



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

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

September 9, 2008

_____ for _____

Dear Mr. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held June 11, 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 Butcher
State Hearing Officer
Member, State Board of Review
Cc: Erika Young, Chairman Board of Review
Steve Brady, MR/DD Waiver Program

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

_____,

Claimant,

vs.

Action Number: 07-BOR-2487

**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 September 9, 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 February 8, 2007 and was rescheduled for March 3, 2008, May 5, 2008, and May 28, 2008 due to claimant's request for a continuance for additional medical reports the final reschedule convened on June 11, 2008 on a timely appeal filed November 18, 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
_____, Therapeutic Consultant for Claimant
Steve Brady, MR/DD Waiver Program
Richard 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 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:

- 1) West Virginia Manual Chapter 500 Covered services, Limitations, and Exclusions, for MR/DD Waiver Services
- 2) Notice of Termination dated November 9, 2007
- 3) DD2-a-ICF/MR Level of Care Evaluation dated March 28, 2008
- 4) Comprehensive Psychological Evaluation DD-3 dated May 28, 2008.

Claimant's Exhibit(s)

None

VII. FINDINGS OF FACT:

- 1) On or about November 9, 2007, the Claimant was notified via a Notice of Termination (Exhibit D-2) that his son's Medicaid MR/DD Waiver Program was terminated. This notice states:

Your Waiver services have been terminated 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	Receptive or Expressive Language
Self-Direction	Mobility
	Capacity for Independent Living

- 2) The Department determined that the claimant has an eligibility diagnosis of Autism and has a substantial limitations in the area of self care.
- 3) The Claimant's representative Ms. _____ and his father contend the Claimant demonstrates substantial adaptive deficits in (1) Learning, (2) Self-Direction, (3) Receptive or Expressive Language, and (4) Capacity for independent living.
- 4) **Learning** – The therapy consultant described the claimant as a child that has been in an intensive Applied Behavioral Analysis, (hereinafter ABA) Program (Exhibit D-4). He is able to stay in a regular school classroom with the constant assistance of a one-on-one ABA therapist. The Claimant tends to repeat things over and over; for example he will tell you about something he watched on television. Mr. _____ presented the fact that his son has been receiving the assistance from a one-on-one therapist through the Autism related Disorders Center during the day in an inclusive classroom. He also stated “he stated with thirty-five to forty (35 to 40) hours of applied Behavioral Analysis and now receives 15 hours per week shadowing aid support environment where he can socialize with his peers”. According to testimony from the Department's Psychologist Richard Workman, the means of evaluation for the area of learning was the WRAT-4 (Wide Range Achievement Test) is also a standard academic screener of three achievement areas: Word Reading, Spelling, and Math Computation. These scores can be compared with his IQ score to determine if the child is working up to his intellectual potential. The claimant's standard score for Word Reading was one hundred eighteen (118) meaning reading at a grade equivalent of third grade five (3.5) months. Spelling: his score was one hundred twenty-six (126) and grade equivalent of fourth grade three (4.3) months, Math Computation: score of sixty-nine (69) and grade equivalent of kindergarten three (K.3) months. Mr. Workman testified that the scores of fifty-five (55) and below are in the eligible range according to policy. Accordingly, no deficit can be awarded in this area.

Self-Direction –Ms. _____ explained the Claimant displays obsessive activity behavior and if not redirected he would continue to do the same thing all day long. According to the

Department's explanation of the psychological evaluation (Exhibit D-4) the child enjoys swimming, playing computer games, watching Noggin on television and anything with horses. In choosing these activities, he is demonstrating self direction skills. Mr. Workman indicated from the Adaptive Behavior Scale (ABS) Self-Direction domain the child is in the second (2nd) percentile. Even though it is very close, it must be three (3) standard deviations below the mean or less than one (1) percentile when derived from non-Mental Retardation (MR) normative population (Exhibit D-1).

Receptive or Expressive Language – Ms. _____ testified “the claimant’s language skills are very robotic no voice inflection, words are just memorization” The evaluator of the psychological evaluation summarizes the findings as presented by Mr. Workman as the intellectual/cognitive results from a Wechsler Abbreviated Scale of Intelligence test as a battery that evaluates different aspects of intellectual functioning. Verbal Comprehension index IQ was 85, Perceptual Reasoning Index IQ score 96, Working Memory Index IQ score 80, Processing Speed Index IQ score 75 and a Full Scale IQ of 81, typical scores fall between 85 and 115. Verbal and Performance IQ scores are a summary of the verbal and performance skills, and the Full Scale IQ is an index of the overall intellectual functioning. All the IQ scores were at or above the seventy fifth (75) percentile. Mr. Workman’s also pointed out the Language Development score in the fifth (5th) percentile of the ABS as derived from MR normative population according to policy (Exhibit D-1), therefore these scores indicate no eligibility deficits could be awarded.

Capacity for Independent Living- Testimony from Ms. _____ and Mr. _____ states the claimant cannot socialize with others or express himself to others. Safety and danger awareness is an issue. The claimant; if not under constant supervision he will wonder off and be would not be able to ask for help. An episode of him leaving the school occurred and he was asked to leave the school because they were not able to supervise him as closely as he needs. He is now in a private school with an ABA therapist shadowing him throughout the day. The home has special locks on the doors and windows for his safety. He would rather play by himself then interact with his peers. According to testimony the claimant’s behavior problems with anger have escalated to open hand slapping people and ripping and tearing holes in his shirt, and not being able to wait his turn in line. In the he A B S interment scored in the first (1st) percentile in the area of Socialization which does not qualify for an eligible score.

- 5) Mr. _____ expressed his concerns and needs for his son in a very compelling statement of how the program has benefited the progression of his abilities to adapt and lead as close to a normal live as he can .Without the program and service he may not have this opportunity.
- 6) 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. 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. For the MR/DD Waiver 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.
- 2) The evidence submitted in this case did demonstrate that the Claimant has an eligible diagnosis of Autism. Diagnostic criterion provided in the Adaptive Behavior Scale – School, Second Edition (ABS-S: 2), Wechsler Intelligence Scale for Children-Fourth Edition, and Wide Range Achievement Test was completed using MR norms did measure the Claimant’s deficits correctly were very close to the approval norm no deficits could be awarded.
- 3) Upon considering the facts of this case, there is sufficient evidence to demonstrate that the Claimant presents a program qualifying diagnosis, however no eligibility test score for the areas in dispute were at the 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 (75th) percentile when derived from MR normative populations. Therefore, substantially limited functioning in three (3) of the listed life areas can not be established for the MR/DD Waiver Program.

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 9th Day of September, 2008

**Jennifer Butcher
State Hearing Officer**