



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
1400 Virginia Street
Oak Hill, WV 25901

Joe Manchin, III
Governor

Martha Yeager Walker
Secretary

August 14, 2009

-----for -----

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held July 29, 2009. Your hearing request was based on the Department of Health and Human Resources' decision to deny ----- services under the MR/DD Waiver program.

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 Waiver program is based on current policy and regulations. These regulations provide 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 or MR/DD Waiver Policy Manual § 513.1).

The information submitted at your hearing was insufficient to establish an eligible diagnosis of autism or mental retardation and the severity of each condition as required by policy.

It is the decision of the State Hearings Officer to **Uphold** the action of the Department to deny ----- services under the MR/DD Waiver program.

Sincerely,

Kristi Logan
State Hearings Officer
Member, State Board of Review

cc: Erika Young, Chairman, Board of Review
Melody Martin, Adoption Specialist
Bureau of Behavioral Health

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

-----,

Claimant,

v.

Action Number: 09-BOR-1142

**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 July 29, 2009 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 July 29, 2009 on a timely appeal, filed April 23, 2009.

II. PROGRAM PURPOSE:

The Program entitled MR/DD Waiver is administered by the West Virginia Department of Health & 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 Foster Parent
Melody Martin, Adoption Specialist, DHHR
Heather Lucas, CPS, DHHR

Carol Brawley, MR/DD Waiver Hearing Coordinator (testified by phone)
Linda Workman, Consulting Psychologist, BMS (testified by phone)

Presiding at the Hearing was Kristi Logan , State Hearing Officer and a member of the Board of Review.

IV. QUESTIONS TO BE DECIDED:

The question to be decided is whether or not whether the Department's decision to deny Claimant MR/DD Waiver services was correct.

V. APPLICABLE POLICY:

MR/DD Waiver Services Policy Manual § 513.3.1

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 MR/DD Waiver Services Policy Manual § 513.3.1
- D-2 Denial Notification Letter dated March 27, 2009
- D-3 Level of Care Evaluation (DD-2A) dated February 18, 2009
- D-4 Psychological Evaluation (DD-3) dated March 3, 2009
- D-5 Individualized Education Program (IEP) dated September 12, 2008
- D-6 Amended Psychological Evaluation dated April 8, 2009
- D-7 Psychological Evaluation dated February 9, 2007
- D-8 Denial Notification Letter dated April 15, 2009

Claimants' Exhibits:

- C-1 Medical Records from [REDACTED] dated March 9, 2009
- C-2 Social Security Administration Child Functioning Report dated June 25, 2009

VII. FINDINGS OF FACT:

- 1) An application for the MR/DD Waiver program was made on Claimant's behalf. A denial notification letter dated April 8, 2009 was issued which read in pertinent parts (D-6):

Your application was denied because:

Asperger's Disorder as diagnosed by the psychologist is not considered to be a "related condition" for Title XIX MR/DD Waiver eligibility and the physician has diagnosed High Functioning Autism which does not meet the severity criteria for diagnostic eligibility. Psychological evaluations submitted to date provide significantly inconsistent impressions as to the Axis II diagnosis with impressions ranging from Average intellectual ability to mental retardation, unspecified. Therefore, diagnostic eligibility cannot be established.

- 2) Linda Workman, consulting psychologist with the Bureau of Medical Services, testified to the reasons for the denial of MR/DD Waiver services for Claimant. The physician who completed the Level of Care Evaluation on February 18, 2009 diagnosed Claimant with high functioning autism, global developmental delay (GDD) and static encephalopathy (D-3).
- 3) Ms. Workman referred to the psychological evaluation dated March 3, 2009. The Kaufman Brief Intelligence Test, Second Edition (KBIT-2) was administered with Claimant scoring an IQ composite of 46. This score was noted to be consistent with that of a person with mental retardation (MR) but difficult to determine the severity due to Claimant's autistic/Asperger's behaviors. The AAMR Adaptive Behavior Scale – Residential Community, Second Edition (ABS-RC:2) was also administered that date. However, Ms. Workman pointed out the domain scores as listed in the evaluation are those of the ABS-2, not the ABS-RC:2 which is administered to adults. The scores were compared with MR individuals and she was unable to convert these scores to those of non MR individuals. The psychologist diagnosed Claimant with Asperger's Disorder and MR, unspecified. A recommendation for ICF/MR level of care was given (D-4 and D-6).
- 4) According to Claimant's IEP dated September 12, 2008, he is able to put alphabet chips in ABC order and identify 90% of the sounds. He recognizes 30% of the 220 Dolch Sight Words. He can count from one to one hundred and also count backwards. He counts pennies and dimes and tells time to the hour. He spends 15% of his time in school in special education classes (D-5).
- 5) A psychological evaluation from February 9, 2007 was also reviewed in determining Claimant's eligibility. The Wechsler Preschool and Primary Scale of Intelligence, Third Edition (WPPSI-III) was administered. Claimant had a verbal intelligence score of 90 and a full performance score of 86. The administering psychologist stated in the report that Claimant "is significantly behind not as a result of intelligence but all the

confusion in his life as well as a serious speech problem.” The report continued in saying Claimant “is a child of average intelligence” (D-7).

- 6) Ms. Workman stated Claimant was denied services because he does not have an eligible diagnosis as set forth in policy. The various documents submitted for review were inconsistent and conflicting. The physician diagnosed Claimant with high functioning autism. However, there was no assessment of autism submitted to determine its severity. Claimant also received a diagnosis of Asperger’s Disorder and MR in March 2009. Not only is Asperger’s Disorder not an eligible condition to qualify for MR/DD Waiver, an individual cannot have both Asperger’s and MR. Asperger’s is a social disorder and not a cognitive disorder. The psychological evaluation from February 2007 indicated Claimant had average intelligence with WPPSI-III test results as supporting documentation. His delays seem to stem from cultural and experiential issues. Since Claimant did not meet the diagnostic criteria, any adaptive deficits were not even considered.
- 7) Melody Martin, Adoption Specialist with the DHHR, testified on Claimant’s behalf. Although Claimant’s IEP stated he is in special education only 15% of the time, the school system utilizes inclusion in which his regular education classes are modified. His progress is insufficient academically and he is not performing at his grade level.

The psychological evaluation of March 2009 indicated Claimant has MR and has significant delays. She does not feel the Asperger’s diagnosis is correct as Claimant cannot carry on a conversation or repeat something he just heard. She felt the test scores from the KBIT were more accurate than the results of the WPPSI-III from 2007 which rated Claimant as of average intelligence.

- 8) The report from the [REDACTED] showed Claimant’s primary cognitive diagnosis as autism. He is reported to have uneven and delayed cognitive development consistent with that of a three (3) year old (C-1).

Claimant can only speak in 2-3 word sentences, carry on a conversation, repeat stories he has heard, recognizes simple sight words only and cannot read or write well. He has limited motor skills due to his coordination, gait and muscle tone. He needs assistance with all self-care skills. He has no understanding of safety issues.

- 9) Heather Lucas, CPS worker with the DHHR, stated Claimant’s abilities were exaggerated on the IEP. From her observations, he will never be able to live independently. She did not want him to be denied services because of the contradictory reports.
- 10) -----, Claimant’s foster parent, testified that Claimant plays with baby toys. She has to remind him to eat and drink and he often sits in a daze.
- 11) MR/DD Waiver Services Policy Manual § 513.3.1 states:

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 503.1, 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 CFR435.1009.

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 will 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).

Conditions Ineligible

- 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 indicate no previous history of co-occurring mental retardation or developmental disability prior to age 22. The member's clinical evaluators 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).

VIII. CONCLUSIONS OF LAW:

- 1) Policy dictates the MR/DD Waiver Program requires 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 in three (3) or more of the major life areas.

- 2) The documentation submitted for the Department's review showed contradictory diagnoses for Claimant. While autism and mental retardation are eligible conditions, there was no information as to the severity of autism and conflicting test scores as to the severity, if any, of mental retardation. Claimant's records were insufficient to establish an eligible diagnosis as set forth in policy.
- 3) Claimant does not meet the medical criteria for the MR/DD Waiver program.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the action of the Department to deny Claimant 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 14th day of August 2009.

**Kristi Logan
State Hearing Officer**