



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

September 1, 2006

Dear Mr. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held August 16, 2006. Your hearing request was based on the Department of Health and Human Resources' action 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 and 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 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 500).

Evidence presented during the hearing does not support the presence of severe and chronic mental retardation with concurrent adaptive deficits that manifested prior to the age of 22.

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
Stephen Brady, Acting Director, MR/DD Waiver Program

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

_____,

Claimant,

vs.

Action Number: 06-BOR-2231

**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 September 1, 2006 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 August 16, 2006 on a timely appeal filed June 26, 2006. The hearing record remained open until August 31, 2006 to allow the Department an opportunity to review a Psychological Consultation Report completed by Dr. [REDACTED]

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
_____, mother of Claimant

[REDACTED]

Susan Hall, Program Manager, MR/DD Waiver Program (participating telephonically)
Richard Workman, Psychologist Consultant, Bureau for Medical Services (participating 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 proposal to deny the Claimant's 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 500

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Department's Exhibits:

- D-1 Notice of Decision dated May 22, 2006
- D-2 Letter from [REDACTED] DD Division Director, [REDACTED]
- D-3 Psychiatric Evaluation Report from [REDACTED] dated September 24, 2003
- D-4 Psychological Evaluation from [REDACTED]
- D-5 Social History dated January 18, 2006
- D-6 Individual Program Plan dated August 23, 2005
- D-7 Individualized Education Program dated May 25, 2005
- D-8 Title XIX MR/DD Home and Community-Based Waiver Program Revised

Operations Manual, Chapter 500
D-9 Annual Medical Evaluation (DD-2A) dated September 1, 2005

Claimant's Exhibits:

- C-1 Letter from Dr. [REDACTED] dated July 31, 2006
- C-2 Letter from [REDACTED] (undated)
- C-3 Report from Dr. [REDACTED]

VII. FINDINGS OF FACT:

- 1) The Claimant applied for MR/DD Waiver services and received a Notice of Denial dated May 22, 2006 (D-1), which states:

Your Waiver Application is hereby denied. Your application was Denied because: According to the agency's Developmental Disabilities Director, Mr. _____'s IDT does not believe he requires an ICF/MR level of care. Likewise, the licensed Social Worker has not recommended participation stating that Mr. _____ does not require an ICF/MR level of care. Overall, documentation submitted for review indicates mild cognitive impairment and a lack of substantial adaptive deficits which are associated with mental retardation or a related condition.

- 2) While evidence indicates that the Claimant has a diagnosis of mild mental retardation, the Department contended that the Claimant does not exhibit substantial adaptive deficits in three major life areas as required for MR/DD Waiver Program eligibility. The Department indicated that the Claimant's only substantial adaptive deficit is in the area of capacity for independent living. Mr. Workman testified that most of the Claimant's challenges are mental health-related, with the Claimant having been both a victim and a perpetrator of sexual abuse.
- 3) Mr. Workman referred to Exhibit D-2, a letter from [REDACTED] DD Division Director for [REDACTED]. The letter indicates that the Claimant is 16 years old and has a diagnosis of Cognitive Disorder NOS, Borderline Intellectual Functioning and Seizure Disorder. The letter states:

[REDACTED] treatment team agrees that he would benefit from (but does not require) the supports provided by the MR/DD Waiver program.

- 4) Mr. Workman referred to a Psychiatric Evaluation (D-3) completed by Dr. [REDACTED] on September 19, 2006. The evaluation states that the Claimant was court-ordered to [REDACTED] for sex offender-specific treatment and was admitted August 13, 2003. The report lists diagnostic impressions as attention deficit/hyperactivity disorder, mixed receptive-expressive language disorder, paraphilia not otherwise specified (provisional), mental retardation- mild (IQ 69) and a family history of Huntington's Disease (which Mr. Workman stated had been ruled out as a diagnosis for the Claimant). Mr. Workman testified that persons eligible for the MR/DD Waiver Program normally exhibit IQ scores of 55 and below, and that the only substantial delay supported in the document is in the area of capacity for independent living.
- 5) Mr. Workman discussed a Psychological Evaluation (D-4) completed for the Claimant on December 19, 2005. He noted that information concerning the Claimant's prior hospitalizations/institutionalizations lists programs for individuals with significant mental health challenges. Information concerning prior psychological testing completed in 1995, 1996 and 2000 includes full-scale IQ scores of 75, 69 and 63, respectively. The report indicates that the Claimant is a student at [REDACTED] School where he is provided with a one-to-one aide for behavioral issues.

The report states:

Despite his intellectual handicaps, _____ reportedly did not represent a behavioral problem either at home or at school until 2003. Twice during that year, he was accused of sexual molestation (fondling of younger children).

The report lists no significant physical/sensory deficits, states that the Claimant has effective use of all extremities and is fully ambulatory, and that the Claimant is able to perform a number of self-help activities with minimal prompting. The report indicates that the Claimant is verbal and can speak in complete sentences although his speech is often hurried and accelerated. The report states that the Claimant's writing skills are limited to printing his name, however, Mr. Workman testified that the Individualized Education Program does not reflect this limitation. Though his social skills are limited, the report states that the Claimant enjoys riding his bicycle, fishing, sports and video games, which Mr. Workman indicated is reflective of self-direction.

- 6) A Social History (D-5) indicates that the Claimant's developmental milestones were normal, however he requires one-to-one supervision because of his history of sexually inappropriate behavior and assault towards other

minors. Mr. Workman testified that the MR/DD Program cannot address those issues and is concerned with developmental delays.

- 7) An Individual Program Plan (D-6) dated August 23, 2005 states that the Claimant is relatively independent at dining, toileting, bathing, tooth brushing and dressing. He is able to do addition and subtraction.
- 8) An Individualized Education Program (D-7) dated May 25, 2005 indicates that the Claimant mows the lawn and operates a weed eater. When questioned during the hearing, the Claimant testified that he can start the weed eater and put gasoline in it. The report states that the Claimant writes correct responses to reading comprehension questions and has shown improvement in reading orally to the class. He is able to write a complete journal page. Regarding mathematics, the report states that the Claimant requires shorter assignments so he does not become overwhelmed, but is consistent with addition and subtraction without regrouping. He is able to count coins, is working on menu math and can use a calculator with assistance. The Claimant is studying the systems of the human body, can explain the water cycle and enjoys computer work. In addition, he is studying the states surrounding West Virginia and can locate map items with prompting. He knows the correct answers to social problems, but does not always apply those skills to his interactions. He occasionally becomes verbally defiant with supervising adults.
- 9) The Annual Medical Evaluation (DD-2A) (D-9) of September 1, 2005 lists only medications used for mental health issues. The diagnostic section lists Huntington's Disease (which Mr. Workman said has been ruled out as a diagnosis), a mild to moderate delay in all domains and ADHD. It indicates that the Claimant is not physically handicapped.
- 10) Ms. [REDACTED] requested that the Claimant be permitted to submit a Psychological Consultation Report with evaluation dates of June 11, 2004 and July 8, 2004 (C-3). The report was completed by Dr. [REDACTED]. The Department agreed to review the document, however, Mr. Workman informed the Hearing Officer on August 16, 2006 that the additional information did not change the Department's decision. Mr. Workman indicated that the document supports a delay in capacity for independent living, but does not address adaptive behavior or an ICF/MR Level of Care.
- 11) Eligibility requirements for the MR/DD Waiver Program are outlined in Chapter 500 of the Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual (D-8).

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
 - Tuberous 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 evidence indicates that the Claimant has a diagnosis of mild mental retardation, it supports the presence of a substantial delay in only one area: capacity for independent living.
- 3) While it is clear that the Claimant's condition poses many challenges, the Department acted correctly in denying his MR/DD Waiver application as documentation fails to support that the Claimant exhibits substantially limited functioning in three or more major life areas.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the Department's action 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 Hearing Decision.

Form IG-BR-29.

ENTERED this 1st Day of September, 2006

**Pamela Hinzman
State Hearing Officer**