

101420

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED  
2010 JUN 24 PM 2:56  
CATHY S. LINDSEY  
KANAWHA COUNTY CLERK

MICHAEL BILLS, by his  
next friend ELLEN BILLS,

*Petitioner,*

v.

Civil Action No. 09-AA-182  
Judge Tod J. Kaufman

PATSY A. HARDY, in her official capacity as  
Secretary of the West Virginia Department of  
Health and Human Resources; and TODD  
THORNTON, in his official capacity as State  
Hearing Officer for the West Virginia  
Department of Health and Human Resources,

*Respondents.*

**FINAL ORDER**

Before the Court is Petitioner's Writ of Certiorari filed on November 10, 2009. Petitioner is appealing from the October 21, 2009 Decision by State Hearing Officer for the Board of Review ("BOR"). A fair hearing was held on August 26, 2009, which upheld the decision of the West Virginia Department of Health and Human Resources ("DHHR") to terminate Petitioner's benefits under the "MR/DD Medicaid Waiver Benefit Program." Petitioner challenges

Respondents decision that the information submitted does not support a finding of sufficient deficits required to meet medical eligibility for participation in the MR/DD Waiver Program.

**Factual and Procedural Background**

Petitioner, who is a 16-year old child, is a recipient of MR/DD Waiver Services. Upon re-evaluation of Petitioner's medical edibility, the Department of Health and Human Resources

(DHHR") sent a notice of termination Petitioner on or about January 13, 2009. The notice

ns the reason for termination of services, in pertinent part, as:

Your application was 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, Self-Direction, Receptive or Expressive Language, Mobility, Capacity for Independent Living.

The notice indicated that the facts relied on in making the DHHR's decision were an ICF/MR Level of Care Evaluation (DD-2A) dated August 25, 2008, a Psychological Evaluation (DD-3) dated June 15, 2008, an Individualized Education Plan (IEP) dated April 22, 2008; a letter from Jamie Melroy dated October 6, 2008, and an APS Healthcare Budget Statement dated September 17, 2008.

Testimony from the DHHR's Psychologist Consultant affirmed that because of information subsequently reviewed in the June 24, 2009 DD-3, the DHHR agreed that the Claimant was substantially limited in the *capacity for independent living* as well as the previously awarded area of *self care*.

The MR/DD Waiver Manual, Chapter 513, Section 513.3.1, effective November 1, 2007, includes the following pertinent medical eligibility criteria (*It should be noted that 42 CFR Section 435.1009-referred to in the following policy- has since been changed to 42 CFR Section 435.1010*):

**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

- 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 aged 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 functions 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
- Tuberos Sclerosis

Additional, 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 at 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 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 homes 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).

The DHHR's Psychologist Consultant testified that Petitioner did not meet the requirement for substantially limited functioning in the area of *mobility*. He noted that the August 25, 2008 DD-2A documented that Petitioner was ambulatory.

The DHHR's Psychologist Consultant testified that Petitioner did not meet the requirement for substantially limited functioning in the area of *learning*. He noted that the September 30, 2008 DD-3 provided Petitioner's results on the Kaufman Brief Intelligence Test: Second Edition (KBIT:2). On this instrument, Petitioner obtained a verbal score of 94, a nonverbal score of 104, and an IQ Composite score of 99. He also noted that the April 22, 2008 IEP provided Petitioner's grade equivalent score of 4.9 in reading, and 3.8 in math. Although below average, the testimony of the DHHR's Psychologist Consultant indicated that these scores were not indicative of substantially limited functioning. Petitioner evaluating Psychologist testified that these grade equivalent scores reflect the controlled environment at school for Petitioner.

The IEP also stated that Petitioner's lowest grade scores have been 75 in Language Arts and 77 in Geography. The DHHR's Psychologist Consultant opined that it would be rare for anyone requiring MR/DD Waiver Services to obtain grades at this level.

The DHHR's Psychologist Consultant testified that Petitioner did not meet the requirement for substantially limited functioning in the area of *language*. He noted the September 30, 2008 DD-3 stated that Petitioner is verbal, can generally communicate wants and needs, can answer simple questions and understand instructions, and sometime uses complex sentences. The April 22, 2008 IEP also described Petitioner as capable of communicating his

wants and needs verbally. Petitioner's evaluating Psychologist testified that Petitioner does have language.

Petitioner's Adaptive Behavior was measured on his September 30, 2008 DD-3 using the Adaptive Behavior Scale-School, 2<sup>nd</sup> Edition, or ABS-S:2. Using non mental retardation (non MR) norms, the results for the part one domain scores are as follows:

Subtest	Raw Score	%ile Rank	Std. Score	Age Equiv.	Rating
Independent Functioning	63	1	1	4-0	Very Poor
Physical Development	22	25	8	11-0	Average
Economic Activity	3	1	1	3-3	Very Poor
Language Development	36	16	7	7-6	Below Average
Numbers and Time	11	25	8	7-9	Average
Pre/Vocational Activity	3	5	5	3-9	Poor
Self-Direction	6	1	3	<3-0	Very Poor
Responsibility	5	16	7	2	Below Average
Socialization	11	1	2	<3-0	Very Poor

The June 24, 2009 DD-3 additionally used the ABS-S:2 instrument to evaluate Petitioner's adaptive behavior. The results for the part one domain scores are as follows:

Subtest	%ile Rank	Standard Score	Rating
Independent Functioning	<1	01	Very Poor
Physical Development	25	08	Average
Economic Activity	<1	01	Very Poor
Language Development	16	07	Below Average
Numbers and Time	25	08	Average
Pre/Vocational Activity	05	05	Poor
Self-Direction	01	03	Very Poor
Responsibility	16	07	Below Average
Socialization	<1	02	Very Poor

The DHHR's Psychologist Consultant cited these scores to demonstrate that Petitioner did not meet the requirement of substantially limited functioning in the areas of *language* and *self direction*, because the standard of "less than one (1) percentile when derived from non MR

normative populations” was not met. Petitioner’s evaluating Psychologist testified that the testing should be accurate. Ellen Bills, Petitioner’s mother-who provided the responses on which the ABS-S:2 results were based-testified that her responses were truthful.

The DHHR’s Psychologist Consultant testified that Petitioner did not meet the requirement for substantially limited functioning the area of *self-direction*. The September 30, 2008 DD-3 stated, in pertinent part:

He enjoys discussions related to his perseverative topics. He enjoys playing with pets. He will engage in leisure activities when arranged for him and participates in group activities if encouraged to do so at times.

Narrative descriptions of Petitioner from his April 22, 2008 IEP stated, in pertinent part:

Mischo has demonstrated that he is interested in a career involving medical services. He is very interest in hearing about details concerning operations, stitches and emergencies. His interest will take over and he is known to avoid school work by continuing in conversation about his interest. When he becomes behind in his school assignments he will often state that the current class he is taking des not apply to his future in medicine or to work in an ambulance.

Testimony from the DHHR’s Psychologist Consultant opined that these narratives indicated that Petitioner has some degree of self-direction, albeit inappropriate at times.

---

Testimony from Petitioner’s evaluating Psychologist regarding *self-direction* noted that Petitioner has his leisure time organized for him, and that he has interests, but not appropriate ones.

Ellen Bills, Petitioner’s mother, testified that Petitioner has “basically no self-direction” and that “95% of the time” he does not initiate and complete tasks on his own. She gave examples of Petitioner’s self-direction being impaired by confusion or lack of safety awareness. She testified that he does enjoy going to a yoga class, and does request that she buy him

computer magazines. Susan McKinley, who owns the business where Petitioner attends yoga, testified that Petitioner did not independently choose to start the yoga classes offered by her business; the class was arranged by her and Petitioner's mother.

James McElroy, Petitioner's Special Education Teacher, and Eddie Jeffries, Petitioner's Community Manger from Autism Services, both asserted that Petitioner is limited in the area of self-direction.

March Ellison, Program Coordinator for the Marshall University Autism Training Center, testified that autism affects an individual's ability to act independently and follow through on actions. Petitioner is noted as having a diagnosis of autism.

#### Standard of Review

This Court's review is governed by the West Virginia Administrative Procedures Act, W.Va. Code § 29A-5-1 *et seq.* West Virginia Code § 29A-5-4(g) states

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The Court must give deference to the administrative agency's factual findings and reviews those findings under a clearly wrong standard. Further, the Court applies a *de novo* standard of review to the agency's conclusions of law. *Muscatell v. Cline*, 474 S.E.2d 518, 525 (W.Va. 1996).

## Discussion

In its Petition, Petitioner claims the following errors:

1. The October 21, 2009 decision is erroneous because the evidence demonstrated that the DHHR denied the application based upon criteria which are undefined, unwritten, and not set forth in any official policy or regulation.

2. The October 21, 2009 decision is erroneous because the evidence demonstrates that Michael Bills has substantial limitations in the major life area of self-direction, which is the third major life area, and thus meets the DHHR's standard.

3. The October 21, 2009 decision is erroneous because the conclusion is contrary to law.

Petitioner's claims do not withstand the amount of evidence in this case. The DHHR has followed a definite procedure that provides standards and guidelines as a proper basis for determining medical eligibility. Applying the DHHR's procedure, as done by the State Hearing Officer for the BOR, Petitioner is unable to support of finding of medical eligibility based up on the evidence.

---

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 or more of the major life areas is required. Substantial limits is defined on standardized measures of adaptive behavior scores three standard deviations below the mean or equal to or below the 75<sup>th</sup> percentile when derived from MR normative populations. Substantially limited functioning must be supported by not only test scores, but by narrative descriptions contained in the documentation provided by Petitioner.

The evidence supports the DHHR's decision because it is based upon detailed procedures and policies that are used to evaluate a participant's eligibility. The record below provides substantial evidence that proves a specific and defined procedure was used in evaluating Petitioner's medical eligibility as is used when determining potential eligibility for participation in the program. To use a different method of testing for the Petitioner to determine his medical eligibility would be contrary to law.

Furthermore, unless Petitioner applies a different procedure of testing, Petitioner can only establish a qualifying diagnosis and functionality in two major life areas—self-care and the capacity for independent living—prior to this hearing. The major life area in question is self-direction. Extensive testimony and documentary evidence clearly show that Petitioner is limited with regard to self-direction. However, policy requires narrative in addition to test scores to quantify the extent of limitation in major life areas, so that functionality can be measured against the required standard of “substantially limited functioning.” Against this standard, Petitioner clearly fails to meet functionality in the area of self-direction. With only two of the required three major life areas met, Petitioner has failed to meet the functionality requirement of medical eligibility for the MR/DD Waiver Program.

---

### Ruling

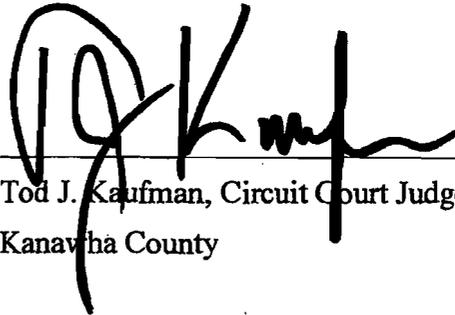
After carefully reviewing decisions below, the record, the parties oral arguments, and the relevant law, the Court hereby AFFIRMS the decision of the Board below because the record supports the findings and conclusions below. Pending appeal to the West Virginia Supreme Court, this case is DISMISSED and STRICKEN from the docket of the Court. Objections and exceptions by the Petitioner are hereby preserved.

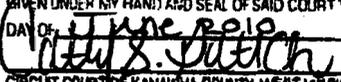
The clerk of the court shall distribute copies of this Order to all counsel of record:

Benita Whitman, Esquire  
Legal Aid of West Virginia  
922 Quarrier Street, 4<sup>th</sup> Floor  
Charleston, WV 25301

**Mary McGavin and**  
Michael E. Bevers, Esquire  
Assistant Attorney General  
Bureau for Medical Services, WVDHHR  
350 Capitol Street  
Charleston, WV 25301

Enter this Order the **24** day of June, 2010.

  
\_\_\_\_\_  
Tod J. Kaufman, Circuit Court Judge for  
Kanawha County

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS **25<sup>th</sup>**  
DAY OF **June 2010**  
  
\_\_\_\_\_  
CATHY S. GATSON, CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA **mr**