



State of West Virginia  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
Office of Inspector General  
Board of Review  
203 East Third Avenue  
Williamson, WV 25661

Joe Manchin III  
Governor

Patsy A. Hardy, FACHE, MSN, MBA  
Cabinet Secretary

April 2, 2010

-----For: -----  
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Dear -----:

Attached is a copy of the findings of fact and conclusions of law on -----'s hearing held November 9, 2009. The hearing request was based on the Department of Health and Human Resources' denial of your application for the Title XIX 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 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 substantiate each of the following elements: 1) a diagnosis of mental retardation with concurrent substantial deficits which require the level of care and services provided in an Intermediate Care Facility for the Mentally Retarded (ICF/MR); 2) substantially limited functioning in three or more of the major life areas of self-care, receptive or expressive language, learning, mobility, self-direction, and capacity for independent living; 3) the requirement for and ability to derive benefit from continuous active treatment; and 4) the endorsement of the need for an ICF/MR level of care from both a physician and a psychologist. (MR/DD Waiver Manual, Chapter 513 – *Covered Services, Limitations, and Exclusions for MR/DD Waiver Services*, §513.3.1).

Information submitted at the hearing established that the claimant was too young at the time of application to make a satisfactory determination as to whether or not he met the element of substantially limited functioning (item #2 above).

It is the decision of the State Hearing Officer to **uphold** the Department's denial of eligibility for the Title XIX MR/DD Waiver Program.

Sincerely,

Stephen M. Baisden  
State Hearing Officer  
Member, State Board of Review

cc: Erika H. Young, Chairman, WV Board of Review  
Steve Brady, WV Bureau for Behavioral Health and Health Facilities (BBHHF)

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

-----,

**Claimant,**

**v.**

**Action Number: 09-BOR-1745**

**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 April 2, 2010 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 November 9, 2009, on a timely appeal filed August 25, 2009.

**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 and representative  
Carol Brawley, Title XIX MR/DD Waiver Program Coordinator, DHHR  
Linda Workman, Psychological Consultant to the WV Bureau of Medical Services

Presiding at the Hearing was Stephen M. Baisden, State Hearing Officer and a member of the State Board of Review.

All participants were sworn in at the beginning of the hearing.

**IV. QUESTION TO BE DECIDED:**

The question to be decided is whether or not the Department was correct in its decision to deny Claimant's application for the Title XIX MR/DD Waiver Program.

**V. APPLICABLE POLICY:**

MR/DD Waiver Manual, Chapter 513 – *Covered Services, Limitations, and Exclusions for MR/DD Waiver Services*, §513

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

**Department's Exhibits:**

- D-1 MR/DD Waiver Manual, Chapter 513 – *Covered Services, Limitations, and Exclusions for MR/DD Waiver Services*, §513.3.1
- D-2 Notice of denial of Title XIX MR/DD Waiver Services dated March 6, 2009
- D-3 DD-2A, Physician's Evaluation of the Need for ICF/MR Level-of-Care, dated February 27, 2009
- D-4 DD-3, Comprehensive Psychological Evaluation from [REDACTED] dated February 15, 2009
- D-5 WV Birth to Three Developmental Specialist Annual Evaluation Review dated January 14, 2009
- D-6 WV Birth to Three Occupational Therapy Evaluation dated January 16, 2009
- D-7 WV Birth to Three Speech and Language Annual Evaluation Review dated January 15, 2009
- D-8 WV Birth to Three Physical Therapy Annual Report dated January 2, 2009
- D-9 Notice of denial of Title XIX MR/DD Waiver Services dated April 15, 2009
- D-10 Clinical notes from [REDACTED] Medical Center – [REDACTED] Hospital Neonatal Follow-up Program dated February 11, 2009
- D-11 Clinical notes from [REDACTED] Medical Center – [REDACTED] Hospital Neonatal Follow-up Program dated August 27, 2008
- D-12 Letter from [REDACTED] – [REDACTED] Neonatal Follow-up Program dated April 23, 2008
- D-13 Notice of denial of Title XIX MR/DD Waiver Services dated July 29, 2009
- D-14 DD-2A, Physician's Evaluation of the Need for ICF/MR Level-of-Care, dated July 11, 2009

**Claimant's Exhibits:**

- C-1 WV Birth to Three Occupational Therapy Evaluation dated November 3, 2009
- C-2 WV Birth to Three Physical Therapy Re-assessment dated October 27, 2009

## VII. FINDINGS OF FACT:

- 1) MR/DD Waiver Manual, Chapter 513.3.1 – *Covered Services, Limitations, and Exclusions for MR/DD Waiver Services*, §513 (Exhibit D-1) states in pertinent part,

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). An ICF/MR provides services in an institutional setting for persons with mental retardation or related condition.
- Verify the need for an ICF/MR Level-of-Care based on an annual medical evaluation (DD-2A), and a 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. 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.
- Have substantially limited functioning in three (3) or more of the following major life areas: self-care, receptive or expressive language, learning, mobility, self-direction, and capacity for independent living. “Substantially limited” is defined on standardized measures of adaptive behavior scores as three standard deviations below the mean or less than one percentile when derived from non MR normative populations or in the average range or equal to or below the 75<sup>th</sup> 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.
- Require and would benefit from continuous active treatment.

- 2) The Claimant’s parents submitted an application to determine their son’s eligibility for benefits and services through the Title XIX MR/DD Waiver Services Program. The Department evaluated this request and sent a notice of denial to the Claimant on March 6, 2009 (Exhibit D-2). The notice explained that the reason for denial, in pertinent part, was:

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: self-care, receptive or expressive language, learning, mobility, self-direction, and capacity for independent living.

- 3) Claimant's application for the Title XIX MR/DD Waiver program included a DD-2A, Physician's Evaluation of the Need for ICF/MR Level-of-Care dated February 27, 2009 (Exhibit D-3). The Diagnostic Section of this document reported a diagnosis of Cerebral Palsy, and the evaluating physician indicated that she certified the need for an ICF/MR level of care for Claimant.
- 4) Claimant's application for the Title XIX MR/DD Waiver program included a DD-3, a Comprehensive Psychological Evaluation completed at [REDACTED] Mental Health, [REDACTED] dated February 15, 2009 (Exhibit D-4). Under the section labeled "Physical/Sensory Deficits" the psychologist has written,

The child apparently has good hearing, vision, and a normal sense of touch. Due to the Cerebral Palsy and Encephalopathy he shows very poor muscle tone and is incapable of maintaining in a sitting position even when manually assisted in an independent manner. He is incapable of rolling over and he does not manipulate objects manually on a regular basis.

Under the section labeled, "Current Behaviors" the psychologist has written in part,

*Self Help:* He cannot consistently hold his sippy cup to drink. He cannot feed himself at all. *Language:* At this point he has no consistent language. Mother states that she believes he can communicate but that no one else can understand him at this time. His language is also hindered by a significant tongue thrust, which occurs most constantly. *Mental Status:* This child has poor use of his limbs. The only consistent muscle control appears to be his eyes and he looks around his environment with interest and with a steady gaze. *Others:* He enjoys interacting with others though he must be held by his mother at all times or he begins to fuss. She indicates that he enjoys going [shopping] where he can see other people and seems to enjoy the stimulation of that environment.

The psychological evaluation included a Vineland Adaptive Behavior Scale, which is a test that requires a child's mother or primary care-giver to answer a series of questions as to the child's ability to adapt to his or her environment. The results are grouped under four subject headings (known as domains) which are communication, daily living, socialization and motor skills. These domains correspond to four of the six major life areas listed in policy as stated in item #1 above. The mean score in each of these domains is 100, with a standard deviation of 15. In order to meet the criteria of substantial deficits in these life areas, a score needs to be three standard deviations (or 45 points) below the mean. Claimant scored as follows: communication, standard score of 79; daily living, standard score of 75; socialization, standard score of 96; motor skills, standard score of 63. Under the section labeled, "Development Findings/Conclusions," the psychologist has written,

Though a standard instrument is impossible to administer at this time, I believe that there are likely significant developmental delays. I am unwilling to estimate the degree of the delay. Therefore I believe a diagnosis for mental retardation unspecified is the most appropriate at this time.

Under the section labeled, "Placement Recommendations," the psychologist has written,

[Claimant] should remain in his family home where his mother is providing excellent stimulation in an effort to help him toward recovery. I believe he is in need of, qualifies for and requires an ICF/MR Level of Care. This care should be provided through the Title XIX Waiver Program.

- 5) Claimant's application for the Title XIX MR/DD Waiver program included a WV Birth to Three Program Occupational Therapy Annual Review dated January 16, 2009. (Exhibit D-6) On it, the occupational therapist has written in part,

[Claimant] demonstrates excellent eye contact with the person speaking to him. He follows simple commands such as wave "hi" or "bye." He is making sounds that begin with g, b or d.

- 6) Claimant's application for the Title XIX MR/DD Waiver program included a WV Birth to Three Program Speech and Language Annual Evaluation Review dated January 15, 2009. (Exhibit D-7) On it, the speech therapist has written in part,

[Claimant] is improving overall and showing progress.

...

[Claimant] is a very happy child and loves to learn new things. He has shown vast improvement and is globally improving. However, he does still present delays in all areas. It is recommended that he continue with therapy to help improve these areas of functioning.

- 7) The Department received additional information in Claimant's case after the initial denial described in item #2 above. The Department evaluated this new information and sent a notice of denial to Claimant's parents on April 15, 2009 (Exhibit D-9). The notice explains that the reason for denial, in pertinent part, was:

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: self-care, receptive or expressive language, learning, mobility, self-direction, and capacity for independent living.

- 8) As part of the submission of additional information, Claimant's parents had submitted a letter from [REDACTED] Medical Center – [REDACTED] Hospital

In summary, [Claimant] is a 15-month-old male with hypoxic ischemic injury and cerebral palsy. I am encouraged that his communication skills and speech are nearly appropriate for age level. His severe delays are gross and fine motor.

- 9) After the second denial described in item #7 above, Claimant's parents submitted the results of a second physical evaluation, a DD-2A dated July 9, 2009. (Exhibit D-14) The physician rated Claimant as normal in all areas of physical development except in the area of hearing. The neurological aspect of Claimant's development was rated normal for alertness, age-appropriate for attention span, delayed in speech, and delayed in sensation and coordination in his upper and lower extremities. The physician indicated in the "Additional Recommendations" section that Claimant would need speech, occupational, physical and developmental therapy, and he certified the need for an ICF/MR level of care.
- 10) The Department evaluated the second physical evaluation and sent a notice of denial to Claimant's parents on July 29, 2009 (Exhibit D-13). The notice explains that the reason for denial, in pertinent part, was:

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: self-care, receptive or expressive language, learning, mobility, self-direction, and capacity for independent living.

- 11) Department's witness Linda Workman testified that she was the psychologist consultant who evaluated Claimant's application. She testified that the eligibility criteria for the Title XIX MR/DD Waiver Program are very strict and straight-forward. She stated that this program is not for children who are 'somewhat behind' their peers. She testified that everyone with cerebral palsy does not qualify for this program. She stated that because the criteria are so strict for eligibility, it is very difficult for a 15-month-old child to demonstrate functional deficits. She said that children who are 15 months old have not lived long enough to develop a substantial delay. She cited as an example the statement that Claimant was not yet using a sippy-cup. That is not unexpected for a 15-month-old child. Many times, children are about three years old before they are able to effectively manage a sippy-cup. As another example, she said that if he is not toilet-trained, that's not expected at this age.
- 12) Claimant's parents submitted three evaluations from the WV Birth to Three Program in support of their position that Claimant has deficits in at least three of the six major life areas. Those evaluations (Exhibits C-1, C-2 and C-3) provided information concerning Claimant's functioning in the areas of self-help and mobility.

- 13) Department's witness reviewed Claimant's exhibits. She stated that upon review of the documents that Claimant's representative submitted, Claimant has a substantial limit in self-care and mobility. But those were the only two areas that she could locate, and the Department needs three to establish eligibility. Therefore, she determined that Claimant meets the criteria diagnostically but he does not meet it with the functional deficits because only two of the six major life areas with these deficits present could be identified.
- 14) Claimant's representative, his mother, testified that Claimant takes Valium and Baclofen. When he is on his medications, it calms his body down and he is able to effectively communicate his wants and needs. When he goes into an un-functioning capacity, he cannot communicate. He cries incessantly and is unresponsive. He arches his back and stiffens his arms and legs. She stated that when he's on his medications and he is OK, he can be asked certain questions and he will lean the questioner toward what he wants. But without medication, it becomes difficult to work with him.

### **VIII. CONCLUSIONS OF LAW:**

- 1) An application for the Title XIX MR/DD Waiver Program must meet a four-part criteria test. There must be a diagnosis of mental retardation or development disability of sufficient severity to warrant the level of care found in an institutional setting. The applicant must be functionally deficient in three out of six major life areas, which are self-care, receptive or expressive language, learning, mobility, self-direction, and capacity for independent living. The applicant must require and benefit from active treatment. The applicant must verify the need for an ICF/MR level of care with documentation from both a physician and a psychologist.
- 2) The Department did not dispute the assertion that Claimant's application for the Program contains a diagnosis of mental retardation or a related developmental disability. The Department did not dispute that the application contained the required certifications of the need for an ICF/MR level of care from both a physician and a psychologist. The Department did not dispute that the application contained verification that Claimant required and would benefit from active treatment. The Department denied the application because it did not demonstrate that Claimant was functionally deficient in three out of six major life areas as stated above.
- 3) Claimant was 15 months old at the time of the initial denial for the Title XIX MR/DD program. At that age, he was too young for a reviewer to make a reasonable determination that he was substantially deficient in any of the six major life areas.
- 4) The Department granted two subsequent reevaluations of Claimant's application, and issued two subsequent denials, both for the same reason that Claimant was too young for a reviewer to make a reasonable determination that Claimant was substantially deficient in three out of six of the major life areas.
- 5) During the hearing, Claimant's representative, his mother, submitted evidence concerning Claimant's progress to the Department's witness. After considering this information, the Department was willing to concede that Claimant was substantially



deficient in the areas of self-care and mobility. However, a successful application must demonstrate substantial deficits in three out of six of the major life areas.

- 6) Program policy specifies that the existence of a substantial limitation in a major life area must be established both by relevant test scores and narrative descriptions in the documentation. A substantial limitation is indicated by a standard score from a measurement of adaptive behavior that is at least three standard deviations below the mean. Claimant's score in the area of communication from the Vineland Adaptive Behavior Scale included in the February 2009 psychological evaluation showed a score in the area of communication that was 79. A score of 55 or below would indicate a substantial limitation. Because there must be both an eligible score and supporting evidence in the narrative descriptions, a deficit cannot be established when there is not an eligible score. Therefore, the Department is correct not to find a substantial deficit in this area.

**IX. DECISION:**

It is the decision of the State Hearing Officer to **uphold** the decision of the Department to deny Claimant's application for the Title XIX 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 2nd Day of April, 2010.**

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**Stephen M. Baisden**  
**State Hearing Officer**