



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

Martha Yeager Walker
Secretary

Joe Manchin III
Governor

January 7, 2008

Dear Mr. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held November 28, 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 do not 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,

Cheryl Henson
State Hearing Officer
Member, State Board of Review

Pc: Chairman, Board of Review
Steve Brady, BHHF

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

_____,

Claimant,

vs.

Action Number: 07-BOR-1192

**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 November 28, 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 November 28, 2007 on a timely appeal filed April 13, 2007.

It should be noted that this hearing was previously scheduled for August 3, 2007 and continued at the request of the Claimant.

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 Mother
_____, Claimant's Day Care Provider

Steve Brady, BHHF
Richard Workman, Psychologist

It should be noted that Steve Brady and Richard Workman participated by telephone.

Presiding at the hearing was Cheryl McKinney (Henson), 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 Chapter 500, MR/DD Waiver Manual
- D-2 Notification letter dated January 25, 2007
- D-3 Annual Medical Evaluation
- D-4 Initial Psychological Evaluation from Dr. [REDACTED] dated October 19, 2006
- D-5 Social History dated November 28, 2006
- D-6 Individual Program Plan
- D-7 _____ County Schools IEP Modification dated September 20, 2006

Claimant's Exhibits:

C-1 Individualized Education Program, _____ County Schools dated April 25, 2006

VII. FINDINGS OF FACT:

- 1) On or about January 25, 2007 the Claimant was notified via a Notice of Denial (Exhibit D-2) 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 physician has not offered an eligible diagnosis on the DD-2A. Documentation submitted for review does not support the presence of substantial adaptive deficits as defined for Title XIX MR/DD Waiver eligibility in three or more of the six major life areas. The psychologist is asked to review the ABS Score Summary, particularly with respect to the percentile scores and standard scores reported for Self-Direction and Socialization. Please submit any current psycho-educational assessments conducted by the school system.

- 2) The evidence reveals that the Physician failed to provide an eligible diagnosis on the DD-2A (D-3). The physician supplied a diagnosis of deaf/blindness which is not an eligible diagnosis, and indicated the Claimant is ambulatory, feeds himself, is alert, but does need assistance with personal hygiene. The Claimant is eight (8) years old. The Claimant was listed as incontinent on the DD-2a. (D-3) 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 mother agreed that the Claimant is very mobile, but indicated this was a problem because he does not understand dangers and is easily hurt. She stated he must be supervised constantly. She indicates he is a hazard to himself due to developmental delays. He cannot deal with things that are not in order and will scream inappropriately. She testified he cannot comb his hair, can put on his shoes but cannot tie them. She states his language is echo laic, and he is self abusive. She offered no evidence to support a diagnosis of mental retardation or related condition.
- 4) The Claimant's Day Care Provider testified that he requires constant supervision and one person must be assigned to him constantly as he can unlock doors and doesn't understand danger. She states he usually plays off by himself. He doesn't use a spoon or fork unless someone sits beside him and constantly reminds him to do so. She stated the Claimant is not

a social child.

- 5) 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) Evidence and testimony provided does not support the finding that this Claimant has a qualifying diagnosis and requires an ICF/MR level of care.
- 3) Whereas the evidence does not demonstrate that the Claimant requires an ICF/MR level of care, medical eligibility for participation in the MR/DD Waiver Program is not established.

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 7th Day of January, 2008

**Cheryl Henson
State Hearing Officer**