive deficit.

- 3) The Department conceded that the Claimant, a four-year-old male, presents an eligible diagnosis of Cerebral Palsy and PDD-NOS, however, the Department contends that the Claimant's condition is not severe and, therefore, does not require the same level of care and services that is provided in an Intermediate Care Facility for individuals with Mental Retardation (ICF/MR level of care). More specifically, the Department contends that the Claimant is not demonstrating substantial adaptive deficits in three or more of the six major life areas. As indicated in Exhibit D-3, the Department stipulated that the Claimant is demonstrating a substantial adaptive deficit in Self-Care.
- 4) The Claimant, through his representative, contends that he is demonstrating substantial adaptive deficits in Language, Mobility, Learning and Self-Direction.
- 5) Because the Claimant was diagnosed with Borderline Intellectual Functioning (not Mental Retardation), the Non-MR ABS scores recorded on the ABS-S:2 (Exhibit D-6) are appropriate for evaluating the Claimant. Pursuant to MR/DD Waiver policy, an eligible Non-MR ABS score of less than 1% identifies a substantial adaptive deficit.
- 6) Exhibits D-4, D-5 and D-6 indicate the Claimant is ambulatory. While the Claimant's gait and muscle tone are noted to be abnormal due to right side weakness, and it is noted that he wears a leg brace in Exhibit C-1, the narrative information indicates the Claimant ambulates independently. According to Exhibit D-6, the Claimant's "Physical Development" ABS is 50<sup>th</sup> percentile (note that less than 1 percentile is an eligible ABS score). While the IEP (D-

7) indicates that he has difficulty going up and down steps, he can do so by holding a hand or using a handrail. Although it is clear that the Claimant's mobility is delayed when compared to same-age peers, the clinical evidence fails to support a finding that the Claimant is demonstrating a substantial adaptive deficit in Mobility.

- 7) The Claimant underwent a Child Development Unit Evaluation at [REDACTED] on June 6, 2008 (Exhibit D-5). This document fails to identify a substantial adaptive deficit in language and notes under the section entitled Current Developmental and Behavioral Concerns, second paragraph –

Mother noted she has no concerns with \_\_\_\_\_ use of language. He uses sentences to communicate and has a history of pointing and may use gestures. He repeats phrases from TV shows. At times, he confuses the pronouns "you" and "me," however, he now may correct himself. \_\_\_\_\_ points out things of interest, talks with others to be social and is able to have a conversation. He may not respond when parents call his name about 40% of the time; however, this has been improving. He is able to follow a two-step direction and can answer questions.

The Initial Psychological Evaluation (D-6) completed on July 24, 2008 further indicates that the Claimant communicates verbally. It is noted that the Claimant uses complete sentences but are often inappropriate to circumstance because he is merely reciting TV lines or engaging in echolalia. He can express basic needs/wants as well as frustrations and can follow one-step directives. Although the Claimant's ABS:S-2 score is 15<sup>th</sup> percentile and rated to be "poor," this evaluation does not support a substantial adaptive deficit in the Claimant's language skills.

The information submitted in Exhibit C-1, specific to the Claimant's language skills, is inconsistent with comprehensive evaluations identified as Exhibits D-5 and D-6. While the Amendment to the IEP (C-2) now includes speech therapy, there are no new standard scores included or any information to demonstrate a change in the documentation previously submitted. Based on the evidence, the Claimant is not demonstrating a substantial adaptive deficit in Receptive and Expressive Language.

- 8) The Initial Psychological Evaluation (D-6) reports that the Claimant scored an overall IQ of 74, indicating his intellectual functioning is in the borderline range. It was noted that the Claimant was uncooperative with the exam so the results are considered provisional. While there is limited information regarding the Claimant's learning abilities in this evaluation, Exhibit D-5 notes that "Mother has no concern with \_\_\_\_\_ acquisition of early academic concepts, noting that he is starting to sound out words and read." Exhibit D-7 indicates he enjoys Language Group and initiates questions at appropriate times. The Claimant knows all the letters of the alphabet and is developing skills with phonemic awareness. He is learning to read environmental print, he can identify his numbers to 20 and can count to 30, and he knows most of his shapes and all of his colors. Based on the evidence submitted for review,

the Claimant is not demonstrating a substantial adaptive deficit in Learning.

- 9) The Claimant's representative purported that the evaluations do not appropriately address Self-Direction skills as he must be prompted to initiate most activities. It is reasonable that a four-year-old child would require some prompting, however, the evaluations clearly indicate that the Claimant has interest in participating in several activities. He demonstrates satisfaction when completing tasks, he participates in Language Group and asks appropriate questions, he enjoys working puzzles, reading, listening to stories on tape and playing on the computer. The ABS-S:2 Self-Direction score is in the 5<sup>th</sup> percentile and rated "poor," however, this score clearly exceeds an eligible score of less than 1 percentile. There is insufficient evidence to indicate the Claimant is demonstrating a substantial adaptive deficit in the area of Self-Direction.
- 10) West Virginia Medicaid Regulations, Chapter 513, – 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 presents program qualifying diagnoses of PDD NOS and Cerebral Palsy, however, the clinical evidence fails to demonstrate that he has substantial adaptive deficits in three (3) or more of the major life areas. While the Department conceded that the Claimant demonstrates a substantial adaptive deficit in Self-Care, the standardized measures of adaptive behavior scores, as well as the clinical and narrative documentation found in the evaluations, fail to confirm substantial adaptive deficits in Language, Mobility, Learning and Self-Direction.
- 3) 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 Department's decision 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 18<sup>th</sup> Day of December, 2008**

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**Thomas E. Arnett  
State Hearing Officer**