



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

November 3, 2008

[REDACTED]

RE: \_\_\_\_\_

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

Attached is a copy of the findings of fact and conclusions of law on the hearing held September 26, 2008. The hearing request was based on the Department of Health and Human Resources' proposed termination of Title XIX MR/DD Waiver services for \_\_\_\_\_.

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." (MR/DD Waiver Services Provider Manual, Chapter 513, effective October 1, 2006)

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  
Mary McQuain, Esq., Assistant Attorney General  
Steve Brady, Department Representative  
\_\_\_\_\_, Claimant

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

\_\_\_\_\_,  
**Claimant,**

**v.**

**Action Number: 07-BOR-2509**

**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 November 3, 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 September 26, 2008 on a timely appeal, filed November 26, 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 Attorney

Mary McQuain, Esq., Assistant Attorney General  
Rick Workman, Psychologist Consultant, BMS  
Steve Brady, Department Representative

\* 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. QUESTION TO BE DECIDED:**

The question to be decided is whether the Department was correct in its decision that medical eligibility was not met for Title XIX MR/DD Waiver Program.

#### **V. APPLICABLE POLICY:**

MR/DD Waiver Services Provider Manual, Chapter 513

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

##### **Department's Exhibits:**

- D-1 MR/DD Waiver Services Provider Manual, Chapter 513
- D-2 Notices of Termination dated September 15, 2008 and September 8, 2008
- D-3 Notice of Termination dated November 9, 2007
- D-4 DD-2A ICF/MR Level of Care Evaluation dated May 25, 2007
- D-5 DD-3 Psychological Evaluation dated September 19, 2006
- D-6 Letter from \_\_\_\_\_ MD, dated April 18, 2006
- D-7 DD-2A ICF/MR Level of Care Evaluation dated April 21, 2008
- D-8 Individualized Education Plan (IEP) dated April 21, 2008
- D-9 DD-3 Psychological Update dated August 31, 2007
- D-10 Psychoeducational Assessment Integrated Report dated June 5, 2008
- D-11 Psychological Evaluation dated August 8, 2008
- D-12 AAMR Adaptive Behavior Scale – School (2<sup>nd</sup> Ed.); Chapter 4 – Normative Procedures\*
- D-13 Individual Program Plan (IPP) dated August 8, 2008

\*Allowed over objection from Claimant's counsel

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

- C-1 Individual Program Plan (IPP) dated August 8, 2008
- C-2 Psychological Evaluation dated August 8, 2008
- C-3 Letter from \_\_\_\_\_ dated June 24, 2008\*\*

- C-4 Letter from [REDACTED] MD, dated April 18, 2008\*\*  
C-5 Prescription from [REDACTED] MD, dated August 25, 2008  
C-6 Prescriptions from [REDACTED] MD, dated May 7, 2008

\*\*Allowed over objection from Department's counsel

## VII. FINDINGS OF FACT:

- 1) The Claimant, who is a fifteen (15) year old child, was a participant in the MR/DD Waiver Program. After an annual reevaluation, notification was sent (Exhibit D-3) to the Claimant, advising that waiver services were to be terminated. The notice explains the reason for termination of services as:  
  
"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."
- 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) In the Department's November 9, 2007 notification to the Claimant, a substantial adaptive deficit was awarded in *Self Care* (Exhibit D-3). During the hearing, the Department conceded the area of *Capacity for independent living*, giving the Claimant a total of two (2) substantial adaptive deficits.
- 4) The MR/DD Waiver Services Provider Manual, Chapter 513, effective October 1, 2006, 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 Section 513.3.1, 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 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 at the time of application (Informed Consent, DD-7).

- 5) Counsel for the Department noted that 42 CFR §435.1009 – referred to in the previous policy – has been changed to 42 CFR §435.1010.
- 6) Psychological updates were completed on the Claimant on August 2, 2006 (Exhibit D-5) and August 31, 2007 (Exhibit D-9), and a psychological evaluation was completed for the Claimant on August 8, 2008 (Exhibit D-11) by [REDACTED] the Claimant's Psychologist. The Department's initial decision to terminate the Claimant's benefits (Exhibit D-3) relied on the first psychological update (Exhibit D-5). Subsequent notification (Exhibit D-2) relied on Exhibit D-9 and D-11.
- 7) The psychological evaluations that were submitted used the Adaptive Behavior Scale - School Edition (ABS:S-2) to score the Claimant's abilities. The raw scores were compared with both mental retardation (MR) norms and non-mental retardation (non-MR) norms to derive percentile ranks and standard scores. Testimony from the Department confirmed that the resulting scores are used to determine if the Claimant has substantial deficits, as defined in policy.
- 8) Upon cross-examination from the Claimant's counsel, the Department's Psychologist Consultant testified that the Claimant met the test score requirements in all areas, except Physical Development, of both domains of the Adaptive Behavior Scale - School Edition (ABS:S-2) of the most recent psychological evaluation (Exhibit D-11). However, further testimony clarified that the Claimant met the test score requirements when the scores were compared with MR norms, but did not meet the test score requirements when non-MR norms were used.

- 9) The test scores for the part one and part two domains of the Adaptive Behavior Scale - School Edition (ABS:S-2) from the psychological report dated **August 2, 2006** (Exhibit D-5) are as follows:

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

(Mental Retardation Norms)

Subtest	Raw Score	%ile Rank	Std Score
Independent Functioning	64	50	10
Physical Development	22	91	14
Economic Activity	3	9	6
Language Development	37	91	14
Numbers and Time	9	63	11
Pre/Vocational Activity	3	16	7
Self-Direction	9	37	9
Responsibility	2	16	7
Socialization	9	9	6

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

(Mental Retardation Norms)

Subtest	Raw Score	%ile Rank	Std Score
Social Behavior	33	16	7
Conformity	20	25	8
Trustworthiness	14	25	8
Ster. And Hyper. Behavior	22	16	7
Self-Abusive Behavior	14	9	6
Social Engagement	7	37	9
Dist. Interp. Behavior	6	63	11

When using non-MR norms, the test results are as follows:

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

(non-mental Retardation Norms)

Subtest	Raw Score	%ile Rank	Std Score
Independent Functioning	64	1	2
Physical Development	22	37	9
Economic Activity	3	1	1
Language Development	37	16	7
Numbers and Time	9	16	7
Pre/Vocational Activity	3	5	5
Self-Direction	9	2	4
Responsibility	2	2	4
Socialization	9	1	2

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

(non-mental Retardation Norms)

Subtest	Raw Score	%ile Rank	Std Score
Social Behavior	33	25	8
Conformity	20	5	5
Trustworthiness	14	5	5
Ster. And Hyper. Behavior	22	2	4
Self-Abusive Behavior	14	1	3
Social Engagement	7	9	6
Dist. Interp. Behavior	6	50	10

- 10) The test scores for the part one and part two domains of the Adaptive Behavior Scale - School Edition (ABS:S-2) from the psychological report dated **August 31, 2007** (Exhibit D-9) are as follows:

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

(Mental Retardation Norms)

Subtest	Raw Score	%ile Rank	Std Score
Independent Functioning	65	50	10
Physical Development	20	75	12
Economic Activity	2	9	6
Language Development	35	84	13
Numbers and Time	9	63	11
Pre/Vocational Activity	2	9	6
Self-Direction	9	37	9
Responsibility	2	16	7
Socialization	9	9	6

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

(Mental Retardation Norms)

Subtest	Raw Score	%ile Rank	Std Score
Social Behavior	35	9	6
Conformity	20	16	7
Trustworthiness	14	25	8
Ster. And Hyper. Behavior	22	16	7
Self-Abusive Behavior	14	9	6
Social Engagement	7	37	9
Dist. Interp. Behavior	12	37	9

When using non-MR norms, the test results are as follows:

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

(non-mental Retardation Norms)

Subtest	Raw Score	%ile Rank	Std Score
Independent Functioning	65	1	3
Physical Development	20	25	8
Economic Activity	2	1	1
Language Development	35	9	6
Numbers and Time	9	16	7
Pre/Vocational Activity	2	2	4
Self-Direction	9	2	4
Responsibility	2	2	4
Socialization	9	1	2

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

(non-mental Retardation Norms)

Subtest	Raw Score	%ile Rank	Std Score
Social Behavior	35	25	8
Conformity	20	5	5
Trustworthiness	14	9	6
Ster. And Hyper. Behavior	22	2	4
Self-Abusive Behavior	14	1	3
Social Engagement	7	9	6
Dist. Interp. Behavior	12	16	7

- 11) The test scores for the part one and part two domains of the Adaptive Behavior Scale - School Edition (ABS:S-2) from the psychological report dated **August 8, 2008** (Exhibit D-11) are as follows:

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

(Mental Retardation Norms)

Subtest	Raw Score	%ile Rank	Std Score
Independent Functioning	51	25	8
Physical Development	25	99	17
Economic Activity	3	9	6
Language Development	29	63	11
Numbers and Time	9	63	11
Pre/Vocational Activity	0	2	4
Self-Direction	6	25	8
Responsibility	4	37	9
Socialization	7	9	6

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

(Mental Retardation Norms)

Subtest	Raw Score	%ile Rank	Std Score
Social Behavior	30	16	7
Conformity	16	25	8
Trustworthiness	8	37	9
Ster. And Hyper. Behavior	34	2	4
Self-Abusive Behavior	24	1	3
Social Engagement	21	5	5
Dist. Interp. Behavior	16	25	8

When using non-MR norms, the test results are as follows:

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

(non-mental Retardation Norms)

Subtest	Raw Score	%ile Rank	Std Score
Independent Functioning	51	1	1
Physical Development	25	63	11
Economic Activity	3	1	1
Language Development	29	2	4
Numbers and Time	9	16	7
Pre/Vocational Activity	0	1	3
Self-Direction	6	1	3
Responsibility	4	9	6
Socialization	7	1	1

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

(non-mental Retardation Norms)

Subtest	Raw Score	%ile Rank	Std Score
Social Behavior	30	25	8
Conformity	16	9	6
Trustworthiness	8	25	8
Ster. And Hyper. Behavior	34	1	1
Self-Abusive Behavior	24	1	1
Social Engagement	21	1	1
Dist. Interp. Behavior	16	9	6

- 12) Testimony from the Department asserted that it is incorrect for the Claimant to be assessed using MR norms because the Claimant does not have a diagnosis of mental retardation. The Department cited the Claimant's results on the Wechsler Intelligence Scale for Children-IV (WISC-IV), which was administered to him as part of a Psychoeducational Assessment Integrated Report (Exhibit D-10). This report shows that the Claimant's Full Scale IQ (FSIQ) was "60+/-3," and his General Ability Index (GAI) was "78." Explaining the use of the GAI instead of the FSIQ, the report states, in pertinent part:

Due to the statistical difference between the FSIQ and the GAI of 18 points, the GAI is the best measure of cognition that should be used when describing his cognitive functioning and when making comparisons to his achievement and can thus be described as being in the borderline range.

Expert witnesses for both the Department and the Claimant testified that the Claimant does not have a diagnosis of mental retardation.

- 13) Testimony from the Claimant's Psychologist explained that one reason both norms were used because it had been a procedural requirement in the past when submitting DD-2A Psychological Updates. Although the confusion in this area appeared to have been caused by miscommunication, testimony from the Department's Psychologist Consultant confirmed that using both norms is not a procedural requirement.
- 14) The second reason for using both norms, as provided in the testimony of the Claimant's Psychologist, is there is no clear guidance in policy as to which norm to use when a person is diagnosed with autism but not diagnosed with mental retardation. The Department responded by citing the AAMR Adaptive Behavior Scale – School (2<sup>nd</sup> Ed.); Chapter 4 – Normative Procedures (Exhibit D-12), Table 4.2, which shows characteristics of the MR normative sample. For IQ, the ranges of less than twenty (20), twenty (20) to forty-nine (49), and fifty (50) to seventy (70), encompass the entirety of the sample. The Department contended that it would be incorrect to classify the Claimant with this sample because of his results on the WISC-IV.
- 15) Counsel for the Department, in her closing statement, moved to have testimony from the Claimant's expert witness disregarded under Rules 702 and 703 of the West Virginia Rules of Evidence, because of her statement that she "did not know" the correct norms to use for a person with a diagnosis of autism who lacks a diagnosis of mental retardation. However, it is clear from the testimony that the overriding issue is the confusion over the procedure when submitting a DD-2A. The Claimant's Psychologist testified that when she had completed DD-2A Psychological Updates in the past with only one norm, the facility for whom she contracted would return the form to her to redo using both norms. There is no reason to doubt the technical knowledge of the Claimant's expert witness, or to cast doubt on the reports from that expert witness.

- 16) The contention of the Claimant, with regard to the question of norms, was the use of “or” in the policy on functionality: “...less than one (1) percentile when derived from non MR normative populations **or**...below the seventy fifth (75) percentile when derived from MR normative populations.” (emphasis added) The Department responded that this choice is not written to be arbitrary, but a choice based on standards on which psychologists in the field rely.
- 17) With regard to the area of *Self-Direction*, convincing testimony from both the Claimant’s mother and his Psychologist described the Claimant’s weakness in this area. They testified that the Claimant has to be prompted to initiate homework, chores, and personal hygiene. It was indicated that the Claimant will self-direct with regard to toys, but his obsessive tendencies in this area can prevent him from choosing to focus on anything else.
- 18) With regard to the area of *Receptive and Expressive Language*, the testimony and evidence revealed the Claimant to have a good vocabulary. However, testimony on behalf of the Claimant questioned the functionality of that vocabulary, stating that at times, the Claimant will only have conversation when he wants, and on the topics he wants to discuss. The Claimant’s Psychologist indicated that the Claimant’s expressive language is deficient, and that this area is also affected by the Claimant’s obsessions.

### **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.
- 2) The policy definition of “substantially limited” does not suggest that a person may make an arbitrary choice between using MR or non-MR norms; it provides a choice to be made by professionals based on the appropriate classification of the person being tested. With testimony from the Department that it is correct to use non-MR norms when assessing the Claimant, testimony from the Claimant’s Psychologist that she primarily used both norms because of limited guidance from the policy and because of her understanding of the DD-2A procedures, and testimony and evidence that the Claimant does not have a diagnosis of mental retardation, it was correct for the Department to assess the Claimant based on non-MR norms.
- 3) Adaptive behavior scores for the Claimant from three different psychological reports spanning three years fail to show any area with a percentile rank less than one (1) percentile when compared with non-MR normative populations.
- 4) While testimony and narratives indicated 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 on behalf of the Claimant 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 November, 2008.**

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**Todd Thornton  
State Hearings Officer**