



State of West Virginia  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
Office of Inspector General  
Board of Review  
1027 N. Randolph Ave.  
Elkins, WV 26241

Joe Manchin  
Governor

Martha Yeager Walker  
Secretary

July 11, 2008

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

Attached is a copy of the findings of fact and conclusions of law on your hearing held July 2, 2008. Your hearing request was based on the Department of Health and Human Resources' action to deny your application for benefits and services under 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 & 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 in three (3) or more major life areas that require the level of care and services provided in an Intermediate Care Facility for individuals with mental retardation and/or related conditions and must have manifested prior to the age of 22. (West Virginia Title XIX MR/DD Home & Community-Based Waiver Revised Operations Manual, Chapter 500).

Evidence presented during the hearing fails to establish an eligible diagnosis for the MR/DD Waiver Program.

It is the decision of the State Hearing Officer to **uphold** the action of the Department to deny benefits and services through the MR/DD Waiver Program.

Sincerely,

Pamela L. Hinzman  
State Hearing Officer  
Member, State Board of Review

cc: Chairman, Board of Review  
Mekell Golden, Hearings Coordinator, MR/DD Waiver Program

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

\_\_\_\_\_  
**Claimant,**  
**vs.**

**Action Number: 08-BOR-1161**

**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 July 11, 2008 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 convened on July 2, 2008 on a timely appeal filed April 3, 2008. The hearing was originally scheduled for June 11, 2008, but was rescheduled upon its assignment to an alternative Hearing Officer.

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's mother  
\_\_\_\_\_, Director of Vocational Programs, \_\_\_\_\_  
\_\_\_\_\_, Supported Employment Coordinator, \_\_\_\_\_

*Participating telephonically:*

\_\_\_\_\_  
Mekell Golden, Hearings Coordinator, MR/DD Waiver Program  
Richard Workman, Psychologist Consultant, Bureau for Medical Services

Presiding at the hearing was Pamela L. Hinzman, 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

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

#### **Department's Exhibits:**

- D-1 Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500
- D-2 Notice of Denial/Termination dated January 3, 2005
- D-3 Notice of Denial/Termination dated September 6, 2006
- D-4 Notice of Denial/Termination dated December 17, 2007
- D-5 Notice of Denial/Termination dated February 13, 2008
- D-6 Diagnostic criteria from DSM-IV
- D-7 DD-2-A Medical Evaluation dated September 18, 2007
- D-8 Psychological Evaluation Update

### **VII. FINDINGS OF FACT:**

- 1) The Claimant applied for MR/DD Waiver services and the Department reviewed his medical/psychological documentation to determine whether he meets medical eligibility requirements for the program.
- 2) The Department determined that the Claimant is ineligible for Waiver services and sent a Notice of Denial/Termination dated December 17, 2007 (D-4), which states:

Your Waiver Application is hereby denied. Your application was Denied because: Additional documentation is requested. The psychologist is asked to clarify the diagnosis of Autism on Axis I as, according to her own report, Mr. \_\_\_\_\_ has not carried this diagnosis historically and first diagnosis at age 19 is rather atypical. Documentation which supports the Autism diagnosis in early childhood is requested. The DD-3 was beyond 90 days at the time of receipt by the Waiver office.

- 3) Upon review of additional information, the Department sent the Claimant a second Notice of Denial/Termination on February 13, 2008 (D-5), which states:

Your Waiver Application is hereby denied. Your application was denied because: Documentation submitted to date indicates that Mr. \_\_\_\_\_ has consistently been diagnosed with Asperger's Disorder since 1993. The diagnosis has been rendered by several different psychologists over at least four evaluations and he was served in special education on the basis of Asperger's Disorder. The current diagnosis of Autistic Disorder is inconsistent with diagnostic history and psychometric data contained in the current DD-3. Therefore, Mr. \_\_\_\_\_ does not meet diagnostic eligibility criteria for the Title XIX Waiver program.

- 4) Mr. Workman, the Department's Psychologist Consultant, testified that no documentation was provided to indicate that the Claimant, now 20 years old, was diagnosed with autism prior to age three. According to Exhibit D-8, a Psychological Evaluation Update completed by Dr. \_\_\_\_\_ on February 5, 2008, the Claimant (at age five) was initially assessed at the \_\_\_\_\_ for Child Development in 1993. While the Claimant's behavior rendered completion of an assessment impossible, the report states that "behavioral

observations made by the examiner at the [REDACTED] [sic] Center and [REDACTED]'s teacher were commensurate to those demonstrated by children with a diagnosis of Asperger's Disorder or Pervasive Developmental Disorder, Not Otherwise Specified."

Exhibit D-8 indicates that the Claimant was assessed at [REDACTED] in May 1995 at age seven and was diagnosed with Asperger's Disorder "based upon marked impairment in the use of eye contact, intense focus on certain tasks or topics and self-stimulatory movements (i.e. hand flapping)."

In addition, Exhibit D-8 states that the Claimant was evaluated by Fred Jay Krieg & Associates in 1998 at age nine. At that time, the Claimant attained a full-scale IQ score of 87 and was diagnosed with Asperger's Disorder "due to severe interpersonal deficits coupled with average intellectual abilities." The Claimant was reassessed by [REDACTED] County Schools in March 2004 using the WISC-IV. At that time, the Claimant attained a full-scale IQ of 76 and was diagnosed with Asperger's Disorder. The Asperger's Diagnosis was further substantiated in May 2006 in an evaluation conducted at [REDACTED]

Mr. Workman testified that the physician completing the ICF/MR Level of Care Evaluation (D-7) in September 2007 determined that the Claimant has normal neurological functions, with the exception of poor coordination. That evaluating physician listed a diagnosis of "Autism/Pervasive Developmental Disorder" and recommended an ICF-MR Level of Care for the Claimant. Mr. Workman testified that there is no basis for the autism diagnosis and that historical assessments indicate the Claimant has Asperger's Disorder. He testified that- if autism was present- the Claimant's condition would not meet severity requirements for the MR/DD Waiver Program.

Mr. Workman testified regarding DSM-IV criteria for Autistic Disorder (D-6), which states- "by definition, the onset of Autistic Disorder is prior to age 3 years." The criteria also states that "in most cases, there is an associated diagnosis of Mental Retardation, which can range from mild to profound." DSM-IV diagnostic criteria for Asperger's Disorder states- "there is no clinically significant general delay in language (e.g., single words used by age 2 years, communicative phrases used by age 3 years)." It also states "there is no clinically significant delay in cognitive development or in the development of age-appropriate self-help skills, adaptive behavior (other than in social interaction), and curiosity about the environment in childhood" and "criteria are not met for another specific Pervasive Developmental Disorder or Schizophrenia."

*Because the Department contended that the Claimant does not meet diagnostic criteria, the issue of substantial adaptive deficits was not addressed during the hearing.*

- 5) Dr. [REDACTED] testified that psychological diagnoses are subjective, unlike other diagnoses in the medical field. She testified that she met with the Claimant on multiple occasions, does not doubt his cognitive strengths, and believes his intellect does not fall in the Mental Retardation range. However, Dr. [REDACTED] testified that the Claimant's verbal abilities are the result of the mental stimulation provided by his adoptive parents. She believes the Claimant

meets DSM-IV criteria for Autistic Disorder in regard to certain qualitative impairments in communication. She testified that communication for autistic children does not merely concern the presence or absence of verbal speech and believes the Claimant should have previously been diagnosed with autism. She further stated that current evaluators are in “a guessing game” since the Claimant was not evaluated prior to age five. Dr. [REDACTED] testified that she could not find documentation confirming an early autism diagnosis, but indicated that she would consider the Claimant’s degree of autism as moderate (not severe). She testified that the Claimant would benefit from MR/DD Waiver services.

The Claimant’s mother testified that she believes her son was diagnosed with autism when he evaluated at [REDACTED] at age two, however, no documentation was provided to support this information. The Claimant’s mother testified that her son received poor grades in school until an aide was assigned to him in ninth grade. She testified that the Claimant lacks social skills and she wants him to “have something to do” so that he can be around other people and “make something of his life.”

The [REDACTED] representatives testified about the Claimant’s experiences with work exploration and indicated that the Claimant requires continual monitoring and verbal prompts to complete tasks. The Director of Vocational Programs testified that she would never foresee the Claimant as being totally independent at a job site or attaining substantially gainful employment. She testified that she has attempted to convince the Claimant to work more than one hour per week; however, he has a rigid schedule and becomes disturbed if his schedule is altered.

- 5) Eligibility requirements 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 (D-1).

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 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 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
  - 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 of 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) Regulations governing the MR/DD Waiver Program require eligible individuals to have a diagnosis of mental retardation and/or a related developmental condition, which must be severe and chronic, in conjunction with substantial deficits (substantial limitations associated with the presence of mental retardation).
- 2) The Department maintained that the Claimant has been historically diagnosed with Asperger's Disorder and does not meet diagnostic criteria for the MR/DD Waiver Program. While the Claimant has had recent diagnoses of Autistic Disorder, no evidence was provided to demonstrate that an autism diagnosis was made prior to the age of three. In addition, the Claimant's evaluating psychologist testified that the Claimant's level of autism would be considered moderate and not severe.
- 3) While it is clear that the Claimant's condition poses many challenges, evidence provided during the hearing fails to demonstrate that the Claimant has an eligible diagnosis of mental retardation and/or a related condition that meets severity requirements for the MR/DD Waiver Program.
- 4) The Department acted correctly in denying the Claimant's application for MR/DD Waiver services as evidence fails to establish the need for an ICF/MR level of care.

## **IX. DECISION:**

It is the decision of the State Hearing Officer to **uphold** the Department's decision to deny 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 11th Day of July, 2008.**

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**Pamela Hinzman**  
**State Hearing Officer**