



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
P.O. Box 1736
Romney, WV 26757

Joe Manchin
Governor

Martha Yeager Walker
Secretary

May 20, 2005

Dear Ms _____:

Attached is a copy of the findings of fact and conclusions of law on your grandson's hearing held October 25, 2004. Your Hearing request was based on the Department of Health and Human Resources' failure to ensure that adequate MR/DD respite services are provided by the case management agency, East Ridge.

In arriving at a decision, the State Hearing Officer is governed by the Public Welfare Laws of West Virginia which are governed by the Code of Federal Regulations. These same laws and regulations are used in all cases to assure that all persons are treated alike.

Eligibility and Services for the MR/DD Home and Community-Based Waiver Program are determined based on current regulations. One of these regulations specifies that respite care through the Title XIX MR/DD Home & Community-Based Waiver Program is temporary care and supervision for a participant who cannot provide for all of his/her needs. (West Virginia Title XIX MR/DD Waiver Home & Community-Based Policy Manual, Chapter 400- 1). Federal Regulation § 42 CFR 431.51 states that a recipient may obtain Medicaid services from any institution or organization that is qualified to furnish the services; and willing to furnish them to that particular recipient.

The information which was submitted at the hearing revealed that the Provider Agency which you had chosen for your grandson's care has been making reasonable attempts to provide adequate respite care. During a period of employee recruitment difficulties, this agency also referred you to a new Agency to consider.

It is the decision of the State Hearing Officer to **uphold** the action of the Department and its contracted provider agency in their efforts to provide adequate services under the MR/DD Waiver Program.

Sincerely,

Sharon Yoho
State Hearing Officer
Member, State Board of Review

cc: Chairman, Board of Review
Cecilia Brown, BBHFF
Alva Page, BBHFF
[REDACTED] WV Advocates

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

_____ by _____,

Claimant,

v.

Action Number: _____

**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 25, 2004 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 October 25, 2004 on a timely appeal filed December 1, 2003.

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
_____, East Ridge Health Services
_____, Regional Advocate Office
Cecilia Brown, MR/DD Waiver Program
Alva Page, Attorney Representing the Department
_____, Attorney Representing the Claimant

Presiding at the hearing was Sharon Yoho, 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 has followed policy in their efforts to provide MR/DD Waiver respite care through their contracted Provider Agency.

V. APPLICABLE POLICY

Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 4 and Code of Federal Regulations § 42 CFR 431.51.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Departments' Exhibits:

- D-1 MR/DD Waiver Manual, Chapter 4 Program Services
- D-2 MR/DD Waiver Manual, Chapter 4 Agency Residential Habilitation Services
- D-3 Letter from _____ to _____, undated

VII. FINDINGS OF FACT:

1. _____ is a young boy who has been a recipient of MR/DD waiver services for several years. He resides with his mother, _____, and grandmother, _____. His mother has limitations of her own and can not care for _____ on her own. She does maintain employment at a shelter workshop outside of the home. His grandmother is also employed outside of the home.
2. Mr. _____ attends public school and has an aide who transports him to school. He has a need for regular respite care to assist in getting him ready for school each morning and to stay with him when he doesn't attend school on weekdays and also on Saturdays when his grandmother is away at work.
3. Mr. _____ is reported to be difficult to handle. He has an anger problem which will cause him to throw things. He has been labeled as a "runner" and the doors to the outside must be locked at all times to avoid his running. He is not permitted to go outside when under his mother's care, or the care of a respite worker. He is only allowed to go outside when his grandmother is home. His grandmother describes him as a "handful and a challenging child."
4. Ms. _____ has been attempting to obtain the needed respite care for _____ through _____ Health Systems. _____ is contracted by the State of WV as a Case Management agency to offer services through the MR/DD waiver program. _____ has a case manager assigned to him by _____. The attempts at providing the needed respite care have been unsuccessful. The lack of success has been due to a few factors. The greatest factor is the difficulty that _____ has in recruitment and retention of qualified respite care workers. Another factor is the difficulty associated with the job of supervising _____. Also a factor, is the expectations of _____'s grandmother, of a respite worker.
5. Mr. _____ has been assigned 4 different respite workers. The most recent respite workers were not acceptable to Ms. _____ however she testifies that she was willing to work with them. The first of the two was a male who was reported to have taken _____ outside, lost control of him and _____ began to run away. This worker was also reported to have allowed _____ to climb up on a table and unscrew a light bulb and stick his finger in the light socket. The respite worker did explain to the grandmother that he knew he wasn't permitted to touch _____, but he did turn the light switch off. This respite worker did not return after 3 days and this was reported by Ms. _____ to be due to a mutual agreement that he was not working out. The second of these two respite workers was a female reported by Ms. _____ to have come to be interviewed in a tight blouse and high heel shoes. This worker came one day and was reported to have not kept the door locked and was reported to have tried to grab _____ and had left a scratch on his back. This lady did not

return after the first day. Ms._____ states she does prefer the respite worker to be a male.

(4)

6. _____ Case Manager Supervisor, of _____ testified that _____ maintains on going recruitment efforts. She states that she has two new people who are going through orientation at the present time to become respite workers. Both of these two new workers after completing their orientation will be offered to Ms._____ for respite services. _____ also reports that a new provider of waiver services, Daily Companion, had recently contacted her agency and advised that they were staffed and prepared to offer services to MR/DD waiver clients. _____ offered this information to Ms._____, who did not wish at that time to accept this offer. Ms._____ testified during this hearing that she wished to continue with efforts to obtain adequate care from _____ Ms._____ states that most often, respite care is provided by a family member who is paid through the MR/DD waiver program and that the recruitment of non family respite workers is difficult.
7. _____ of the Regional Advocate Office testified that he became aware of the _____ case and the lack of care that was being given and responded by contacting _____ and requesting them to remedy the situation within 10 days. He then filed an appeal on August 20, 2003 with _____ Executive Director of _____ who responded in writing, Exhibit D-3. _____ explains in his letter the difficulty _____ has with recruitment of respite workers. He states that there is a recruiting ad on a web site. He says that there were two separate job fairs held within the community in June which attracted no interest in respite positions. He concludes that _____ has made considerable effort to secure respite services for Mr. _____. He indicates that Ms._____ had requested only male respite workers and that drastically limits the possibilities. He also reported in this letter that when referred to the _____ Center, an ICF/MR facility for respite care, the grandmother became frustrated with the paper work required. Later she did utilize the _____ Center for some respite care for _____. Mr. _____ assured _____ that efforts would continue to secure a respite provider for Mr. _____.
8. Testimony supports that the Department has no authority to force _____ to do anymore than what they are already doing to remedy this situation.

VIII. CONCLUSIONS OF LAW:

1. MR/DD Waiver program policy chapter 4 titled Program Services Respite Care Definition: Respite care is **temporary care** and supervision for a participant who cannot provide for all of his/her needs. This service is used for **short term intervals** due to the absence/need of the participant's primary care giver(s). Respite care may include any of the following components as deemed appropriate/necessary by the IDT.
Supervision

Monitoring
Implementation of Behavior Support Plan

(5)

Implementation of Medical Plans of Care Habilitation Training

2. MR/DD Waiver program policy Chapter 4 titled,

A. The purpose of respite care services:

1. Allow the participant's primary care giver(s) to have planned time for him/herself and other family members.
2. Provide assistance to the participant's primary care giver(s) or participant in crisis or emergency situations.
3. Ensure the physical and/or emotional well being of the participant's primary care giver(s) or the participant by relieving the primary care provider(s) of the responsibility of providing care.
5. Be used as a back-up service when the participant's primary care giver(s) is not available.

C. Location of Service – Respite Care Services: Location of services should be in the most integrated setting as determined by the Interdisciplinary Team.

1. Participant's residence by a qualified provider;
2. Medicaid certified hospital;
3. Out of the participant's residence in a Medicaid certified ICF/MR home or facility;
4. Out of the participant's residence in a group home or ISS licensed by the Office of Health Facilities Licensure and Certification (OHFLAC) to deliver services to individuals with disabilities;

Important Information

The intent of Respite Care services is not to intrude upon the occupants of an Individualized Support Setting and/or a Group Home. The Interdisciplinary Team (for those individuals residing in an ISS or GH) must approve the inclusion of a participant for purposes of receiving Respite Care services in a setting which is occupied by other participants who received MR/DD Waiver services.

5. In a licensed Respite Care facility;
6. Approved specialized Family Care home by a qualified Special Family Care Provider;
7. Day Program facility licensed by OHFLAC to deliver services to individuals with disabilities;
8. Licensed Day Care program (children only);
9. The Community;
10. OBHS funded by DD Crisis Respite Crisis site; and/or
11. Crisis Residential Unit site.

3. Code of Federal Regulations § 42 CFR 431.51 (b)(1) states:
State plan requirements: A State plan must provide as follows:

- (1) Except as provided under paragraph (c) of this section and part 438 of this chapter, a recipient may obtain Medicaid services from any institution, agency, pharmacy, person, or organization that is:
- i. Qualified to furnish the services; and
 - ii. **Willing to furnish them to that particular recipient.**

IX. DECISION:

It is clear that Ms. _____ is not obtaining the respite services that she needs to adequately maintain Mr. _____ safely in his home. The obstacles which are preventing this requested optimum care are also clear. The difficult task of maintaining control of Mr. _____, the selective criteria which Ms. _____ has required in respite care and the difficulty that _____ confronts in recruitment of respite workers are all factors which have created this problem.

Policy is clear that respite care by definition is designed to be temporary care for short term intervals and it can be accomplished in a number of settings other than in the participant's home. The continuous needs of this claimant do not readily fall into the definition of temporary or short term. This creates an even more difficult task for the provider agency.

MR/DD waiver policy does not give the Bureau of Medical Services the authority to force _____ to provide services that they are obviously making an honest yet unsuccessful effort to provide. Federal Regulations provide that that a recipient may obtain Medicaid services from any qualified organization that is willing to furnish them.

It is the finding of the Hearing Officer that sufficient evidence was presented to show that Mr. _____ is not being provided needed services in his home from his current and chosen provider agency; however the agency has been making attempts to remedy the situation by recruitment of additional workers, referring the client to another provider agency and to an ICF/MR facility for respite care. I am ruling that the Agency is following policy and procedures correctly as they are outlined in the Federal Regulations and the MR/DD waiver manual. The Agency's actions are **upheld**.

X. RIGHT OF APPEAL:

See Attachment.

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision.
Form IG-BR-29.

ENTERED this 20th Day of May, 2005

State Hearing Officer

