



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

Joe Manchin III
Governor

Office of Inspector General

Board of Review

PO Box 29

Grafton WV 26354

September 6, 2007

Martha Yeager Walker
Secretary

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held July 27, 2007. Your hearing request was based on the Department of Health and Human Resources' action to deny your application for services under the MR/DD Home and Community-Based 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 and benefit levels for the MR/DD Home and Community-Based Waiver Program are determined based on current regulations. One of these regulations specifies that in order to be eligible for the Title XIX MR/DD Home & Community-Based Waiver Program, an individual must have both a diagnosis of mental retardation and/or a related condition(s), and require the level of care and services provided in an Intermediate Care Facility for individuals with Mental Retardation and /or related conditions. (MR/DD Waiver Manual § 503.1

The information provided failed to demonstrate substantial functional limitations in three or more of the designated major life areas, indicating that the level of care provided in an ICF/MR facility is not currently required.

It is the decision of the State Hearing Examiner to **uphold** the Department's determination as set forth in the March 9, 2007 notification denying benefits and services under the MR/DD- Home and Community-Based Waiver Program.

Sincerely,

Ron Anglin
State Hearing Examiner
Member, State Board of Review

cc: Erika Young, Chairman, Board of Review
Stephen Brady, Office of Behavioral Health Services

WEST VIRGINIA DEPARTMENT OF HEALTH & HUMAN RESOURCES

Claimant,

v.

Action Number 07-BOR-1467

West Virginia Department of Health & Human Resources,
Respondent.

SUMMARY AND 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 4, 2007 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 held July 27, 2007 on a timely appeal filed May 29, 2007.

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 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). 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:

_____, mother to claimant

Frank Kirkland, MR/DD Program, Office of Behavior Health Services (by phone)

Linda Workman, Psychologist Consultant, Bureau for Medical Services (by phone)

Presiding at the hearing was Ron Anglin, State Hearing Examiner and a member of the State Board of Review.

IV. QUESTION(S) TO BE DECIDED:

The question to be decided is whether the agency was correct in their determination that the claimant does not meet the medical eligibility criteria for participation in the MR/DD Home and Community-Based Waiver Program.

V. APPLICABLE POLICY:

MR/DD Waiver Manual § 503.1

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department Exhibits:

A-1- MR/DD Waiver Manual Policy 503.1

A-2- ICF/MR Level of Care Evaluation, DD-2A, 1/18/07

A-3- Addendum to Psychological Evaluation, 1/30/07

A-4- Individual Program Plan (IPP), 10/02/06

A-5- Psychological Evaluation, 7/11/07 (faxed to agency just prior to beginning hearing)

A-6- Notification, 3/9/07

A-7- DD-3 (1/30/07, Medication list (1/31/07), Psychiatry notes (1/15/07- 1/31/07)

Claimant Exhibits:

C-1- Psychological Evaluation Addendum, 7/25/07

C-2- Social/Medical package presented by claimant at hearing- sent to MR/DD unit 7/27/07

VII. FINDING OF FACTS:

- 1) On March 9, 2007, a Notice of Denial (A-6) was sent to the claimant as a result of an application for MR/DD program coverage. The basis of that decision indicated that documentation provided: *"does not provide an eligible diagnosis of mental retardation or a related condition. Asperger's Disorder, by definition, excludes mental retardation and substantial adaptive deficits, other than social interaction. Additionally, the psychologist does not recommend an ICF/MR level of care and there was not a measure of adaptive behavior provided in the packet"*.
- 2) A hearing request was received by the agency May 17, 2007 and by this examiner June 6, 2007. A hearing was scheduled for and held July 27, 2007.
- 3) Exhibits as listed in Section VI above were accepted. Exhibit C-2 was submitted by the claimant at the hearing and a copy mailed to the agency that day for consideration. August 1, 2007 E-Mail from Workman no change in the agency's position.

- 5) Testimony was heard from the individuals listed in section III above. All persons giving testimony were placed under oath.
- 6) The agency's psychologist reviewed the medical/social information. No physical problems were noted on the DD-2a (A-2). Notes ambulatory, incontinent, assistance with feeding and personal hygiene and behavioral issues. Speech and occupational therapy are recommended. Diagnosis is Asperger's with no diagnosis on Axis II which is where MR would be noted. ICF/MR level of care is recommended. A-3 reveals, bed-wetting, sleeping problems, behavioral issues, destructive, head banging, withdrawn and overactive. 4 years 2 months old at time and problems worse in past 2 years. A Gillium ((GARS) administered at the time reveals an above average (81 %tile) probability of Autism. A Kaufman vocabulary score is 113 – above average. Non-verbal score is 81 and composite score is 97. Average range for scores is 90 to 109. Diagnosis is again Asperger's. A-4 reveals strengths in use of spoon and open cup. Clear articulation, filling in words in songs and stories and responding to name, expresses wants and needs. Plays simple games, imitates actions of adults and engages in play extending beyond self. Has difficulty interacting with peers. Delays in communication, social and adaptive skills impact ability to be successful in classroom. Asperger's is not an eligible diagnosis. A-5 reveals previous full scale IQ score of 116. Mother reported child "out of control". Is ambulatory with steady gait. Can dress self and has frequent accidents and needs assistance with toileting. Speech normal rate and tone and receptive skills appear better developed than expressive. He is prone to tantrums and easily angered. He doesn't play well with others and social skills appear mildly impaired. Slossen IQ test score was 67. ABS scores utilized are non-MR norms. Most are in the average range or exceed the < 1%ile threshold. Diagnoses are Pervasive Developmental Disorder and Oppositional Defiant Disorder. PDD may be an eligible diagnosis under some circumstances. Opinion that while there are some self care issues claimant doesn't qualify in this functional category. Language appears appropriate for age level. Learning documentation fails to show a significant deficit here. While socialization skills are delayed they appear not to be significantly impaired. Appears behavior issues affect functional categories. Self direction – he appears active and energetic.
- 7) Testimony offered on behalf the claimant reveals he drinks only from a sippy cup. He throws food and pretends to choke. Cannot bathe himself and fights during bathing. Fights taking medication. Was been potty trained but has fallen back. Has broken his arm because of his behavior. Cannot always understand or may not follow directions. Screams because he is unable to express himself. Behavior impacts his ability to learn. Cannot color as he refuses to hold crayon. Feels he is not self- directed but goes from one activity to the next. He is getting worse. He was placed in inpatient treatment due to issues. He is currently taking medication for behavioral issues.

- 8) Exhibit C-2, Individualized Education Program from [REDACTED] County Schools dated 6/6/07 States in part: "He [REDACTED] does assert his needs but can become upset when he is redirected. He is engaging in make believe play and will interact during songs, rhymes and stories.
- 9) Exhibit C-1, Psychological Evaluation Addendum of 7/25/07 reveals a full scale IQ score of 97.
- 10) Code of Federal Regulations- 42 CFR 435.1009 in part:
Persons with related conditions means individuals who have a severe, chronic disability that meets all of the following conditions:
(a) It is attributable to--
(1) Cerebral palsy or epilepsy; or
(2) Any other 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, and requires treatment or services similar to those required for these persons.
- 11) Eligibility Criteria for the MR/DD Waiver Program § 503.1
Medical Eligibility Criteria
- The MR/DD State Waiver Office determines the medical eligibility for an applicant in the MR/DD Waiver Program. In order to be eligible to receive MR/DD Waiver Program Services, an applicant must meet the following medical eligibility criteria:
• Have a diagnosis of mental retardation and/or a related condition
• Require the level of care and services provided in an ICF/MR (Intermediate Care Facility for the Mentally Retarded) as evidenced by required evaluations and corroborated by narrative descriptions of functioning and reported history. An ICF/MR provides services in an institutional setting for persons with mental retardation or related condition. An ICF/MR facility provides monitoring, supervision, training, and supports.
- MR/DD State Waiver Office determines the level of care (medical eligibility) based on the Annual Medical Evaluation (DD-2A), the Psychological Evaluation (DD-3) and verification if not indicated in the DD-2A and DD-3, that documents that the 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. Other documents, if applicable and available, that can be utilized include the Social History, IEP for school age children, Birth to Three assessments, and other related assessments.
The evaluations must demonstrate that an applicant has a diagnosis of mental retardation and/or a related developmental condition, which constitutes a severe and chronic disability. For this program individuals must meet the diagnostic criteria for medical eligibility not only by the relevant test scores, but also the narrative descriptions contained in the documentation.

- Must have a diagnosis of mental retardation, with concurrent 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, and requires services similar to those required for persons with mental retardation.

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.

- Must have the presence of a least three (3) substantial deficits as that term is defined in Title 42, Chapter IV, Part 435.1009 of the Code of Federal Regulations (CFR). Substantial deficits associated with a diagnosis other than mental retardation or a related diagnosis do not meet eligibility criteria. Additionally, any individual needing only personal care services does not meet the eligibility criteria. Individuals diagnosed with mental illness whose evaluations submitted for medical eligibility determination with no indication of a previous co-occurring history of mental retardation or developmental disability prior to age 22 must provide clinical verification through the appropriate eligibility documentation that their mental illness is not the primary cause of the substantial deficits and the mental retardation or developmental disability occurred prior to the age of twenty-two (22).

Functionality

- Substantially limited functioning in three (3) or more of the following major life areas; (“substantially limited” is defined on standardized measures of adaptive behavior scores as three (3) standard deviations below the mean or less than one (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 not only by the relevant test scores, but also the narrative descriptions contained in the documentation submitted for review, i.e., psychological, the IEP, Occupational Therapy evaluation, etc.). Applicable categories regarding general functioning include:

- 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 and leisure activities).

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, maintain current level of 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.

The applicant or legal representative must be informed of the right to choose between ICF/MR services and home and community-based services under the MR/DD Waiver Program and informed of his/her right to a fair hearing

VIII. CONCLUSIONS OF LAW:

- 1) In order to be eligible to receive MR/DD Waiver Program Services, an applicant must have a diagnosis of mental retardation and/or a related condition. Information submitted during the hearing provides major diagnoses of Asperger's Disorder, Pervasive Developmental Disorder, and Oppositional Defiant Disorder.
- 2) Specific 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 specific list noted in section VII # 11 above. None of the aforementioned diagnoses are specified.
- 3) Other than mental illness, any condition 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, and requires services similar to those required for persons with mental retardation would also qualify as an eligible diagnosis. The agency indicated that PDD in and of itself could be a qualifying diagnosis. Additionally, convincing evidence was offered that the claimant's combination of disorders and symptoms result in significant delay or impairment of "general intellectual functioning or adaptive behavior." Finally a Gillium ((GARS) reveals an above average, (81 %tile) probability of Autism- an eligible diagnosis.

- 4) An eligible individual must possess substantially limited functioning in **three** or more of the following designated major life areas.
- 5) Mobility - evidence reveals no physical impairment. He ambulates independently. No substantial deficit found
- 6) Self-Care- evidence reveals the claimant has significant delays in feeding, potty training, and personal hygiene. These delays seem to be interlaced with his behavioral issues but are none-the-less significant. These delays appear not to be age appropriate. Substantial deficit is found.
- 7) Receptive/Expressive Language- receptive and expressive language skills appear within normal limits. The psychological evaluation (A-5) indicates speech of normal rate and tone. Receptive skills exceed expressive. A finding of significant deficit in this area is not supported by documentation.
- 8) Learning (functional academics) – Intelligence scores are all in the average range on most evaluations entered into evidence with the exception of a score of 67 on a 7/11/07 evaluation. The most recent evaluation of 7/25/07 (C-1) indicated a full scale IQ of 97. While behavioral issues appear to impact learning, evidence is insufficient to establish a significant deficit in this category.
- 9) Self-Direction – Evidence reveals the claimant plays simple games and engages in play extending beyond himself. School records indicate that he asserts his needs but can become upset redirected. He engages in make believe play and will interact during songs, rhymes and stories. This degree of self- direction seems age appropriate. A finding of significant deficit in this area is not supported by documentation.
- 10) Capacity for Independent Living - The claimant's potential ability to live independently appears questionable if behavioral issues noted in documentation and testimony are not resolved prior to adulthood. Based on the current information submitted, the awarding of a qualifying deficit is appropriate.
- 11) To establish eligibility an eligible individual must possess substantially limited functioning in **three** or more of the **six** designated major life areas noted in # 5 through #10 above. Evidence supported a finding of qualifying deficit in only two categories (Self-Care and Capacity for Independent Living) thus failing to establish medical eligibility.

IX. DECISION

After a thorough examination of all evidence presented, it is the decision of the State Hearing Examiner to **uphold** the Department's action to deny of the claimant's application for medical benefits and related services under the MR/DD Waiver Program as set forth in the March 9, 2007 notification.

While it is clear that the claimant has some obvious challenges, evidence provided fails to support a finding that the claimant requires that level- of- care routinely provided in an ICF/MR facility.

IX. RIGHT OF APPEAL:

See Attachment.

X. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision.

IG-BR-29

ENTERED This 6th Day of September 2007,

RON ANGLIN
State Hearing Examiner

CLAIMANT'S RECOURSE TO ADMINISTRATIVE HEARING DECISION

For

**Public Assistance Hearings,
Administrative Disqualification Hearings, and
Child Support Enforcement Hearings**

A. CIRCUIT COURT

Upon a decision of a State Hearing Officer, the claimant will be advised he may bring a petition in the Circuit Court of Kanawha County within four months (4) from the date of the hearing decision.

The Court may grant an appeal and may determine anew all questions submitted to it on appeal from the decision or determination of the State Hearing Officer. In such appeals a certified copy of the hearing determination or decision is admissible or may constitute prima facie evidence of the hearing determination or decision. Furthermore, the decision of the circuit Court may be appealed by the client or petitioner to the Supreme Court of Appeals of the State of West Virginia.

B. THE UNITED STATE DEPARTMENT OF HEALTH AND HUMAN SERVICES

If you believe you have been discriminated against because of race, color, national origin, age, sex or handicap, write immediately to the Secretary of the United States Department of health and Human Services, Washington, D.C. 20201.

C. THE UNITED STATE DEPARTMENT OF AGRICULTURE

If you believe you have been discriminated against because of race, color, national origin, age, sex or handicap, write immediately to the Secretary of the Department of Agriculture, Washington, D.C. 20250.