



State of West Virginia  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
Office of Inspector General  
Board of Review  
P.O. Box 970  
Danville, WV 25053

Joe Manchin III  
Governor

Martha Yeager Walker  
Secretary

December 5, 2007

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dear Mr. \_\_\_\_\_:

Attached is a copy of the findings of fact and conclusions of law on your hearing held October 19, 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 shows 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 **reverse** the Department's action in denying your application for benefits and services through the Medicaid, Title XIX MR/DD Waiver Program.

Sincerely,

Cheryl McKinney  
State Hearing Officer  
Member, State Board of Review

Pc: Chairman, Board of Review

\_\_\_\_\_  
Steve Brady, BHHF  
Alva Fuzzy Page, Atty.

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

\_\_\_\_\_,

**Claimant,**

**vs.**

**Action Number: 06-BOR-3234**

**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 October 19, 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 October 19, 2007 on a timely appeal filed July 28, 2006.

It should be noted that this hearing was previously scheduled for December 29, 2006 and continued at the request of the Claimant. It was also scheduled for March 7, 2007 and June 4, 2007, and continued at the request of the Department.

**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  
[REDACTED]

\_\_\_\_\_, Claimant's mother

\_\_\_\_\_, Claimant's father  
[REDACTED]

Steve Brady, BHHF

Alva Fuzzy Page, Assistant Attorney General, DHHR

Linda Workman, Psychologist Consultant  
[REDACTED]

Mary McQuain, Assistant Attorney General, observing

It should be noted that Steve Brady, Alva Fuzzy Page, Linda Workman, Mary McQuain, and [REDACTED] participated by telephone.

Presiding at the hearing was Cheryl McKinney, 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**

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

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

#### **Departments Exhibits:**

- D-1 Notice of Denial dated August 4, 2006
- D-2 Adult Mental Profile dated January 10, 2000
- D-3 Letter from [REDACTED] dated June 1, 2000
- D-4 Job Analysis form dated April 17, 2006
- D-5 Letter from \_\_\_\_\_ dated July 20, 2006
- D-6 Individual Plan for Employment dated April 12, 2006
- D-7 Letter from [REDACTED] M.D. dated July 10, 2006
- D-8 Letter from [REDACTED] M.D. dated August 22, 2005

- D-9 Psycho-educational Evaluation dated May 5, 2000
- D-10 Academy of Careers Vocational Assessment dated April 20, 1999
- D-11 Educational Assessment Report dated April 20, 1999
- D-12 Evaluation report of Licensed Physician/Psychologist dated June 9, 1999
- D-13 Denial letter dated July 6, 2005
- D-14 Waiver Application Cover Sheet and documents
- D-15 Annual Medical Evaluation dated April 19, 2006
- D-16 Psychological Evaluation dated April 4, 2005
- D-17 Social History dated April 13, 2005
- D-18 Individual Program Plan dated April 13, 2005
- D-19 Addendum to Psychological Evaluation dated July 26, 2006
- D-20 MR/DD Waiver Program Policy

**Claimant's Exhibits:**

- C-1 Psychological Evaluation performed by [REDACTED] Licensed Psychologist of [REDACTED] dated August 13, 2007
- C-2 Addendum to Psychological Report dated August 13, 2007
- C-3 Notes of IEP Meeting dated April 19, 2000
- C-4 Notes of IEP Meeting dated April 29, 1999
- C-5 [REDACTED] notes regarding his need for a job coach.
- C-6 Report from [REDACTED] dated February 1989
- C-7 Medical Summary from [REDACTED] dated December 1988
- C-8 Report from [REDACTED] dated December 1988
- C-9 Report from [REDACTED] Schools dated October 1990
- C-10 Psychological Evaluation from [REDACTED] Schools dated August 6, 1981
- C-11 Psychological Evaluation from [REDACTED] Schools dated November 27, 1993
- C-12 Psychological Report from [REDACTED] Schools dated August 28, 1996
- C-13 Educational Assessment Report from [REDACTED] Schools dated April 20, 1999

**VII. FINDINGS OF FACT:**

- 1) On or about August 4, 2006 the Claimant was notified via a Notice of Denial (Exhibit D-1) 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:**

The additional information has been reviewed. The documentation submitted does not support eligibility for the title XIX Waiver Program. Current information, i.e., 4/4/04 Psychological Evaluation, is inconsistent with previous psychological reports that were completed when Mr. \_\_\_\_\_ was 18 years old. Based upon the information, he had achievement scores and intellectual scores

that were within the Borderline to low Average range. While a diagnosis of mild mental retardation was indicated, Mr. \_\_\_\_\_ does not have a severe deficit as is required and he does not require the level of support supervision and active treatment typically provided in an ICF/MR institutional setting. Additionally, documentation submitted does not reflect that he had substantial adaptive deficits prior to the age of twenty-two.

- 2) The evidence reveals that the Claimant has a program qualifying diagnosis of Pervasive Developmental Disorder (PDD) Not Otherwise Specified (NOS), which is chronic, as well as mild to moderate mental retardation; however, the Department contends that the severity of the Claimant's condition does not demonstrate the need for an ICF/MR level of care. The Department contends that the clinical evidence fails to support the finding of a substantial adaptive deficit in three (3) of the six (6) major life areas.
- 3) The Claimant's representative contends that medical eligibility should have been established because the Claimant's PDD-NOS was diagnosed before the age of twenty-two years of age, and he has substantial deficits in three or more of the major life areas.
- 4) In the area of *Self Care*, the Claimant's representative contends the Claimant is incapable of basic self-care. These areas of self-care include dressing, toileting, feeding, bathing, and simple meal preparation. The Claimant's mother testified that without a schedule in place for school or work, it does not occur to her son to change his clothes, bathe, or brush his teeth. She has to prompt him to do these things on days when he doesn't have these events scheduled. [REDACTED] cannot prepare a meal for himself. He cannot cook using the microwave. Although he may be able to read instructions, he cannot understand and follow the directions. The Department contends that although the Claimant has deficits in this area, they are not substantially limiting. The Claimant's physician testified that he had diagnosed the Claimant with PDD-NOS before the age of twenty two years, however his letter dated August 22, 2005 (D-8) does not indicate this. A Psycho-educational Evaluation dated May 5, 1999 states that one of the Claimant's strengths is his self help skills (D-9). A Psychological Evaluation dated April 4, 2005 provides that the Claimant is able to use a knife for cutting and spreading; can order complete meals in a restaurant; and must be prompted to complete personal hygiene tasks. (D-16)
- 5) In the area of *Capacity for Independent Living*, the Claimant's representative contends the Claimant cannot ensure his own safety. Testimony given at the hearing indicates that the claimant is unaware of many dangers around him and must be supervised in many aspects of his life. The Claimant's mother testified that although her son could cross a simple residential two-lane street, she would not feel he was safe to cross anything more complex with more traffic. The Claimant is unable to recognize dangers a stranger might pose. He is unable to anticipate what others might be thinking. The Claimant's representative contends that it would be difficult for the Claimant to function socially on his own. He lives in his bedroom, and watches certain television shows and plays gameboy on the computer. He has no friends, and engages in no social activities unless it is with his parents. He speaks so rapidly that it is almost impossible to understand what he says unless one is accustomed to listening to him. He is unable to understand math enough for him to pay for items and get

proper change back. The Department contends that no evidence was provided to show that the Claimant has substantial limitations in this area. Their contention is that the Claimant “chooses” to not participate in community activities. The Department points to documentation that shows he enjoys leisure activities such as, watching sports, playing with pets, and playing his video games.

- 6) In the area of *Receptive and/or Expressive Language*, the Claimant’s representative contends that although the Claimant scores well on word recognition tests, he has a large gap between his ability to recognize and read words, and his ability to recognize what those words mean. Evidence and testimony provided at the hearing support this. The Department contends that the Claimant does not have a substantial deficit in this area, and points to evidence (C-1) in the form of a Psychological Evaluation completed August 13, 2007 which states that “language is strength”.
- 7) In the area of *Learning*, the Claimant’s representative contends that although he has what appear to be “good” reading skills, his broader performance is very poor in functional academics, which refers to “general cognitive competence and ability to acquire new behaviors, perceptions and information, and applying experience to new situations”. The Educational Assessment Report dated April 1999 (D-11) supports this contention in that it shows he scored within the moderate deficit range in writing samples, social studies, and humanities, while scoring within the severe deficit range in calculation, applied problems, and dictation. The report from [REDACTED] (C-1) also provides supporting evidence, showing sentence comprehension and math comprehension at grade equivalents of 5.7 and 3.5 at the age of twenty six years.
- 8) 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 {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 (Emphasis added). 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., psychological evaluation, 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 Pervasive Developmental Delay-Not Otherwise Specified (PDD-NOS), which manifested before the age of twenty-two years, is chronic, and is likely to continue indefinitely. His GAC, Conceptual, Practical and Social Domains are below the 1<sup>st</sup> percentile. Evidence and testimony support the finding that the Claimant has substantial deficits in Capacity for Independent Living, Receptive or expressive language, and Learning. The Claimant requires and would benefit from continuous active treatment.
- 3) Whereas the evidence demonstrates that the Claimant requires an ICF/MR level of care, medical eligibility for participation in the MR/DD Waiver Program is established.

## **IX. DECISION:**

It is the decision of the State Hearing Officer to **reverse** 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 5<sup>th</sup> Day of December, 2007**

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**Cheryl McKinney  
State Hearing Officer**