



State of West Virginia  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
Office of Inspector General  
Board of Review  
P.O. Box 2590  
Fairmont, WV 26555-2590

Joe Manchin III  
Governor

Martha Yeager Walker  
Secretary

September 6, 2007

\_\_\_\_\_ for  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dear \_\_\_\_\_:

Attached is a copy of the findings of fact and conclusions of law on your hearing held August 31, 2007. Your Hearing request was based on the Department of Health and Human Resources' action to deny your application for benefits and services through 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 (ICF/MR Facility). (West Virginia Title XIX MR/DD Waiver Home & Community-Based Policy Manual, Chapter 502.1).

The information submitted at your hearing confirms that you do not meet the criteria necessary to establish medical eligibility for participation in the MR/DD Waiver Program.

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 Medicaid, Title XIX MR/DD Waiver Program.

Sincerely,

Thomas E. Arnett  
State Hearing Officer  
Member, State Board of Review

Pc: Chairman, Board of Review  
John Sassie, BMS

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

\_\_\_\_\_ ,

**Claimant,**

**vs.**

**Action Number: 07-BOR-1530**

**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 6, 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 convened on August 31, 2007 on a timely appeal filed May 17, 2007.

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/Representative  
John Sassie, BMS, MR/DD Waiver Program  
Richard Workman, Psychologist Consultant, BMS

Presiding at the hearing was Thomas E. Arnett, 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**

Medicaid, Title XIX MR/DD Home and Community-Based Waiver Program Manual, Chapter 500, Volume 13

#### **VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED**

##### **Departments Exhibits:**

- D-1 Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500, Volume 13
- D-2 Notice of Denial dated 5/4/07
- D-3 DD-2a, Annual Medical Evaluation, dated 3/27/07
- D-4 Psychological Evaluation dated 2/16/07
- D-5 Individualized Education Program (██████████ County Schools) dated 9/22/06.

#### **VII. FINDINGS OF FACT:**

- 1) On or about May 4, 2007, the Claimant was notified via a Notice of Denial that his application for benefits and services through the MR/DD Waiver Program was denied. This notice states, in pertinent part:

**Medicaid MR/DD Waiver Program**  
Your Waiver Application is hereby denied.

##### **Your application was denied because:**

Documentation provided does not include a measure of Autism such as the Gilliam Autism Rating Scale. Additionally, mild mental retardation has been diagnosed with scores noted in the Average range in the Verbal domain and an overall score in the Borderline Range. When compared to a Non-mental retardation normative population on the ABS scales, \_\_\_\_\_ does not demonstrate substantial delays in three of the six major life areas. Please

submit copies of any available school psycho-educational reports for any further considerations.

- 2) As a matter of record, the Department stipulated that the Claimant's diagnosis of Autism is a program qualifying related condition, however, the Department contends that the documentation submitted for review fails to identify substantial adaptive deficits in any of the major life areas. Additionally, the Department noted that a diagnosis of Mild Mental Retardation was not consistent with the clinical documentation found in Exhibit D-4 (Psychological Evaluation dated 2/16/07) as the evaluating psychologist noted on page 3 – "These scores would place \_\_\_\_\_ in the borderline range of intellectual functioning."

- 3) The Claimant's representative purported that her son is constantly on the go and getting into to things that he should not. She stated that he must be watched at all times and that she has applied for MR/DD Waiver benefits as she needs help and this program offers respite. She cited a trip to the [REDACTED] Zoo where her son expressed an extreme fear of riding the escalator and when the trip to the zoo was concluded, they had to exit by way of the elevator. She believes that his difficulty with adapting to new social situations shows a deficit in his *Capacity for Independent Living*.

She contends that his *Self-Care* abilities are deficient as he cannot tie his shoes. She has worked on this with him for quite some time and he continues to get frustrated and will sometimes demonstrate behaviors like biting and hitting.

The last area of concern addressed by the Claimant's representative was *Self-Direction*. She stated that it is difficult to get her son to do his homework and that she must offer him rewards to get him to do it.

- 4) The Department's psychologist testified that it is often difficult to determine an individual's *Capacity for Independent Living* when they are young because we do not expect them to have capacity until they get older. He stated that there are circumstances when an individual is so delayed that the determination can be made, but the Claimant was only 7 years old when the evaluation was completed and he demonstrates reading above grade level, he has Self-Care, he has some community use, and he demonstrates language and Self-Direction skills. The Department's psychologist indicated that he is uncertain if the Claimant will have capacity for independent living but there is insufficient evidence to conclude that he will not at this time. Additionally, the ABS scores found on page 3 of 4 of Exhibit D-4 do not reflect a score of less than 1% in any of the areas used to determine Capacity for Independent Living. Based on the evidence, a substantial adaptive deficit has not been identified in the Claimant's Capacity for Independent Living.
- 5) The Department's psychologist indicated that while individuals may demonstrate some areas of weakness in *Self-Care*, the fact that he cannot tie his shoes at the age of 7 would not qualify as a substantial adaptive deficit requiring an ICF/MR level of care. The evidence found in Exhibit D-3 (DD-2a – ICF/MR Level of Care Evaluation) completed by the Claimant's physician indicates that he is continent, feeds himself, is independent in personal hygiene /self care. The Claimant rated an ABS of 16% in Independent functioning and a

substantial adaptive deficit is demonstrated by a score of three (3) standard deviations below the mean or less than 1 percentile when derived from non MR normative populations. Based on the evidence, the Claimant does not demonstrate a substantial adaptive deficit in Self-Care.

- 6) The Department's psychologist defined Self-Direction as an individual's ability to make choices regarding their activity. Exhibit D-4, Section II,C,6 indicates that the Claimant enjoys fixing roads, playing with Tonka toys, swimming, playing ball, playing on computer/video games. The Claimant also chooses to do his homework after being offered a reward and his ABS score in this area is 9% (must be less than 1% to qualify). While the Claimant may demonstrate non-compliance behaviors, these behaviors further demonstrate Self-Direction skills. The evidence fails to demonstrate a substantial adaptive deficit in the area of Self-Direction.
- 7) 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 (Effective 7/1/05). 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 o
  - 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 {Emphasis added} 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.

## **VIII. CONCLUSIONS OF LAW:**

- 1) The regulations that govern the MR/DD Waiver Program require eligible individuals to have

a diagnosis of Mental Retardation and/or a related condition, which must be severe and chronic, in conjunction with substantial deficits. Substantially limited functioning in three or more of the major life areas is required. Substantial limits is defined on standardized measures of adaptive behavior scores as three (3) standard deviations below the mean or less than 1 percentile when derived from non-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.). The documentation must demonstrate that the individual needs the same level of care and services that is provided in an ICF/MR institutional setting.

- 2) The Claimant presents a program qualifying diagnosis of Autistic Disorder, however, the standardized measures of adaptive behavior, and the supporting clinical documentation, fail to identify substantial adaptive deficits in any of the major life areas.
- 3) Whereas the evidence fails to demonstrate that the Claimant requires an ICF/MR level of care, medical eligibility for participation in the MR/DD Waiver Program cannot be established.

#### **IX. DECISION:**

It is the decision of the State Hearing Officer to **uphold** the Department's action in denying 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 6<sup>th</sup> Day of September, 2007**

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**Thomas E. Arnett  
State Hearing Officer**