



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
1027 N. Randolph Ave.
Elkins, WV 26241

Joe Manchin
Governor

Martha Yeager Walker
Secretary

April 22, 2009

-----for -----

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held April 15, 2009. Your hearing request was based on the Department of Health and Human Resources' action to deny your application for 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)

Evidence presented during the hearing fails to establish an eligible diagnosis that meets severity requirements for the MR/DD Waiver Program.

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

Sincerely,

Pamela L. Hinzman
State Hearing Officer
Member, State Board of Review

cc: Chairman, Board of Review
Carol Brawley, Hearings Coordinator, MR/DD Waiver Program

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

-----,

Claimant,

vs.

Action Number: 09-BOR-484

**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 April 22, 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 convened on April 15, 2009 on a timely appeal filed January 15, 2009.

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

Carol Brawley, Hearings Coordinator, MR/DD Waiver Program (participated telephonically)

Richard Workman, Psychologist Consultant, Bureau for Medical Services (participated telephonically)

Presiding at the hearing was Pamela L. Hinzman, 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 513

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Department's Exhibits:

- D-1 Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 513
- D-2 Notice of Denial/Termination dated December 10, 2008
- D-3 DD-2-A Medical Evaluation dated July 17, 2008
- D-4 Harrison County Schools Psychoeducational Evaluation dated May 14, 2008
- D-5 Individualized Education Program dated September 16, 2008
- D-6 Adaptive Behavior Scale scores dated April 1, 2009
- D-7 Psychological Evaluation, completed by the office of Dr. -----, dated September 29, 2008

VII. FINDINGS OF FACT:

- 1) The Claimant applied for Title XIX MR/DD Waiver services and the Department reviewed her medical/psychological documentation to determine whether she meets medical eligibility criteria for the program.
- 2) The Department determined that the Claimant is ineligible for Waiver services and sent a Notice of Denial/Termination dated December 10, 2008 (D-2), which states:

Your Waiver Application is hereby denied. Your application was denied because: Overall, documentations [*sic*] submitted for review does not support the presence of mental retardation especially to the degree associated with the need for an institutional level of care. Please resubmit the ABS-S:2 Score Summary with scores derived from non-mental retardation norms. The IEP submitted with the packet is outdated.

- 3) The Department's Psychologist Consultant testified that the Claimant, who is currently six (6) years old, has not been diagnosed with mental retardation and/or a related developmental condition that constitutes a severe and chronic disability. In addition, evidence does not support the existence of substantial adaptive deficits in three (3) or more of the six (6) major life areas identified by policy.

While the physician completing the Claimant's Level of Care Evaluation (D-3) certified that the Claimant requires the level of services provided in an intermediate care facility, the form lists the Claimant's Axis I diagnosis as Pervasive Developmental Disorder-Not Otherwise Specified (PDD-NOS) and her Axis II diagnosis as low average intelligence. The medical assessment lists no neurological deficiencies with the exception of low attention span.

Exhibit D-4, a [REDACTED] Schools Psychoeducational Evaluation, indicates that the Claimant scored a full-scale IQ of 82 (low average range) on the Wechsler Preschool and Primary Scale of Intelligence- Third Edition (WPPSI-III) and a processing speed score of 113 (high average). The examiner wrote that the evaluation results may have been a "slight underestimate of ----'s true cognitive potential, but likely a good representation of her current performance in the classroom." The Department's Psychologist Consultant testified that IQ scores of 55 and below are normally considered eligible scores for the MR/DD Waiver Program. The Claimant also achieved an Adaptive Behavior Quotient score of 82 (low average range), and an Autism Quotient score of 97, suggesting an "average probability of autism." The Psychologist Consultant explained that the level of autism must be severe to be considered as an eligible diagnosis for the MR/DD Program. He reviewed the Summary of Scores included with the document and explained why the scores do not support the existence of severe adaptive deficits.

The Psychologist Consultant reviewed Exhibit D-5, an Individualized Education Program from [REDACTED] Schools, which states: "The psycho-educational evaluation took place on 5-14-08 and the results determined that ---- is in the low average range in the areas of intelligence, adaptive skills and achievement skills." The consultant reviewed Exhibit D-6, AAMR Adaptive Behavior Scale-School scores, and noted that the Claimant – provided that

she had an eligible diagnosis – would meet substantial limitation requirements in only one (1) area, self-care, as determined by her independent functioning score.

Exhibit D-7, a Psychological Evaluation completed on September 29, 2008, indicates that the Claimant achieved a full scale IQ of 72 on the WISC-IV test. The examiner wrote that the score normally falls in the borderline intellectual range of functioning, however, “due to her reported deficits in adaptive functioning and due to her diagnosis of Pervasive Developmental Disorder, NOS, her intellectual functioning is around a mild mental retardation range.”

The Claimant’s mother testified that her daughter has skin, lung, kidney and vision problems. She is also prone to rages, seizures and self-infliction of pain. The Claimant’s mother testified that – while the Claimant needs much assistance – her condition is not severe enough to warrant institutionalization. She indicated that she had been unaware of the severity requirements for the MR/DD Waiver Program.

Because the Claimant does not meet diagnostic criteria, the issue of substantial adaptive deficits is moot and will not be addressed in this decision.

- 4) 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).
- 2) While it is clear that the Claimant's condition poses many challenges, evidence provided during the hearing fails to demonstrate that the Claimant has an eligible diagnosis that meets severity requirements for the MR/DD Waiver Program.
- 3) The Department acted correctly in denying the Claimant's application for MR/DD Waiver services.

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 22nd Day of April, 2009.

**Pamela Hinzman
State Hearing Officer**