



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
150 Maplewood Ave.
Lewisburg, WV 24901

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

March 15, 2006

_____ for _____

Dear Mr. & Mrs. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held December 2, 2005. Your hearing request was based on the Department of Health and Human Resources' action to deny your son's application for benefits and services through the MR/DD Waiver Program.

In arriving at a decision, the State Hearing Officer 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 (ICF/MR Facility). (West Virginia Title XIX MR/DD Waiver Home & Community-Based Policy Manual, Chapter 502.1).

The information submitted at the hearing revealed your son's condition does not require the "level of care" that is provided in an ICF/MR Facility.

It is the decision of the State Hearing Officer to **uphold** the action of the Department in their decision to deny your son's application for benefits and services through the MR/DD Waiver Program.

Sincerely,

Margaret M. Mann
State Hearing Officer
Member, State Board of Review

cc: Chairman, Board of Review
Stephen Brady, BBHMF
[REDACTED]

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

_____,

Claimant,

vs.

Action Number: 05-BOR-6741

**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 December 2, 2005 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 December 2, 2005 on a timely appeal filed September 20, 2005.

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

[REDACTED], [REDACTED]'s parents and representative
[REDACTED]

Stephen Brady, BBHMF (By Telephone)

Richard Workman, Psychologist Consultant, Bureau for Medical Services (By Telephone)

Presiding at the hearing was Margaret M. Mann, 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 their 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 500-8 (revised October 2004), 42 CFR 435.1009 and 42 CFR 483.440(a)

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Departments= Exhibits:

D-1 Notice of Denial dated 09/07/05

D-2 Letter from Dr. [REDACTED] dated 09/28/05

D-3 Cover Letter dated 08/04/05 from [REDACTED]

D-4 DD-2A Annual Medical Evaluation

D-5 Psychological Evaluation 07/27/05

D-6 Social History Update

D-7 Individual Program Plan dated 07/29/05

VII. FINDINGS OF FACT:

1. On September 7, 2005, a Notice of Denial (D-1) was sent to the Claimant. This notice includes some of the following pertinent information:

Your Waiver Application is hereby denied.

Documentation submitted for review does not support the presence of substantial adaptive deficits in three or more of the six major life areas identified for MR/DD Waiver eligibility which necessitate active treatment and an ICF/MR level of care.

2. The Department stipulated that the Claimant does have an eligible diagnosis of Autism and this was manifested prior to the age of 22.
3. The Department reviewed the Claimant's functionality in the seven major life areas.
4. The letter from Dr. [REDACTED] dated 09/28/05 (D-2) reads in part that she has been treating the Claimant for the following disorders: High Functioning Autism, Bipolar Disorder, Tourette's Syndrome, Obsessive-Compulsive Disorder, and Attention Hyperactivity Disorder. In addition to these neurodevelopmental illnesses, he has Borderline IQ.

Self Care: He needs prompting as he will not take personal care of himself if left alone. He does not participate in activities of daily living.

Learning: _____ did graduate from high school but was absent at least 1/3 of the time secondary to his illnesses; he was violent at school, and had to have one-to-one help..... _____ might be able to learn a trade in a sheltered workshop, but may engage in behaviors (violence, anxiety, etc.) that would prevent full functioning in that setting. As it is, _____ held a job at a local grocery store at which, originally, he was suppose to work 3-4 hours twice a week. He was not able to keep this job as he behavior was erratic.Many times he would start to drive to work and would turn around and go home because of his anxiety level.

Capacity for Independent Living: _____ only functions marginally at home and requires supervision to participate in family life. He would not be able to live alone, but in a highly structured setting seems to respond to routine.

Receptive and Expressive Language disorder: _____ has both of the expressive and receptive language difficulties that are usually seen in autism as well as borderline IQ.

Self-Direction: _____ cannot plan ahead, is not self-motivated, and requires outside supervision and encouragement constantly. He is unable to handle his finances and is unable to be self-sufficient.

5. Mr. Workman stated that on the cover letter sent in with the packet (D-3), it is noted that _____ is diagnosed with OCD, Bi-polar, ADHD, Autism and has been given the diagnosis of Aspergers Syndrome. Mr. Workman testified that Autism and Aspergers are separate diagnoses and are exclusionary. If an individual is diagnosed with one, you cannot be diagnosed with the other. However, some people believe Aspergers is very similar to a higher functioning Autism.
6. The DD-2a, Annual Medical Evaluation (D-4), dated 06/15/05, reads in part on page 3 that all items under neurological are checked normal. These items include alertness, coherence, attention span, vision, hearing, speech, sensation, coordination, gait, muscle tone, and reflexes. There is a statement at the bottom of the page which states "This boy is completely self-help". On page 4 the document reads that the claimant is ambulatory, continent, feeds self, self-care under personal hygiene, and under mental and behavioral difficulties: alert, irrational behavior, and needs close supervision. The physician indicated "yes" for ICF level of care.
7. The psychological evaluation completed 07/27/05 (D-5) revealed the claimant has been hospitalized several times due to aggressive behavior. It is noted that _____ has a driver's license and works minimal hours at _____ grocery store.

Psychomotor: There are no difficulties noted.

Self-help: _____ is able to feed self with spoon and fork with considerable spilling. He tends to personal hygiene with minimal assistance from parents. The assistance consists of verbal prompts and supervision due to his being unmotivated to complete tasks independently. He dresses/undresses self independently. His safety skills are adequate. He can cross the street by himself and go to and from work independently. _____ is able to make simple purchases and make change correctly. _____ is able to do simple math and tell time. _____ completes domestic chores with supervision and prompting. He can cook simple meals and use a microwave.

Language: _____ has good receptive language skills. He can follow multi-step directives but does not comprehend complex instructions that involve decision making. _____'s expressive language is spontaneous, coherent and relevant. He can read simple stories and looks at magazines. He can write or print whole sentences.

Mental Status: _____ has insight into his difficulties. He is able to state what medications he takes and why he takes them. He understands their importance. _____'s judgment is consistent with intellectual abilities. The mother indicates that even though he can verbalize right from wrong, he cannot resist impulses of aggression and exhibits some paranoia which also impairs judgment.

Other: _____ offers to help others. He engages in group activities with encouragement. He likes the computer, action and comedy movies, basketball, and swimming, as well as lifting weights.

Results of the Slossan Intelligence Test: Total Standard Score (TSS) of 70 which falls in the borderline range of intellectual functioning. The report reads in part that although he (_____) has the knowledge of social skills he does not always act appropriately. _____'s scores indicated he has the ability to use and understand words orally.

Neither the licensed psychologist nor the supervised psychologist recommended ICF level of care.

8. Social History Update dated 07/15/05 (D-6) reads in part that _____ attended public and alternative high school and had an aide. He was able to graduate in 2004. Visits with paternal grandmother. Likes to help with farm work.
9. The Individual Program Plan dated 07/29/05 (D-7) reads in part that _____ communicates wants and needs/likes and dislikes. _____ is aware of surroundings and alert to time and environment. It also notes uses walker for mobility. Testimony clarified this was at a time when _____ had a broken leg.
10. Testimony received on behalf of the Claimant from his mother revealed she probably gone into more detail during the evaluations in regard to _____'s self-care. He can go to the bathroom but he uses the floor and wets the bed. He can't even clean himself. He recently went to respite for a week and did not change clothes while he was there because he was not prompted. At one point in his life, he was trying so hard to be normal. It took him about six tries for the drivers test. Someone read the questions to him and he finally got it right. They live on a straight road from where he supposedly worked. He tried and was not able to perform the work. They tried again after two years for him to work at _____ cleaning shelves but it did not work out. At this point he is not driving and she does not foresee him being able to drive again. His mother administers his medication. He knows he has to take the pills or he would be in a hospital somewhere. He has no friends to speak of.
11. Testimony from _____ revealed that in evaluating _____ she has found he is mobile in his own home but is not mobile within his community. He has severe limitations in self-care. He has no self-direction as everything has to be planned for him. He does test well as he has good verbal communication but no consistency of understanding. He has a severe level of safety and requires 24 hour care. He is receiving respite one week per month. _____ is an individual a psychologist without a lot of experience would have a difficult time evaluating because information is obtained by report vs. their own ability to

make their own decision. _____ is not able to carry out things he presents. Driving is an example. He has a modified degree to graduate from high school. Without this type of care, _____ would likely end up being institutionalized.

12. Eligibility Criteria 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 (Revised October 1, 2004).

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/or 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, 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 daily living.
 - A need for the same level of care and services that is provided in an ICF/MR institutional setting.

13. 42 CFR 435.1009 states, in part:

"Active Treatment in intermediate care facilities for the mentally retarded means treatment that meets the requirements specified in the standard concerning active treatment for intermediate care facilities for persons with mental retardation under 483.440(a) of this subchapter....."

14. 42 CFR 483.440(a) states, in part:

"(a) Standard: Active treatment.

- (1) Each client must receive a continuous active treatment program, which includes aggressive, consistent implementation of a program of specialized and generic training, treatment, health services and related services described in this subpart, that is directed toward--
 - (i) The acquisition of the behaviors necessary for the client to function with as much self determination and independence as possible; and
 - (ii) The prevention or deceleration of regression or loss of current optimal functional status.
- (2) Active treatment does not include services to maintain generally independent clients who are able to function with little supervision or in the absence of a continuous active treatment program."

VIII. CONCLUSIONS OF LAW:

1. The Claimant has a program qualifying diagnosis of Autism.
2. Regulations require that along with a qualifying diagnosis substantial limitations in functioning must exist in three (3) or more of the major life areas. Testimony and evidence did not support that the Claimant has substantial limitations in three (3) of the major life areas.
3. Regulations require that evaluations of the applicant must demonstrate a need for the same level of care and services that is provided in an ICF/MR facility. The only report recommending ICF level of care was the general physical. There was no documentation in the report to support the recommendation,
4. Testimony received on behalf of the Claimant does not clearly demonstrate any changes to the conclusions reached by the Department. The Claimant does have limitations but the evidence and testimony does not support substantial limitations needed for ICF level of care.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the Department's action in denying your 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 15th Day of March, 2006

Margaret M. Mann
State Hearing Officer