

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

\_\_\_\_\_  
**Claimant,**

**vs.**

**Action Number: 06-BOR-2472**

**West Virginia Department of  
Health & 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 November 22, 2006 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 requested by a timely appeal filed July 13, 2006 from denials dated June 23, 2006; July 24, 2006, and September 20, 2006.

The following persons giving testimony were placed under oath:

\_\_\_\_\_, Claimant's Mother

\_\_\_\_\_, Claimant's Father

Susan Hall, MR/DD Waiver Program Director, BMS

Richard Workman, Psychologist Consultant for the MR/DD Waiver Program BMS

**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). 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**

\_\_\_\_ and \_\_\_\_\_, Claimant's Parents/Representatives  
Susan Hall, Program Manager, MR/DD Waiver Program  
Richard Workman, Psychologist Consultant, Bureau of Medical Services

The Claimant was represented by:

\_\_\_\_\_  
Bureau of Medical Services, was represented by, Nisar Kalwar, Assistant Attorney General for Medicaid Subrogation Program

### **IV. QUESTION(S) TO BE DECIDED**

The question to be decided is whether the Department was correct in its action denying 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 Operations Manual  
Chapter 1  
Code of Federal Regulations §42 CFR 435.1009(a),2

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

- D-1** Notice of Denial (June 23, 2006)
- D-2** Notice of Denial (July 24, 2006)
- D-3** Notice of Denial (September 20, 2006)
- D-4** Annual Medical Evaluation dated July 26, 2006
- D-5** Psychological Evaluation by \_\_\_\_\_ (April 12, 2006)
- D-6** Psychological Evaluation- \_\_\_\_\_ Report (August 14, 2006)
- D-7** Individual Multidisciplinary Team Member Report \_\_\_\_\_ County Schools
- D-8** \_\_\_\_\_ County Schools Individualized Education Plan
- D-9** Comprehensive Psychiatric Evaluation-Dr. \_\_\_\_\_
- D-10** Dr. \_\_\_\_\_ Report to Dr. \_\_\_\_\_ January 5, 2006
- D-11** \_\_\_\_\_ County Pre-Kindergarten Progress Report

- C-1** DD-4 Social History

## **VII: FINDINGS OF FACT**

1. On June 23, 2006, the Department notified the Claimant via a NOTICE OF DENIAL (Exhibit D-1) that her Waiver application was denied. This notice states in part:

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 considered in eligibility.

The Reviewer(s) relied on the following facts: DD-1 through DD-5, 1/24/06 [REDACTED] County School IET, Letter from [REDACTED] 2/2/06; Speech/Language Pathology Observation, Birth to Three Assessments, 2/16/05 Westbrook Healthy Services Comprehensive Evaluation, Physicians Progress notes.

- 2) On July, 24, 2006, following the submission of additional documentation, the Department notified the Claimant via a NOTICE OF DENIAL (Exhibit D-2) that her Waiver application was denied. This notice states in part:

Additional documentation does not support the presence of substantial adaptive delays as defined for Title XIX MR/DD Waiver eligibility in three or more of the six major life areas.

The Reviewer(s) relied on the following facts: 3/3/06 [REDACTED] County School SCP Report and Protocols, 5/23/06 [REDACTED] County School IEP, 6/13/06 [REDACTED] OT Initial Plan of Care, 1/27/06 [REDACTED] Letter, 6/4/04 SSI Evaluation, 4/12/06 [REDACTED] County Psychological Evaluation.

- 3) On September 20, 2006, following the submission of additional documentation, the Department notified the Claimant via a NOTICE OF DENIAL (Exhibit D-3) that her Waiver application was denied. This notice states in part:

Additional documentation does not support the presence of substantial adaptive delays as defined for Title XIX MR/DD Waiver eligibility in three or more of the six major life areas.

The Reviewer(s) relied on the following facts: 7/26/06 DD2A, 8/14/06 Psychological Examination.

- 4) Susan Hall testified about the MR/DD Waiver Program requirements. She outlined the requirements for eligibility for services under the Title XIX MR/DD Waiver Program from the Revised Operations Manual, June 1, 2001.

- 5) Ms. Hall outlined the criteria that the Claimant was considered under as four areas of eligibility::
- a. Eligible Diagnosis
  - b. Functionality
  - c. Active Treatment
  - d. Level of Care
- 6) Richard Workman testified that there were three denials in this matter because each time a NOTICE OF DENIAL was issued; additional information was submitted on behalf of the Claimant. He explained that after review of all the additional information, he was unable to find that the Claimant had a substantial deficient in three or more of the major life areas as required for eligibility under the program. (Exhibits D-3)
- 7) Richard Workman testified that one of the major areas considered for eligibility under the program is mobility. He noted that on the Annual Physical Examination, Page 4, (Exhibit D-4), the physician noted at the top of the page that \_\_\_\_ is ambulatory; thus she does not exhibit a substantial eligibility requirement for the MR/DD Waiver Program.
- 8) Richard Workman testified further referring to the Annual Physical Examination, that the Claimant is also continent, and that the standards for an institutional level of care as outlined by Ms. Hall, indicate the Claimant does not meet the criteria.
- 9) Mr. Workman testified that although this physician has diagnosed autism, which is an eligible related condition, however the severity in this particular situation does not meet the criteria for eligibility. (D-4)
- 10) Mr. Workman testified that the [REDACTED] County Psychological Exam completed by [REDACTED] that addressed substantial delays and the severity level of the autism, failed to show deficits in six of the major areas of life. Specifically:
- The report shows that \_\_\_\_ completes work at school readily. That she participates well in discussions and activities and will attempt to answer questions. That she has strengths of alphabet recognition, articulation, coloring skills and is helpful to others.
- Mr. Workman testified that this is significant because for the MR/DD Waiver program, a claimant must need aggressive treatment to learn, which is not evidenced in \_\_\_\_ case.

- 11) Mr. Workman testified that the psychological report did not reflect any significant challenges from the claimant in the classroom which would be evident if the level of autism was severe enough to qualify for the MR/DD Waiver Program.
- 12) Mr. Workman testified that the psychological report indicates that \_\_\_\_ received a standard scale of 98 on the PPVT test for language. Eligible scores for the MR/DD Waiver Program are typically 55 and lower, thus evidencing that \_\_\_\_ does not qualify as having a substantial deficit in the major life area of language.
- 13) Mr. Workman testified that on the TOL test \_\_\_\_ had a language quotient of 74 which is in the borderline range, which indicates delay. However delay is not enough to qualify for the program which looks for scores in the 55 or below range.
- 14) Mr. Workman testified that \_\_\_\_'s scores on the PIAT-R test for General Information, Reading Recognition, Total Reading, Mathematics, Spelling, Total Test, and Written Language were not low enough to meet the level required for the MR/DD Waiver Program. All of the claimant's scores were in the range of 74-88, above the score of 55 necessary for the program. That again, some of these scores would indicate delay, but not the scores typically associated with severe autism. All of these measurements show that the Claimant does not meet the required level of impairment for Functionality.
- 15) Mr. Workman testified that all of the scores in the psychological evaluation do not indicate substantial deficit in language, mobility, or learning. which are three of the six major life areas.
- 16) \_\_\_\_ received a score of 48 on the Vineland Adaptive Behavior Scale in the area of self-care included in the report of \_\_\_\_ (D-6) BMS agrees that \_\_\_\_ is probably deficient in this area based on the score being lower than 55. However, the narrative accompanying the score lends some confusion to this.
- 17) Mr. Workman testified that the report of \_\_\_\_ states that the purpose of this particular evaluation is to determine eligibility for the Title XIX Waiver Program. (D-6). This is important because the examiner is looking specifically for criteria applicable to the program and evaluated all relevant history of the claimant.
- 18) Mr. Workman testified that scores in the TOLD-P:3 testing report (D-6) do not indicate any scores that meet the required low score of 55 to meet the eligibility requirements.
- 9). Mr. Workman testified that the scores noted on the \_\_\_\_ County School Multidisciplinary Team Member Report, are well above the low score of 55 needed to be eligible for the program. (D-7)
- 10) Mr. Workman testified that the \_\_\_\_ County IEP (D-8) on page 2 of 17, reports that \_\_\_\_ is cooperative and willing to complete the required tasks, and has been a

willing participant throughout the year. Mr. Workman pointed out that these are all very positive statements for someone who would have a diagnosis of autism. Additionally, on page 8, the fifth paragraph, it points out that \_\_\_\_ uses language effectively, has some grammatical errors in the use of past tense, has some difficulty in her listening skills, and has some difficulty with materially presented auditorily, but not visually. These too are very positive statements for someone with autism. On page 15, Mr. Workman noted under the District Achievement Testing that \_\_\_\_ was going to participate under standard conditions. All of this reflects the lack of severity level of autism that would be expected for eligibility to the MR/DD Waiver program. Mr. Workman pointed out that significant weight should be given to the [REDACTED] report because the psychologist followed the Claimant over a period of nine months.

11) The report of Dr. [REDACTED] (D-9) states that \_\_\_\_'s results were not positive for:

1. Failure to develop peer relationships.
2. Lack of spontaneous seeking to share enjoyment.
3. Lack of social and emotional reciprocity.

That even though she met DSM-IV criteria for Autistic Disorder, the severe level needed for the program was not evidenced. On page 3 of this report, Mr. Workman noted that on Axis I Dr. [REDACTED] did not diagnosis Autism. He reports in the DISCUSSION that this is a Confusing situation as while \_\_\_\_ does exhibit some aspects relative to autism, her ability to maintain relationships and get along with peers does not go along with the diagnosis of autism

12) Mr. testified that the Claimant apparently has never been tested for a standard screening score of autism, as a score is not recorded in any of the documentation provided.

13) Mr. Workman testified that Dr. [REDACTED]'s Report (D-10) contained a good summary, that although Dr. [REDACTED] states on page 2 that the "young lady meets the criteria for autism" this does not hold the same credibility as the report of Dr. [REDACTED] where the claimant was followed for a significant length of time. Mr. Workman reiterated that the department does not challenge the diagnosis of autism, but the level of the diagnosis without a screening instrument designating severity level, it is difficult to determine the severity.

14) Mr. Workman pointed out that on the [REDACTED] County Schools Pre-Kindergarten Progress Report, (D-11) that it was noted \_\_\_\_ is "cognitive and eager to learn", which are not qualities normally exhibited by someone with autism severe enough to qualify for the Waiver program. Mr. Workman noted that positive comments continue throughout the report and that the Eligibility Committee did not indicate where they had the opportunity to, any indication of Autism.

15) Ms. [REDACTED] points out in her closing argument that Mr. Workman has never met

or evaluated \_\_\_\_, however it is Mr. Workman's responsibility only to determine if the evaluations by the doctors and psychologists coupled with reports from the parents and school meet the criteria set forth by the federal government under the Medicaid program

- 16) No evidence was presented on behalf of the claimant disputing any of the scores relied upon by the department for denial of the Waiver Application. \_\_\_\_ or \_\_\_\_ did not offer any testimony or conflicting scores to what the Department had presented.
- 17) Eligibility Criteria for the MR/DD Waiver Program are outlined in Chapter 1 of the Title XIX MR/DD Home and Community-Based Waiver Program Operations Manual.

I. Level of care Criteria for medical edibility.

A. In order to be eligible for the Title XIX MR/DD Waiver Program and 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 (ICF/MR Facility).

B. The following list includes some examples of related conditions. This list does not represent all related conditions.

1. Autism or Pervasive Development Disability, NOS
2. Spina Bifida
3. Cerebral Palsy
4. Tuberous Sclerosis
5. Traumatic Brain injury and/or Spinal Cord injuries (occurring during the developmental period).

C. The evaluations must demonstrate that an individual has a diagnosis of mental retardation and/or a related condition which constitute a severe chronic disability which is:

1. Attributable to a mental or physical disability or a combination of both;
2. Manifested before a person reaches twenty-two (22) years of age;
3. Likely to continue indefinitely; and
4. Substantially limits functioning in three or more of the following areas of major life activities:

- a. Self-Care
  - b. Learning (functional academics)
  - c. Mobility
  - d. Capacity for Independent Living (home living, social skills, health and safety, community use, leisure)
  - e. Receptive and/or expressive language
  - f. Self Direction
  - g. Economic Self-sufficiency (Employment)
- D. Level of Care determinations are made by the Office of Behavioral Health Services (OBHS) and the Bureau of Medical Services (BMS) based on the medical, psychological and social evaluations (DD-2A, DD-3. DD-4).
- E. Evaluations must demonstrate the need for an ICF/MR level of care and services. This is demonstrated by the individual's need for intensive instruction, services, safety, assistance and supervision to learn new skills and increase independence in activities of daily living. The level of care and services needed must be the same level which if provided in an ICF/MR facility.

## **VII> CONCLUSIONS OF LAW:**

- 1) The requirements that govern the MR/DD Waiver Program require eligible individuals to have a diagnosis of Mental Retardation and/or a related condition AND substantial limitations in three or more areas of major life activities.
- 2) While the claimant, does have a qualifying diagnosis of autism, the severity level has not been determined, and indeed there is confusion among the varying practitioners in their diagnosis, and the mere diagnosis is not enough in that no evidence as to the severity level has been supplied.
- 3) From both written narrative supplied by the claimant's parents, school personnel, psychologists, and the claimant's scores on the above noted testing instrumentalities, it is not clearly proven that \_\_\_\_ is substantially limited in three or more areas of major life areas.
- 4) As set forth in the Title XIX Manual, the determination is correctly made by the Office of Behavioral Health Services and the Bureau for Medical Services.
- 5) A diagnosis of a "related condition" such as in the claimant's case as autism, is alone not enough to meet the threshold for eligibility for the MR/DD Waiver program.



**IX: DECISION**

It is the decision of the State Hearing Officer to **uphold** the action of the Department in denying your application for benefits and services through the Medicaid MR/DD Waiver Program.

**VIII. RIGHT OF APPEAL**

See attachment.

**IX. ATTACHMENTS**

The Claimant's Recourse to Hearing Decision.

Form IG-BR-29.

**ENTERED this 5th day of February, 2007.**

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**Patricia J. Lawson**  
**State Hearing Officer**