



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

September 5, 2008

Dear Mr. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held April 16, 2008. Your hearing request was based on the Department of Health and Human Resources' denial 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 to deny 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
Steve Brady, Department Representative

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

_____,
Claimant,

Action Number: 08-BOR-515

**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 September 5, 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 April 16, 2008 on a timely appeal, filed January 2, 2008.

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
Steve Brady, Hearings Coordinator, BBHMF
Richard Workman, Psychologist Consultant, BMS

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 November 28, 2007
- D-3 DD-2-A ICF/MR Level of Care Evaluation dated September 18, 2007
- D-4 DD-3 Psychological Evaluation dated September 13, 2007

Claimants' Exhibits:

None

VII. FINDINGS OF FACT:

- 1) An application was made on behalf of the Claimant, who was a two (2) year old child at the time, for the MR/DD Waiver Program. A denial letter was sent (Exhibit D-2) to the Claimant on or about November 28, 2007. The letter explains the reasons for the denial as:

“The psychologist has not indicated whether, in her opinion, Mr. _____ requires an ICF/MR level of care.

Documentation submitted for does not support the presence of substantial adaptive deficits in three or more of the six major life areas identified for Waiver eligibility.”

- 2) The Claimant's physician certified that the Claimant required an ICF/MR Level of Care on the DD-2A (Exhibit D-3). However, the need for an ICF/MR Level of Care was not noted by the psychologist in the DD-3 Psychological Evaluation (Exhibit D-4). The Department explained that this was the first reason for the denial.
- 3) Additional testimony from the Department explained that the Claimant did not meet the requirement of substantial adaptive deficits in any of the six (6) major life areas. This was the second reason for the Waiver application denial. The Psychologist Consultant for the Department later conceded a deficit in *Receptive or expressive language* for the Claimant; however, with a requirement for substantial adaptive deficits in three (3) of the six (6) major life areas, this would not have changed the Department's action to deny the application.
- 4) 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).
- 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 DD-3 Psychological Evaluation (Exhibit D-4) used the Vineland Adaptive Behavior Scale–II to measure adaptive behaviors for the Claimant. The standard scores, with corresponding confidence intervals, are as follows:

<u>Domain Score Profile</u>	Std. Score	Conf. Int.
Adaptive Behavior Composite	60	56-64
Communication	48	41-55
Daily Living Skills	64	56-72
Socialization	61	54-68
Motor Skills	79	70-88

- 7) The Developmental Assessment of Young Children (DAYC) was the tool used in the Psychological Evaluation (Exhibit D-4) to assess the Claimant’s developmental skills. The results of this instrument are as follows:

<u>Domain</u>	<u>Raw Score</u>	<u>Age Equivalent</u>	<u>Standard</u>
Cognitive	25	18 months	83
Communication	23	13 months	60
Social-Emotional	16	10 months	64
Physical Development	53	20 months	87
Adaptive Behavior	16	12 months	70

- 8) The Department explained that the standard scores used in both the Vineland Adaptive Behavior Scale–II and the DAYC (Exhibit D-4) are based on a mean of one-hundred (100) and a standard deviation of fifteen (15). A standard score less than or equal to fifty-five (55) would meet the standard of “substantially limited,” or three (3) standard deviations below the mean for non MR normative populations. The communication domain in the Vineland Adaptive Behavior Scale–II met this requirement, but failed to meet the requirement in the DAYC. The Department conceded this area of functionality after considering testimony from the Claimant’s mother. No other areas of functionality were supported by test scores.
- 9) Testimony from the Claimant’s mother described extensively the limitations and delays of the Claimant. She offered anecdotal evidence of the Claimant’s limitations in all

functional areas. The Department explained that the areas of *Learning* and *Capacity for independent living* were not assessed for a child the Claimant's age. With regard to all other functional areas – excluding the conceded area of *Receptive or expressive language* – the Department countered that there was no dispute of the Claimant's delays, only the extent of these delays.

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. Additionally, an ICF/MR Level of Care must be required.
- 2) Test scores from the Vineland Adaptive Behavior Scale–II revealed only one functional area with an eligible standard score less than or equal to fifty-five (55). Policy clearly requires that test scores must support substantial limitations in addition to any narratives or testimony; one cannot substitute for the other. With only the functional area of *Receptive or expressive language* met, the Claimant did not meet medical eligibility in the area of functionality.
- 3) The Claimant also failed to meet medical eligibility with regard to level of care. With neither the functionality nor the level of care requirements met, 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 action of the Department to deny MR/DD Waiver services based on their finding that medical eligibility for the program was not met.

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this ____ Day of September, 2008.

Todd Thornton
State Hearings Officer