



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

October 24, 2007

Mr. & Mrs. _____
c/o _____

_____ Case Name: _____

Dear Mr. & Mrs. _____:

Attached is a copy of the findings of fact and conclusions of law with respect to your hearing held September 24, 2007. Your hearing request was based on the Department of Health and Human Resources' proposal to deny your request for benefits and services through the MR/DD Waiver Program on behalf of _____.

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 _____ does not qualify to meet the criteria necessary to establish eligibility for participation in the MR/DD Waiver Program.

It is the decision of the State Hearing Officer to **uphold** the Department's proposal to deny Claimant's request for benefits and services through the Medicaid, Title XIX MR/DD Waiver Program.

Sincerely,

Raymond Keener, III
State Hearing Officer
Member, State Board of Review

Pc: Chairman, Board of Review
Stephen Brady, Operations Coordinator, MR/DD Waiver Program

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

_____,

Claimant,

vs.

Action Number: 07-BOR-1638

**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 24, 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 September 24, 2007 on a timely appeal filed June 25, 2007.

It should be noted that benefits have continued pending a hearing decision.

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

_____, Claimant's father

John Sassi, Program Manager, MR/DD Waiver Program

Linda Workman, Psychologist Consultant, BMS

Presiding at the hearing was Raymond Keener, III, 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 request 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

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

- D-1 Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500-8 (Effective July 1, 2005)
- D-2 Annual Medical Evaluation (DD-2A)
- D-3 Comprehensive Psychological Evaluation prepared by [REDACTED]
- D-4 Letter of Denial dated May 23, 2007
- D-5 Individual Educational Plan (IEP)
- D-6 Amended Annual Medical Evaluation (DD-2A) dated July 2, 2007
- D-7 Amended Psychological Evaluation completed by Ms. [REDACTED] dated July 6, 2007
- C-1 Written statement offered by Mr. & Mrs. _____ dated September 24, 2007

VII. FINDINGS OF FACT:

- 1) In accordance with section 504 of the Medicaid, MR/DD Waiver Manual and the Code of Federal Regulations, the Claimant underwent a medical evaluation to determine eligibility for participation in the MR/DD Waiver Program.
- 2) Documents as noted in Section VI above were accepted and admitted into the record.

- 3) Testimony was heard from the participants listed in Section III above. All persons providing testimony were properly placed under oath.
- 4) On or about May 23, 2007, the Claimant was notified via a Notice of Denial (Exhibit D-4) that his request for Waiver services was denied. This notice goes on to say, in pertinent part:

Documentation submitted for review does not support the presence of substantial adaptive deficits as defined for Title XIX MR/DD Waiver eligibility in three (3) or more of the six (6) major life areas.

- 5) The Department entered Exhibits D-1 through D-7 and contended that the evidence fails to identify any substantial adaptive deficits in three (3) or more of the six (6) major life areas. Mr. John Sassi testified on behalf of the Department and set forth the specific Medical Eligibility Criteria relating to diagnosis, functionality and active treatment.
- 6) Ms. Linda Workman, psychologist, testified on behalf of the Department and specifically stated that she reviewed the Exhibits D-1 through D-7 in reaching her determination that the documentation submitted does not support the presence of substantial adaptive deficits as defined for MR/DD waiver eligibility in three (3) or more of the six (6) major life areas considered, at this time. Ms. Workman initially referenced the "ANNUAL MEDICAL EVALUATION" otherwise referred to as the DD 2A, and referenced various components of the form. Specifically, Ms. Workman stated that the physician made remarks in the Diagnostic section of the form in which conclusions were reached that the child was classified as having an Autism Spectrum Disorder.

Ms. Workman further testified that with respect to the "COMPREHENSIVE PSYCHOLOGICAL EVALUATION" prepared by Ms. [REDACTED] dated February 27, 2007, noting various aspects of the report authored by Ms. [REDACTED]. Specifically, Ms. Workman referenced the sections of the report dealing with Family History, Behavioral History, as well as Current Behaviors. Ms. Workman specifically referenced the diagnosis listed by Ms. [REDACTED] as being Autistic Disorder with Mild Mental Retardation.

Ms. Workman testified with respect to the document entitled "INDIVIDUAL EDUCATIONAL PLAN" (IEP) and specifically referenced various aspects of the report. Ms. Workman testified that [REDACTED] is in kindergarten full time and that [REDACTED] can and does sit and listen in class. Ms. Workman also stated that [REDACTED] has been seen every other week for speech therapy to increase pragmatic skills. Ms. Workman acknowledged that the information set forth within the IEP does not indicate the type of individual who would normally be placed in an ICF group home given [REDACTED]'s ability to listen and take instructions during class.

Ms. Workman further testified with respect to a document entitled "AMENDED ANNUAL MEDICAL EVALUATION" (DD 2A) prepared and submitted by Dr. [REDACTED] dated July 2, 2007. Ms. Workman also testified with respect to the "AMENDED

PSYCHOLOGICAL EVALUATION” prepared and submitted by Ms. [REDACTED] dated July 6, 2007.

Ms. Workman concluded her testimony by stating that based upon her review of all available documentation, that _____ would satisfy only one (1) of the major life areas with that being self-care.

- 7) The Claimant’s representative/mother, Ms. _____, testified and contended that the Claimant’s MR/DD Waiver eligibility should be approved as he demonstrates substantial adaptive deficits in all the following major life areas: *Self-Care, Receptive or expressive language, Learning, Mobility, Self-direction, and Capacity for Independent Living*. In support of her testimony, Ms. _____ offered as an exhibit, Claimant’s #1, a written statement setting forth her and her husband’s position regarding the fact that Claimant demonstrates substantial adaptive deficits in at least three (3) of the referenced major life areas.
- 8) The Claimant’s father, _____, also testified generally in support of the Claimant’s MR/DD Waiver eligibility and the fact that it should be approved for the same general reasons as set forth previously by Ms. _____.
- 9) 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 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.

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, with concurrent substantial deficits in three (3) or more of the six (6) major life areas. Substantial limits are defined on standardized measures of adaptive behavior scores as three (3) standard deviations below the mean or equal to or below the seventy fifth (75) percentile when derived from MR normative populations.
- 2) The Claimant presents with a primary diagnosis of Autism and mild mental retardation.
- 3) The evidence presented unquestionably demonstrates that Claimant has a substantial adaptive deficit in the major life area referred to as self-care. Based upon a review of the entire record, it is specifically found that the Claimant has failed to adequately establish the existence of substantive adaptive deficits in any of the other five (5) major life areas.

Specifically, it is found that the testimony of Ms. Workman is considered most reliable in this matter in establishing that Claimant has failed to adequately demonstrate entitlement to substantive adaptive deficits in at least three (3) major life areas. It is further specifically found that no reliable or credible evidence has been presented which would rebut or otherwise contradict the reliable and credible testimony of Ms. Workman as it relates to the issue of Claimant's entitlement to substantive adaptive deficits in the remaining five (5) major life areas.

It is specifically found that the evidence presented or otherwise submitted on behalf of Claimant fails to adequately demonstrate Claimant's entitlement to substantive adaptive deficits in at three (3) major life areas.

- 4) Based on the evidence presented, eligibility for the MR/DD Waiver Program cannot currently be established for the Claimant.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the Department's proposal to deny Claimant's request 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-46.

ENTERED this the 24th Day of OCTOBER, 2007

Raymond Keener, III
State Hearing Officer