



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
P.O. Box 1736

Joe Manchin
Governor

Patsy Hardy, FACHE, MSN, MBA
Cabinet Secretary

October 16, 2009

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held September 21, 2009. Your hearing request was based on the Department of Health and Human Resources' proposal to deny benefits and services under 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 & 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 in three (3) or more major life areas that require the level of care and services provided in an Intermediate Care Facility for individuals with mental retardation and/or related conditions and must have manifested prior to the age of 22. (West Virginia Title XIX MR/DD Home & Community-Based Waiver Revised Operations Manual, Chapter 513).

It was derived through testimony during the hearing process that you lacked the diagnosis of mental retardation or a related condition, therefore the Department correctly assessed the denial.

It is the decision of the State Hearing Officer to **uphold** the proposal of the Department to deny benefits and services through the MR/DD Waiver Program.

Sincerely,

Eric L. Phillips
State Hearing Officer
Member, State Board of Review

cc: Chairman, Board of Review
Steve Brady, Operations Coordinator MRDD

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

-----,

Claimant,

vs.

Action Number: 09-BOR-1506

**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 October 16, 2009 for ----- . This hearing was conducted 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 convened on September 21, 2009 on a timely appeal filed July 17, 2009.

All persons giving testimony were placed under oath.

II. PROGRAM PURPOSE:

The *Medicaid Home and Community-Based MR/DD Waiver Program* (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

-----, Claimant's representative and Grandmother

-----, Witness and Aunt
Carol Brawley, Hearings Coordinator Title XIX Waiver Services
-----, Psychologist Consultant

Presiding at the hearing was Eric L. Phillips, 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 or not the Department was correct in its denying 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 513

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Department's Exhibits:

- D-1 Title XIX MR/DD Home and Community-Based Waiver Program Operations Manual, Chapter 513
- D-2 Notice of Denial dated June 15, 2009
- D-3 ICF/MR Level of Care Evaluation (DD 2A) dated April 30, 2009
- D-4 Comprehensive Psychological Evaluation (DD 3) dated March 17, 2009
- D-5 Individualized Education Program, Hampshire County Schools dated May 30, 2008

VII. FINDINGS OF FACT:

- 1) The Claimant applied for and was subsequently denied Title XIX MRDD Waiver Services on June 15, 2009.
- 2) Exhibit D-2 was issued to Claimant on June 15, 2009. Denial notice list reasons for denial as:

“----- has not been diagnosed with mental retardation or a related condition by the psychologist. While the physician has diagnosed mental retardation this diagnosis is inconsistent with the psychometric data contained in the DD-3. Asperger's Disorder is not considered to be a related condition because it is not associated with mental retardation and does not typically

result in the need for an institutional level of care”

- 3) Claimant’s representative testified that the Claimant has been diagnosed with Autism at an early age. The Psychologist Consultant reviewed Exhibit D-3, ICF/MR Level of Care Evaluation., which revealed that the physician completing the evaluation listed the Claimant on Axis I of the Diagnostic Section with Irrational behavior and Axis II of the evaluation diagnoses the Claimant with mental retardation. The physician completing the evaluation further certified the need for an ICF level of care on Exhibit D-3, but documentation provided to the Department did not support the diagnosis listed on the evaluation. The evaluation of the Claimant illustrates delays in speech and coordination, but assesses the Claimant as mobile, continent, and shows independence in the ability to feed oneself and personal hygiene.
- 4) Exhibit D-4, Psychologist Evaluation dated March 17, 2009, completed by [REDACTED] states that the Claimant was diagnosed with Asperger’s Disorder while in the 3rd grade. The Claimant met the criteria for an Asperger’s disorder as he has a failure to develop peer relationships appropriate to the developmental level and lacks social or emotional reciprocity. A diagnosis on Axis I and Axis II of the Diagnosis section of the documentation is listed as Asperger’s Disorder and Borderline Intellectual Functioning. The Psychologist Consultant testified that individuals with Asperger’s Disorder are not mentally retarded and this condition is not associated with adaptive delays in self help or language. The Psychological Consultant contended that individuals with Asperger’s Disorder may live productive lives and are gainfully employed and can lead self-sufficient lives. The Psychologist Consultant conveyed that Asperger’s Disorder is not associated with adaptive delay, but an individual with this diagnosis may have deficits on the autism spectrum and deficits of social reciprocity.
- 5) Testimony from the Psychologist Consultant revealed that the Claimant was issued the Wechsler Adult Intelligence Scale in March of 2009 in an evaluation for Social Security benefits. The psychologist conducting the evaluation for Exhibit D-2 issued the Slosson Intelligence in her assessment of the Claimant. Test scores from the Slosson assessment show that the Claimant achieved a raw score of 115 which is equivalent to a total standard score of 78. This score is equivalent to a Wechsler IQ of 79. The Psychologist Consultant testified that these scores are on the upper end of the borderline range of ability and are not in the range of mental retardation. Evaluations of the assessment revealed there were no indications of mental retardation.

Furthermore, Exhibit D-4, documents that the Adaptive Behavior Scale-Residential and Community (ABS) was issued to measure adaptive behavior. Test results show that the Claimant achieved a superior score in physical development and average scores in independent functioning, economic activity, language development, numbers, domestic activity, responsibility and socializations. The Claimant was evaluated with below average scores in vocational activity and self direction. The second portion of the assessment

measured the Claimants behavioral difficulties, and the assessment revealed average and below average scores. Average scores were achieved in social behavior, conformity, trust worthiness, sexual behavior, self abusive behavior and social engagement. The Claimant obtained a below average score in stereotypical and hyperactive behavior as well as disturbing interpersonal behavior. The Claimant also obtained an above average score in personal self-sufficiency and average score in community self-sufficiency. Personal-social responsibility and personal and social adjustment revealed a below average score for the Claimant.

The following is documentation from ABS scores using non-MR normative populations:

Subtest	Raw Score	%tle Rank	Std Score
Independent Functioning	68	50	10
Physical Development	23	23	15
Economic Activity	8	50	10
Language Development	27	63	11
Numbers and Time	7	50	10
Domestic Activity	11	75	12
Pre/Vocational Activity	3	9	6
Self-Direction	4	9	6
Responsibility	4	37	9
Socialization	13	37	9
Social Behavior	12	50	10
Conformity	14	25	8
Trustworthiness	2	50	10
Ster. And Hyper. Behavior	21	9	6
Sexual Behavior	0	75	12
Self-Abusive Behavior	2	63	11
Social Engagement	7	25	8
Dist. Interp. Behavior	13	16	7
Pers. Self-sufficiency	73	79	
Comm. Self-sufficiency		73	50
Personal-Social Resp.	22	16	
Social Adjustment	28	23	
Personal Adjustment	23	0	

- 6) The Claimant's witness and Aunt, [REDACTED] contended that her understanding of Asperger's disorder is that the disorder is a form of high functioning Autism. The Psychologist Consultant described the differences between Autism and Asperger's disorder, as Autism being a more severe disorder in which individuals begin to develop language and social reciprocity from age 15 months to 3 years and that individuals with Autism lose the ability to communicate with language as well as, the ability to interact with other individuals. Testimony further reiterated that individuals with Asperger's disorder have full use of language and are not delayed academically.
- 7) Exhibit D-5, Claimant's Individual Education Plan, shows that Claimant participated in algebra, horticulture, and other classes while attending [REDACTED] County Schools. Claimant's representatives contend that although the Claimant graduated with a modified

diploma, he lacks the ability to read and write and would be unable to obtain employment without constant supervision.

- 8) Eligibility requirements for the MR/DD Waiver Program are outlined in Chapter 513 of the Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual (D-1).

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 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 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
 - Autism
 - Traumatic brain injury
 - Cerebral Palsy
 - Spina Bifida
 - Tuberos 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 of 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) Regulations governing the MR/DD Waiver Program require eligible individuals to have a diagnosis of mental retardation and/or a related developmental condition, which must be severe and chronic, in conjunction with substantial deficits (substantial limitations associated with the presence of mental retardation). The individual must exhibit substantial adaptive deficits in three (3) or more major life areas to qualify for the program.
- 2) Evidence revealed that the Claimant was diagnosed with Asperger’s disorder, irrational behavior, and mental retardation during evaluation stages of the application. Any claims of a

severe and chronic diagnosis of mental retardation in the evaluations for Title XIX Waiver Services were not supported by any presented documentation or IQ scores from the available evaluations and the Claimant failed to meet initial criteria for the program.

- 3) Based on information provided during the hearing, Asperger's Disorder is not a diagnosis of mental retardation and a related developmental condition. The condition must be severe and chronic and the Claimant's diagnosis does not meet diagnostic criteria set forth in policy, therefore the Department was correct in its decision to deny services under the Title XIX MRDD Waiver Program.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the Department's decision to deny the Claimant's benefits and services through the MR/DD Waiver Program.

X. RIGHT OF APPEAL:

See Attachment.

XI. ATTACHMENTS:

The Claimant's Recourse to the Hearing Decision.

Form IG-BR-29.

ENTERED this _____ Day of October 2009.

Eric L. Phillips
State Hearing Officer