



**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**

December 10, 2007

_____ for _____

Dear Mr. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held December 5, 2007. Your Hearing request was based on the Department of Health and Human Resources' proposal to terminate your 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 500).

The information submitted at your hearing fails to demonstrate that you 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
Steve Brady, Operations Coordinator, MR/DD Waiver Program

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

Claimant,

vs.

Action Number: 07-BOR-2232

**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 10, 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 December 5, 2007 on a timely appeal filed October 5, 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

_____, Claimant's Father / Representative

_____, Claimant's Mother / Representative

Steve Brady, Operations Coordinator, 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 500-8

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Department's Exhibit(s):

- D-1 Medicaid, Title XIX MR/DD Home and Community-Based Waiver Program Manual, Chapter 500-8
- D-2 Notice of Denial/Termination dated 9/19/07
- D-3 DD-2a, ICF/MR Level of Care Evaluation – Initial (received 8/30/07)
- D-4 DD-3, New Waiver Psychological Evaluation dated 7/20/07
- D-5 Childhood Autism Rating Scale (CARS) – Conducted at 18 years & 8 months.

Claimant's Exhibit(s):

- C-1 Correspondence from _____ Assistant Director Human Resources, _____ dated 12/4/07.

VII. FINDINGS OF FACT:

- 1) On or about September 19, 2007, the Claimant was notified via a Notice of Denial/Termination that his application for benefits and services through the Medicaid MR/DD Waiver Program was denied. This notice states, in pertinent part:

Your Waiver Application is hereby denied.

Your application was Denied because:

Documentation submitted does not include an eligible diagnosis of mental retardation nor a condition related to mental retardation. Additionally, the psychologist indicates that Mr. _____ does not require and ICF/MR level of care.

- 2) The Department cited Exhibits D-3 (ICF/MR Level of Care Evaluation) and Exhibit D-4 (New Waiver Psychological Evaluation dated 7/20/07) to show that the Claimant presents a diagnosis of Asperger's Disorder. The Department noted that while Asperger's Disorder is an Autism Spectrum disorder, the affects of Asperger's is milder and does not manifest moderate level adaptive deficits like Moderate Mental Retardation or severe Autism. Therefore, Asperger's is not related to mental retardation and does not qualify as a "related condition" for the MR/DD Waiver Program.
- 3) The Department cited Exhibit D-5, The Childhood Autism Rating Scale (CARS), completed on the Claimant when he was 18 years and 8 months. This rating confirms that the Claimant's score of 33 places him in the Mildly-Moderately Autistic range, not Severely Autistic.
- 4) The policy and regulations that govern the MR/DD Waiver Program require that the individual demonstrate the need for the same level of care and services that is provided in an ICF/MR institutional setting. In Section VII (PLACEMENT RECOMMENDATIONS) found in the New Waiver Psychological Evaluation (Exhibit D-4), the evaluating psychologist states – "More specifically, Mr. _____ does not require an ICF/MR level of care."
- 5) The Claimant's representatives indicated that they were specifically interested in the MR/DD Waiver Program as it provides supportive employment opportunities that are not available through other programs. Exhibit C-1 was submitted to show that [REDACTED] Assistant Director of Human Resources would consider employing the Claimant through the Title XIX Wavier Services provision. It should be noted, however, that there was no evidence submitted to refute the clinical documentation reviewed by the Department for medical eligibility.
- 6) Eligibility Criteria for the MR/DD Waiver Program are outlined in Chapter 500-8 of the Title XIX MR/DD Home and Community-Based Waiver Program Manual.

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, 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 three (3) standard deviations below the mean or less than 1 percentile when derived from non-MR normative populations. Additionally, policy states that the individual must require and benefit from continuous active treatment and need the same level of care and services that is provided in an ICF/MR institutional setting.
- 2) The documentation submitted for review fails to identify a MR/DD Program qualifying diagnosis/related condition, and the evaluating psychologist concluded that the Claimant does not require and ICF/MR level of care.
- 3) Based on the evidence, the Claimant does not meet medical criteria necessary to establish eligibility for participation in the Medicaid MR/DD Waiver Program.

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 10th Day of December, 2007

**Thomas E. Arnett
State Hearing Officer**