



State of West Virginia  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
Office of Inspector General  
Board of Review  
4190 W Washington St.  
Charleston, WV 25313  
304-746-2360 ext 2227

Joe Manchin III  
Governor

Martha Yeager Walker  
Secretary

July 22, 2008

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

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

Attached is a copy of the findings of fact and conclusions of law on your hearing held May 16, 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 E Butcher  
State Hearing Officer  
Member, State Board of Review

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

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

\_\_\_\_\_,

**Claimant,**

**Vs.**

**Action Number: 08-BOR-866**

**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 May 16, 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 scheduled to convene on May 16, 2008 on a timely appeal filed June 25, 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 mother

\_\_\_\_\_, Claimant's father

Steve Brady, MR/DD Waiver Program

Linda 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 MR/DD Waiver Service Manual Chapter 500
2. DD-2A ICF/MR Level of Care Evaluation, by Dr. \_\_\_\_\_ dated April 11, 2007
3. Comprehensive Psychological Evaluation, by \_\_\_\_\_ M.A. Licensed Psychologist / WV#727 dated February 27, 2007
4. 1<sup>st</sup> Denial letter with request for additional information for consideration dated May 16, 2007
5. Individual Education Program herein after (IEP) evaluation form \_\_\_\_\_ County Schools dated April 24, 2007
6. Updated DD-2A from \_\_\_\_\_ dated July 2, 2007
7. Psychological Evaluation – Addendum by \_\_\_\_\_ MA dated July 6, 2007
8. Final Denial letter dated July 18, 2008

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

- 1) The Claimant is a 7-year child who has applied for the Title XIX MR/DD waiver program in 2007 and was found not meeting three or more of the six major life areas identified for Waiver eligibility.

- 2) On or about May 16, 2007 the Claimant was notified via a Notice of Denial (Exhibit D-4) that his application for the Medicaid MR/DD Waiver Program was denied. This notice states:

Your application was denied because:  
The eligibility pack lacked an IEP. Additionally, for further consideration please submit the IEP and copies of school psycho-educational assessments to confirm the diagnosis offered in the psychological report as the previous evaluations had a different diagnosis. The DD-2A did not indicate mental retardation was present. An objective measure of the degree of Autism such as the GARS or CARS is also requested.
- 3) In response to the additional information received from the Claimant, a second Notice of Denial (Exhibit 8) advised the Claimant that his application was again denied. This notice states:

Your application was denied because:  
Additional documentation is requested. Please submit copies of any psycho-educational assessments conducted by the school system.
- 4) Claimant's father stated he could not provide any other documentation from the school other than what the \_\_\_\_\_ County Schools had available, the assessments are only completed every three years and he presented the most current to the Department for evaluation.
- 5) The Department was unable to determine a diagnosis from the DD-2A dated April 11, 2007(Exhibit D-2) of a diagnosis. According to the Diagnostic Section of the report on AXIS I (List all Emotional and/or psychiatric conditions) Claimant was noted as having Autism Spectrum Disorder, which is not a diagnosis: according to the testimony of Linda Workman and under AXIS II (List all Cognitive, Developmental conditions and personality disorders) he was noted as using speech substitution and having fine motor delay but did not indicate Mental Retardation. Under the Neurological section it was documented \_\_\_\_\_ has a short attention span. The report recommended speech, occupational, and physical therapy and an ICF/MR level of care.
- 6) Claimant's physician submitted an addendum to the DD-2A dated July 2, 2007(Exhibit D-6) which did have the diagnosis of Mild Mental Retardation for AXIS II. The Psychological Evaluation Addendum dated July 6, 2006(Exhibit D-7) provides the department with the Childhood Autism Rating Scale (CARS) that was administered to \_\_\_\_\_. The result obtained was a total score of 38, which suggests he functions within the moderate to severe range of autistic disorder.
- 7) Ms Workman indicated the instruments used to evaluate \_\_\_\_\_'s Intellectual /Cognitive level was the Kaufman Brief Intelligence Test-2( KBIT-2) and for Adaptive Behavior was the ABS-S:2 (Exhibit D-3)The KBIT-2 test scores are divided into subtest one half verbal

and one half nonverbal. The score obtained for verbal was 65 this is a rating of Mild Mental Retardation and the nonverbal score was 81 which is in the low average range of ability. \_\_\_\_\_'s IQ composite score was 69; this is the absolute upper end limit of the MR range. The ABS-S: 2 test is a measures of adaptive behavior and is compared with others \_\_\_\_\_ age in two domains. According to the report completed by \_\_\_\_\_ Psychologist MA states in part:

\_\_\_\_\_ had significant strength in physical development and relative strength in language development and exhibits weakness in economic activity, socialization, self-abusive behavior, social adjustment and personal adjustment . \_\_\_\_\_'s scores less than the 75<sup>th</sup> percentile in independent functioning ,economic activity, prevocational activity, self-direction and socialization in Part One Domain. He also scores less than the 75<sup>th</sup> percentile across all areas of Part Two Domain and factor scores. Although \_\_\_\_\_ has been able to exhibit gradual progress in some daily living skills, he continues to exhibit significant deficits in adaptive functioning. He would benefit from intensive and aggressive habilitative training to improve in many adaptive skill areas.

- 8) The IEP (Exhibit D-5) reports \_\_\_\_\_ is 99 percent in regular class and 1 percent special education. Ms Workman noted an inconsistency of \_\_\_\_\_ being diagnosed with Mental Retardation while being rated so high on the scores. Also in the IEP from \_\_\_\_\_ County Schools, states in part that \_\_\_\_\_ is working on Kindergarten level academically. Ms Workman pointed out this it is another indication that no mental retardation is present. .
- 9) The Department has established through the clinical evidence that \_\_\_\_\_ has met the criteria for two out of five of the major life areas of Self-care and Capacity for independent living.
- 10) The areas in dispute are Self-Direction, Receptive or Expressive Language and Learning

#### Self-Direction:

Claimant's father and Ms \_\_\_\_\_ testimony merits consideration. The father's testimony indicates \_\_\_\_\_ is not motivated on his own to engage in some type of activity; he has to be prompted and /or assisted. \_\_\_\_\_ form the \_\_\_\_\_ contends while in a structured environment such as school \_\_\_\_\_ excels due to the well established and controlled environment which is set up to meet his needs. Ms Workman evaluated the evidence from (Exhibit D-3) and came to the conclusion \_\_\_\_\_ is able to self-engage himself with other, for example page 4 of the exhibit "He prefers to watch others or engage in parallel play before interacting with others. He enjoys playing video games; watching movies; his scooter; playing outside; his Spongebob toy; Star Wars play; and has good computer skills. He enjoys activities and information related to the solar system." Ms Workman also stated in her testimony "By far most individuals with Autism who are in the

school system today are not in the Title XIX Waiver program. There are many children who have Autism who do not meet the restricted level of care. Self Direction can also mean having an interest or goal to do anything else. Do you choose an active versus passive life style? Do you have interest? The narrative states he does have things he enjoys doing it states he tries to control situations. He is not a passive participant in his environment. That is initiating your will in a situation.” The documents submitted for evaluation does not show Claimant is substantially limited in self direction.

#### Receptive or Expressive Language:

Ms [REDACTED] indicated with (Exhibit D-5) page 4 of 8 of the IEP states “\_\_\_\_\_ uses terminology that has meaning only to him.” And (Exhibit D-3) page 3 of 9 under Language, last sentence “He does not engage in appropriate and reciprocal conversation with others.” Also on page 4 of 9 under Other “He may exhibit conversational speech, but it is generally a reflection of something he has seen in movies he watches.” According to Ms Workman the criteria in functional Language is one who can express his wants and needs. According to the Psychological Evaluation dated /27/07 (Exhibit D-3) on the last page under Summary of active treatment number 3. Able to communicate basic needs and wants - YES. The documents submitted for this evaluation shows that \_\_\_\_\_ can communicate with others as noted in the testimonies from both Ms [REDACTED] and Ms Workman.

#### Learning: (Functional Academics)

According to Ms Bragg’s testimony with (Exhibit D-3) page 9 of 9 without the program \_\_\_\_\_ would not have the opportunity to learn new skills. Ms Workman’s evaluation of the IEP (Exhibit D-5) page 2 Social Skills she indicates the evaluator stating “\_\_\_\_\_ is working on Kindergarten level academically and he will raise his hand to read and answer questions.” Also the scores from the ABS-S:2 test found in (Exhibit D-3) shows \_\_\_\_\_ scoring average to above average the 75<sup>th</sup> percentile in Language Development and Numbers and Time as well as the IEP stating Claimant is in the regular class room 99 percent of the time and Special Education 1 percent. Documentation of Claimant’s level of functioning in the classroom, in combination with the scores on the Kaufman Brief Intelligence test and his ABS scores indicate that he does not meet the criteria for a deficit in the area of functional academics.

- 11) Ms [REDACTED] also referred to the Active Treatment Summary of (Exhibit D-3) late page. She states \_\_\_\_\_ currently is unable to complete the following needs set forth under the active treatment program for the Title XIX Waiver program.

- Able to take care of most personal care needs –No.
- Able to learn new skills without aggressive and consistent training - No.

- Able to apply skills learned in a training situation to other environments or settings without aggressive and consistent training -No.
- Able to demonstrate behavior appropriate to the time, situation, or place without direct supervision -No.
- Able to make decisions requiring informed consent without extreme difficulty –No.

- 12) Eligibility Criteria for the MR/DD Waiver Program are outlined in Chapter 500 of the Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual (Effective 7/1/05).

The level of care criteria for medical eligibility is outlined in this chapter and reads as follows:

### **Diagnosis**

- Must have a diagnosis of mental retardation, which must be severe and/or chronic, in conjunction with substantial deficits (substantial limitations associated with the presence of mental retardation), and or
- Must have a related developmental condition, which constitutes a severe, 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
  - Autism
  - Traumatic brain injury
  - Cerebral Palsy
  - Spina Bifida
  - Tuberous Sclerosis
- Additionally, 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

### **Functionality**

- Substantially limited functioning in three or more of the following major life areas: (Substantial limits is defined on standardized measures of adaptive behavior scores three (3) standard deviations below the mean or less than 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 by the documentation submitted for review, i.e., the IEP, Occupational Therapy evaluation, narrative descriptions, etc.)
  - 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 use, leisure).

### **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 and increase independence in activities daily living.
  - A need for the same level of care and services that is provided in an ICF/MR institutional setting.

## **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 (75) percentile when derived from MR normative populations.

- 2) The evidence submitted in this case demonstrates Claimant has an eligible diagnosis of Autism. The diagnostic criterion provided in the Comprehensive Psychological Evaluation Addendum (CARS) was completed and with a score of 38 which substantiates the finding of Autism.
- 3) Two of the six deficits in the major life areas have been substantiated by documentation presented for evaluation of the Title XIX MR/DD Waiver Program. These are Self-care and Capacity for Independent living.
- 4) Upon considering the facts of this case, there is insufficient evidence to establish additional deficits in the other four (4) major life areas. Therefore, eligibility for the MR/DD Waiver Program cannot be established.

#### **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 22 Day of July, 2008**

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**Jennifer Butcher**  
**State Hearing Officer**

Cc: Erika Young, Chairman BOR  
Steve Brady, BMS  
Linda Workman, Psychologist Consultant for DHHR