



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
June 28, 2007

Martha Yeager Walker
Secretary

_____ for _____

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on the hearing held April 2, 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 September 6, 2006 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
Alva Page, Esq. Assistant Attorney General- DHHR



WEST VIRGINIA DEPARTMENT OF HEALTH & HUMAN RESOURCES

_____,
Claimant,

v.

Action Number 06- BOR- 3157

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 June 26, 2007 for [REDACTED]. 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 April 2, 2007 on a timely appeal filed October 17, 2006. It should be noted here that services 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 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

[REDACTED] claimant's counsel

Stephen Brady, MR/DD Program, Office of Behavior Health Services (by phone)

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

Alva Page, agency's counsel (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:

D-1- MR/DD Waiver Manual Policy 503.1

D-2- Notification, 9/6/06

D-3- Annual Medical Evaluation, 5/22/06

D-4- Psychological Evaluation, 5/30/06

D-5- Social History Update, 5/22/06

D-6- Individual Program Plan (IPP) 5/22/06

D-7- Psychoeducational Evaluation, 3/14/04

D-8- Reports- [REDACTED] 5/1/95

Claimant Exhibits:

C-1- DSM-IV-TR § 307.9, 299.80

VII. FINDING OF FACTS:

- 1) On September 6, 2006, a Notice of Termination (D-2) was sent to the claimant as a result of a recertification review. The basis of that decision indicated that information provided: *"does not support the presence of an eligible diagnosis for the Title XIX MR/DD Waiver program of mental retardation or a related condition. Asperger's Disorder is not considered to be a related condition because it is not associated with mental retardation and does not result in substantial adaptive deficits similar to those of individuals with mental retardation. The presence of substantial adaptive deficits in three or more of the six major areas is not supported within the documents submitted for review"*.
- 2) A hearing request was received by the agency October 17, 2006 and by this examiner October 30, 2006. [REDACTED] appeared to be representing the claimant and were contacted November 14, 2006 to verify and begin the scheduling process. [REDACTED] indicated on November 14 that a decision as to whether they would represent the claimant was forthcoming. [REDACTED] was contacted December 18 and January 16. E-Mail from [REDACTED] on January 16 that they will represent the claimant.
- 3) A hearing was scheduled for and held April 2, 2007.

- 4) Exhibits as listed in Section VI above were accepted. Written closing arguments received by April 25, 2007
- 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. Agency's position is that no eligible diagnosis is present as was noted in the 9/6/06 notification. Also 3 of 6 deficits requirement is not met. 42 CFR 435.1009 provides guidelines as to related diagnoses. While noted as diagnoses on the DD2a (D-3) Asperger's and Autism are mutually exclusive diagnoses. Claimant is not MR. Documentation all points to a diagnosis of Asperger's which cannot be considered an eligible diagnosis as it is not associated with MR. By definition Asperger's is not associated with MR. Autistic individuals usually have language issues while Asperger's have functional use of language. Autism, when severe, is an eligible diagnosis while Asperger's is not.
Admits that several other conditions listed as related in policy (D-1) do not entail MR. Claimant is not ineligible because he isn't autistic but because Asperger's is specifically designated as not related to MR and does not result in substantial adaptive deficits as is seen in persons with MR. Eligible diagnoses must be severe. Agrees with Asperger's description in C-1. Some diagnoses listed under Pervasive Developmental Disorders are eligible as they are related to MR however Asperger's specifically is not related to MR. Notes that documented ABS scores may not be accurate as test given appears not to be the test designated.
- 7) Testimony offered on behalf the claimant reveals he is currently 19. He graduated HS with regular degree. He had an aide - 9th grade to graduation. He had problems in 7-8 grades as he had no aide. Lives with parents currently. He was in Spec Ed for some subjects. His vocabulary is okay when talking about things he likes. He doesn't like loud noises and confusing situations in social settings. He cannot cook or prepare food. He has trouble with traffic and crossing streets. He must be monitored when in a store. He cannot handle money. Sometimes writing is difficult to read. He is uncoordinated and cannot ride a bicycle. Needs prompting to complete personal hygiene. He receives SS Disability. Claimant's mother believes that with an aide and training he might acquire adequate skills to live independently.
- 8) Exhibit D-3, Annual Medical Evaluation of 5/22/06 reveals under "Problem areas requiring special care" that the claimant is independent in mobility, continence, feeding, personal hygiene (with reminders) and alert. The diagnoses set forth are Autism and Asperger's Disorder and the prognosis fair.

- 9) Exhibit D-4, Psychological Evaluation of 5/30/06 reveals independence in ambulation, assistance with ADL's in self help, adequate expressive and receptive language, intelligence in the average range. Diagnosis- Asperger's Disorder
- 10) Exhibit C-1- DSM-IV-TR § 299.80 Asperger's Disorder reads in part:
The essential features of Asperger's Disorder are severe and sustained impairment in social interaction and the development of restricted, repetitive patterns of behavior, interests, and activities. The disturbance must cause clinically significant impairment in social, occupational, or other important areas of functioning. In contrast to Autistic Disorder, there are no clinically significant delays or deviance in language acquisition although more subtle aspects of social communication may be affected.
Individuals with Asperger's Disorder do not have clinically significant delays in cognitive development or in age-appropriate self help skills, adaptive behavior and curiosity about the environment in childhood.
In contrast to Autistic Disorder, Mental Retardation is not usually observed in Asperger's Disorder, although occasional cases in which Mild Mental Retardation is present have been noted. Variability of cognitive functioning may be observed, often with strengths in areas of verbal ability and weakness in non-verbal areas.
- 11) 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.
- 12) 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 a diagnosis of Asperger’s 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 # 10 above. Asperger’s Disorder is not 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.
- 4) Functional ability is assessed in the following designated major life areas.
- 5) Mobility - evidence reveals no significant physical impairment. Claimant ambulates independently. No substantial deficit found
- 6) Self-Care- evidence reveals independence with the exception of prompting and reminders. No substantial deficit is apparent.
- 7) Receptive/Expressive Language- receptive and expressive language skills appear within normal limits. The psychological evaluation (D-4) indicates use of comprehensive sentences in expressing self and good comprehensive skills. A finding of significant deficit in this area is not supported by documentation.
- 8) Learning (functional academics) – Intelligence scores range from 92- 93 which according to the psychological evaluation (D-4) place the claimant in the average range in intelligence. No substantial qualifying deficit found.
- 9) Self-Direction – The claimant is 19 years old and interests documented appear not age appropriate. Has some issues in social settings and requires prompting to complete ADL's. The assignment of a qualifying deficit in this category appears justified.
- 10) Capacity for Independent Living - The claimant's ability to live independently appears questionable. He requires reminders and prompting to complete tasks. His social skills are underdeveloped and he is uncomfortable in noisy environs. His interests are limited and his ability to live alone is not supported by evidence presented. Documentation fails to provide any convincing evidence concerning the ability of the claimant to live independently in the future. Qualifying deficit found.
- 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 supports a finding of qualifying deficit in only two categories 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 September 6, 2006 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 28th Day of June 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.