



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
P.O. Box 2590
Fairmont, WV 26555-2590

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

January 17, 2008

Dear Mr. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held January 16, 2008. Your hearing request was based on the Department of Health and Human Resources' decision 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 fails to meet the criteria necessary to establish eligibility for participation in the MR/DD Waiver Program.

It is the decision of the State Hearing Officer to **uphold** the Department's decision to deny your application for benefits and services through the Medicaid, Title XIX MR/DD Waiver Program.

Sincerely,

Thomas E. Arnett
State Hearing Officer
Member, State Board of Review

Pc: Chairman, Board of Review
Steve Brady, Operations Coordinator, MR/DD Waiver

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

Claimant,

vs.

Action Number: 07-BOR-1912

**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 January 17, 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 was convened on January 16, 2008 on a timely appeal filed August 15, 2007.

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

_____, Claimant's Grandmother/Guardian

Steve Brady, Operations Coordinator, MR/DD Waiver Program

Rick Workman, Psychologist Consultant, BMS

Presiding at the hearing was Thomas E. Arnett, 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 applications 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 500-8.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

- D-1 Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500-8.
- D-2 Notice of Denial dated July 11, 2007
- D-3 Notice of Denial dated 9/26/07
- D-4 DD 2-A-Level of Care Evaluation dated
- D-5 Preschool Mental Profile dated August 1, 2006
- D-6 Correspondence from The Office of _____ M.D. dated 2/20/07
- D-7 Individualized Education Program (IEP), _____ county Schools dated 5/18/07
- D-8 Milestones Evaluation dated 3/19/07
- D-9 Percentile Rank and Standard Score Conversion Table
- D-10 Comprehensive Psychological Evaluation DD-3, dated 5/21/07

VII. FINDINGS OF FACT:

- 1) On or about July 11, 2007, The Claimant was notified via a Notice of Denial (Exhibit D-2) that his application for benefits and services through the MR/DD Wavier Program were denied. This notice states:

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.

- 2) Additional documentation was submitted by the Claimant and a second Notice of Denial was sent to the Claimant on September 26, 2007. This notice states:

Documentation submitted does no support the presence of substantial adaptive deficits in three or more of the six major life areas identified for Waiver eligibility. Specifically, the documentation failed to demonstrate substantial limitations in the following major life areas: Learning, Self-Direction, Receptive or Expressive Language, Mobility & Capacity for Independent Living.

- 3) As a matter of record, the Department stipulated that the Claimant presents an eligible diagnosis. A review of the eligibility criteria reveals that Claimant's condition manifested prior to the age of 22 and it is likely to continue indefinitely. The Department, however, contends that the Claimant's condition is not severe as demonstrated by the lack of substantial adaptive deficits three (3) of the six (6) major life areas.
- 4) The Department submitted Exhibits D-1 through D-10 in support of its findings and indicated the evidence supports the finding of a substantial adaptive deficit in the major life are of Self-Care. The Department concluded by stating that while the Claimant has some challenges, the degree of severity does not support an ICF/MR Level of Care.
- 5) The Claimant's representative provided anecdotal examples of behavioral anomalies but was unable to provide evidence contrary to the Department's findings. She indicated that the Claimant's current level of performance is the result of hard work by her and the individuals at the Birth-to-Three program. Her primary concern, as a grandmother and caretaker, is the Claimant's future ability to perform independent living skills, although she agreed that he does not demonstrate a substantial adaptive deficit in Mobility, Language, Learning and Self-Direction. She expressed her disappointment with the Department's findings but acknowledged the Claimant does not demonstrate substantial adaptive deficits in three or more of the major life areas as defined by the MR/DD Waiver Program Level of Care criterion.
- 6) 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 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. Substantial limits is defined on standardized measures of adaptive behavior scores three (3) standard deviations below the mean or equal to or below the seventy fifth (75) percentile when derived from MR normative populations.
- 2) The Claimant presents program qualifying diagnoses of PDD/NOS and or Autism, however, the clinical evidence fails to demonstrate that he has substantial adaptive deficits in three (3) or more of the major life areas. While the Department conceded that the Claimant demonstrates a substantial adaptive deficit in his Self-Care, the standardized measures of adaptive behavior scores, as well as the clinical and narrative documentation, fail to identify substantial adaptive deficits in any of the other major life areas.

- 3) Based on the evidence, medical eligibility for participation in the MR/DD Waiver Program cannot be established.

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 17th Day of January, 2008.

**Thomas E. Arnett
State Hearing Officer**