



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

March 21, 2008

_____ for

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held February 21, 2008. 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 500-8).

The information submitted at your hearing fails to demonstrate that you meet the eligibility criteria necessary 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,

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

Pc: Chairman, Board of Review
Steve Brady, MR/DD Waiver Program
Alva Page III, Esq., BMS
[REDACTED]

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

_____,

Claimant,

vs.

Action Number: 07-BOR-1934

**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 March 21, 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 originally scheduled to convene on November 8, 2007 and again on November 26, 2007 but was rescheduled at the request of the Claimant and convened on February 21, 2008 on a timely appeal filed July 25, 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

[REDACTED]

_____, Claimant's mother

_____, Claimant's step-father

_____, Director for Disabilities Action Center

[REDACTED]

Alva Page III, Esq., BMS, Assistant AG's Office (Participated telephonically)

Steve Brady, MR/DD Waiver Program (Participated telephonically)

Linda Workman, Psychologist Consultant, BMS (Participated telephonically)

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 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 500-8.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Department's Exhibits:

- 1 DD 2-A ICF/MR Level of Care Evaluation – dated 6/6/07
- 2 Evaluation & ABS-S:2 rating by [REDACTED] Licensed Psychologist – dated 6/8/07
- 3 Notice of Denial dated 7/11/07
- 4 _____ Hospital Psychiatric Evaluation dated 5/26/05
- 5 _____ Hospital Discharge Summary dated 6/6/05
- 6 Individualized Education Program dated 1/8/07
- 7 Psychoeducational Evaluation completed by _____ on 11/1/06
- 8 Notice of Denial/Termination dated 8/20/07
- 9 Evaluation by [REDACTED] Licensed Psychologist – dated 12/14/07
- 10 Notice of Denial /Termination dated 1/23/08

Claimant's Exhibit(s)

*F [REDACTED] Evaluation completed on 10/12/05

* Subsequent to the hearing, both parties agreed that Exhibit F would be admitted as part of the record.

The record remained open for the submission of closing arguments by both parties. Closing

arguments were received timely from both parties and considered in this decision.

VII. FINDINGS OF FACT:

- 1) On or about July 11, 2007, the Claimant was notified via a Notice of Denial (Exhibit D-3) that her application for the Medicaid MR/DD Waiver Program was denied. This notice states:

Your application was Denied because:

The packet lacked Miss _____'s IEP. Please submit the most current psycho-educational assessments conducted by the school system and discharge summaries from _____ Hospital.

- 2) In response to the additional information received from the Claimant, a second Notice of Denial (Exhibit 8 dated August 20, 2007), advised the Claimant that her application was again denied. This notice states, in pertinent part:

Your application was Denied because:

Miss _____'s application lacks diagnostic clarity. In some documents she is noted to be diagnosed with Asperger's Disorder, which is not an eligible diagnosis, and in some documents she is diagnosed with Autism. Clarification is requested. In addition, overall documentation does not support the presence of mental retardation as psycho-educational assessments indicate, at least Borderline IQ and an achievement level which is in compatible [*sic*] with the presence of mental retardation. Clarification of the Axis I diagnosis is requested as is a measure of adaptive behavior with scores derived from a non-mental retardation normative population.

- 3) In response to Exhibit 8, Exhibit 9 (Evaluation completed on 12/14/07) was submitted for review and a third denial/termination notice was sent to the Claimant on January 23, 2008 (Exhibit 10). This notice states:

Additional documentation submitted did not provide clarification regarding the Axis II diagnosis. Therefore, at this point, Miss _____ does not meet diagnostic eligibility (See Notice of Denial dated 8/20/07).

- 4) The Department contends that determining a program qualifying diagnosis in the Claimant's case was not possible due to the inconsistent diagnoses provided. The Claimant has been diagnosed in the past with Asperger's Disorder and PDD NOS, but has recently been diagnosed with Autism and Mild Mental Retardation. With regard to an eligible diagnosis, the Department contends that - (1) If the Claimant's condition was severe, the Claimant's diagnosis would not be questionable, (2) the Autism and Mild Mental Retardation diagnoses are not supported by clinical documentation and (3) the Claimant is not demonstrating substantial adaptive deficits in three of the six major life areas. Although it was noted at the

hearing that recent Adaptive Behavior Scale Scores (ABS S:2) results (Exhibit 2) completed with Mental Retardation “Norms” provided scores in the eligible range, the Department contends that Non-MR Norms should have been used as an MR diagnosis is not appropriate for the Claimant. The Axis I diagnosis of Autism is contested as the evidence fails to include confirmation from an Autism screening instrument.

- 5) The Claimant contends that she presents an eligible diagnosis (Autism and Mild Mental Retardation), as supported by the clinical evidence and that she demonstrates substantial adaptive deficits in (1) Language, (2) Self-direction, (3) Capacity for independent living (4) Learning and (5) Self-care.
- 6) A review of the evaluations submitted into evidence reveals the following pertinent diagnostic findings:

The evaluations completed in May and June 2005 by [REDACTED] Hospital (**Exhibits 4 & 5**) include an Axis I diagnosis of PDD NOS and Asperger’s Disorder. According to the Department, these diagnoses are mutually exclusive - an individual cannot be diagnosed with both of these conditions simultaneously. The Axis II diagnosis is Borderline Intellectual Functioning (not Mild MR).

Exhibit F is an evaluation completed by [REDACTED] on October 12, 2005. This document provides an Axis I diagnosis of Autistic Disorder and an Axis II diagnosis of Mild Mental Retardation.

The evaluator notes in Section I.B. (Prior Psychological Testing) that he did not have access to prior psychological assessments but concludes - “A consistent diagnosis of Autism and/or Pervasive Development Disorder has been given.” The evaluator states in Section I.C. – “Signs of symptoms of autism include that of repetitive and ritualistic hand flapping, as well as rocking.” In the same section, third paragraph, the evaluator states - “Additionally, the [REDACTED] works with her in classroom setting.” This evaluation does not state if an Autism screening instrument was used to diagnose Autism and the fourth paragraph (same section) states – “At the same time, she has more recently been treated for Asperger’s diagnosis under the direction of Dr. [REDACTED]”

Section III.A.2 includes intellectual/cognitive results from a Wechsler Abbreviated Scale of Intelligence and the Bender-Gestalt Visual Motor Test and states “According to the WASI, Stephanie obtained a Verbal IQ of 74, Performance IQ of 56 and a Full Scale IQ of 64, placing her within the Mild Mental Retardation range of intellectual functioning.”

Exhibit 7 is a Psychoeducational Evaluation completed on November 1, 2006 by Frank D. Roman, ED.D. The Claimant was evaluated with the Wechsler Adult Intelligence Scale – Third Edition (WAIS-III) and a Kaufman Test of Education Achievement – Second Edition. The Claimant’s IQ results are as follows: Verbal IQ of 83, Performance IQ of 65 and a Full Scale IQ of 73. The evaluator notes on page 6 - “Achievement testing is actually higher with

a Reading Composite of 93, Math Composite at 81 and Spelling was 92. Therefore, Stephanie is achieving above what the IQ level is at this point in time. There is an indication that the Verbal IQ is the best indicator of her ability which is in the low average range. If the General Ability Index (GAI) were computed using the Verbal Comprehension and Perceptual Organization subtests in which there are six total, the IQ of 73 now becomes an IQ of 77. Thus, a 4 point increase makes her IQ score at the upper end of the borderline range.”

Exhibit 2 is a Psychological Evaluation completed by [REDACTED] MA, on June 8, 2007. Section III.A. of this evaluation includes intellectual /cognitive testing results. Ms. [REDACTED] notes in the discussion section – [REDACTED] received a Verbal IQ of 77, which falls in the borderline intellectual functioning range [*sic*], a Performance IQ score of 57, which falls in the mild mental retardation range and a Full Scale IQ of 66 which falls in the mild mental retardation range. Given her adaptive functioning, it is likely that [REDACTED] does function in a mild mental retardation range.” The Diagnosis (page 6, Section V) includes the following: Axis I: 299 Autistic Disorder and Axis II: 317 Mild Mental Retardation. The ABS-S:2 AAMR Adaptive Behavior Scale-School, Second Edition Profile/Summary Form was completed using the MR normative table. While the ABS scores included with this psychological evaluation indicate substantial adaptive deficits in several areas, the Department, as indicated in the notice, contends that MR Norms are not appropriate for the Claimant and therefore provide inaccurate results.

Exhibit 9 is a Psychological Evaluation completed by [REDACTED] MA, on December 14, 2007. This evaluation was completed in response to the second denial notice (Exhibit 8) – “The focus of this evaluation is to complete the psycho-educational testing in order to address discrepancies in IQ Scores from prior evaluations, as part of a continuing eligibility for Title XIX Waiver Services.” The Claimant received a Verbal IQ of 82, a Performance IQ of 62 and a Full Scale IQ of 77. Section V, Diagnosis includes the following: Axis I: Autistic Disorder and Axis II Mild Mental Retardation.

- 7) The Claimant’s diagnoses, past and present, are complicated by several factors. The first evaluations included in evidence (chronologically by the date completed), Exhibits 4&5, include diagnoses of Asperger’s Disorder and PDD NOS - two diagnoses that are mutually exclusive, and Borderline Intellectual Functioning. While PDD NOS is an eligible diagnosis for participation in the MR/DD Waiver Program, Asperger’s and Borderline Intellectual Functioning are not. Diagnostic clarity is a problem beginning with the evaluations from [REDACTED]

The Claimant was subsequently diagnosed with Autism in Exhibit F, seemingly by history, as the evaluator indicated he did not have access to previous evaluations. The Autism diagnosis is further questionable as there is no mention of an Autism screening instrument and the Claimant was noted to be receiving treatment for Asperger’s. This evaluation does, however, provide a diagnosis of Mild Mental Retardation which is supported by IQ testing results at that time.

One year later, a Psychoeducational Evaluation (Exhibit 7) was completed indicating the Claimant's IQ is in the upper end of borderline range (IQ of 77). Based on her verbal IQ, she is performing in the low average range.

██████████ completed two subsequent psychological evaluations (June 8 & December 14, 2007) which include the diagnoses of Mild MR and Autism. The Mild MR diagnosis in the first evaluation (Exhibit 2) was based the Claimant's IQ testing results and Ms. ██████████ opinion that considered IQ scores in conjunction with the Claimant's adaptive deficits. In Exhibit 9 (the most recent evaluation), the Claimant's Full Scale IQ was determined to be a 77, but again Ms. ██████████ evaluation states that the Claimant's adaptive deficits indicate the Claimant is functioning in the mild mental retardation range. The diagnosis of Autism is referred to in Exhibit 9, page 5 (see #3 Discussion) wherein Ms. ██████████ states that the discrepancy between the Verbal and Performance IQ scores is very common in individuals with Autism, however, there is no indication in Exhibit 2 or Exhibit 9 that the Claimant was evaluated for the Autism diagnosis with an autism screening instrument.

- 8) The Individualized Education Program (IEP) dated January 8, 2007 (Exhibit 6) indicates the Claimant participates in regular education classes 86% of the time and that her educational program will lead to a standard diploma. The Claimant participated in the West Test and scored at near mastery at grade level (as interpreted by the Department) according to the scores in the IEP and was expecting to take an ACT / SAT for college entrance. In addition, page 5 of 13, Part IV notes – “in the two categories Cognitive and Maladaptive behavior, both teachers rate ██████████ in the very probability for Aspergres [sic]. ██████████ average score was 92 which places her in the probability of Aspergres [sic].”
- 9) ██████████ provided testimony consistent with the findings in her evaluation of the Claimant and it is her opinion that a Mild MR diagnosis is appropriate for the Claimant due to her substantial adaptive deficits. However, according to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-TR), Washington D.C., American Psychiatric Association, 2000, it is “possible to diagnose mental retardation with individuals with IQ's between 70 and 75 who exhibit significant deficits in adaptive behavior.” The Claimant's IQ, according to Ms. ██████████ most recent evaluation, resulted in a Full IQ of 77 and, therefore, does not meet the diagnostic criteria in the DSM-TR for a Mental Retardation diagnosis. Ms. ██████████ acknowledged that she did not complete a formal evaluation for the Autism diagnosis but reported that she had sufficient information to conclude Autism is an appropriate diagnosis.
- 10) 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 (3) 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 evidence submitted in this case fails to demonstrate that the Claimant has an eligible diagnosis of Mental Retardation. The diagnostic criterion provided in the DSM-TR has not been met and therefore the Adaptive Behavior Scale – School, Second Edition (ABS-S:2) completed using MR norms is not an accurate measure of the Claimant’s adaptive deficits. The PDD NOS diagnosis is incredible as it was diagnosed in conjunction with Asperger’s (a mutually exclusive diagnosis that does not qualify as a related condition for MR/DD Waiver eligibility). While there is a diagnosis of Autism (a program qualifying diagnosis) offered in the evaluations submitted into evidence, there is no evidence to indicate that an Autism screening instrument was ever used to confirm this diagnosis.
- 3) Because evidence fails to demonstrate that the Claimant has a diagnosis of Mental Retardation or a related developmental condition, the determination of substantial adaptive deficits in the major life areas is moot.
- 4) Upon considering the facts of this case, there is insufficient evidence to demonstrate that the Claimant presents a program qualifying diagnosis. Therefore, eligibility for the MR/DD

Waiver Program cannot be established.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the Department's action 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 21st Day of March, 2008

**Thomas E. Arnett
State Hearing Officer**