



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

June 30, 2008

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held May 30, 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 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

cc: Chairman, Board of Review
Steve Brady, BHHF

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

_____,

Claimant,

vs.

Action Number: 07-BOR-1936

**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 May 30, 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 May 30, 2008 on a timely appeal filed July 18, 2007.

It should be noted that this hearing was previously scheduled for October 18, 2007, but was continued at the request of the Hearing Officer, and again on March 20, 2008 and was 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's mother
_____, Claimant's sister
_____, Autism Service Center, participated by telephone

Steve Brady, BHHF
Richard Workman, Psychologist Consultant, BMS

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

Presiding at the hearing was Cheryl 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 April 6, 2007
- D-3 Initial ICF/MR Level of Care Evaluation dated February 22, 2007
- D-4 Initial Psychological Evaluation dated March 5, 2007
- D-5 Medical Information from [REDACTED] dated May 18, 1988
- D-6 Letter from [REDACTED] M.D. dated October 13, 1998
- D-7 Letter from _____ to Social Security Administration dated October 15, 1998

Claimant's Exhibits:

- C-1 Summary notes from _____
- C-2 Records and documents pertaining to _____

VII. FINDINGS OF FACT:

- 1) On or about April 6, 2007, the Claimant was notified via a Notice of Denial (Exhibit D-2) that her 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:

Documentation submitted for review does not support the presence of substantial adaptive deficits in three or more of the six major life areas. Further, documentation was not submitted which supports the presence of substantial adaptive deficits within the developmental period.

- 2) The Department conceded during the hearing that the evidence provided supports that the Claimant does have a qualifying substantial adaptive deficit in the area of "capacity for independent living". However, it is their contention that the evidence provided does not support any other substantial adaptive deficits required for the MR/DD program. Exhibit (D-3), which is the DD-2a completed by the Claimant's physician on February 22, 2007, shows the Claimant is 34 years old and lives at home with her parents. Under the medical assessment section, the physician has indicated all areas are "normal", however he does offer a few narrative comments. Under speech, a comment was entered indicating she has "slow but clear" speech. Under coordination, he indicates she has slow movements, and a wide stance with guarded movements. Under the section listed "Problems requiring Special Care", he has entered that the Claimant is ambulatory with no help needed, feeds herself, is independent in her personal hygiene and self care, is alert, but has irrational behavior and needs close supervision. He lists a diagnosis of Pervasive Developmental Disability, NOS under Axis I, and Borderline intellectual Functioning under Axis II. PDD NOS is a recognized qualifying diagnosis however the Department points out this was offered after the age of twenty two.
- 3) Exhibit (D-4) is a Psychological Evaluation completed on March 5, 2007 by [REDACTED] a licensed psychologist at [REDACTED]. The psychologist documents that the Claimant had developmental delays from an early age especially those relating to language development and did not talk until after the age of four years. She graduated in 1992 and has attended various employment skills training programs, but has never been employed. She has always lived with her family in [REDACTED] West Virginia. She documented that the Claimant has had several psychiatric admissions dating back to her childhood, and has a well documented history of severe behavioral difficulties. She indicates that based on available information, the Claimant has had thirteen (13) or fourteen (14) hospitalizations relating to behavioral issues. Under "Prior Psychological Assessments" she documents numerous assessments. In 1995, she received a Axis II diagnosis of "Learning Disorder NOS". In 1999, Dr. [REDACTED] offered a diagnostic impression of *Axis I:

Pervasive Developmental Disorder NOS (R/O Aspergers Disorder), and another psychological evaluation in 2001 showed an Axis I diagnosis of Aspergers Disorder being suggested. An update was done in 2002 and a diagnosis of PDD/NOS was indicated. Another psychological completed in 2002 by [REDACTED] suggested PDD/NOS. Under “Behavioral History and Concerns” the psychologist indicates that the Claimant has a long standing history of severe behavioral issues dating back to early childhood, and has a long history of isolating herself, sometimes refusing to leave home. She indicates that the Claimant has the ability to do personal care, but would not do so without prompting and even then she can be resistant. Under “Language” the psychologist indicates the Claimant has “good expressive and receptive skills”. She is able to read fairly well, can write and make some phone calls. The Vineland Score Summary shows a score of “72” for communication which is in the borderline range, with a percentile rank of “3”. The Department looks for a score of less than one (1) percentile for eligibility purposes.

- 4) Exhibit (D-5) is a genetics evaluation completed in 1988 when the Claimant was fifteen years old by [REDACTED]. This document provides a diagnostic impression of Mental Retardation, seizure disorder, developmental delays and behavior disorder; however, the Mental Retardation diagnosis is not supported in later evaluations.
- 5) The Claimant’s mother indicated during testimony that the Department has a good understanding of her daughter’s (Claimant) functioning level and capacity; however, she contends the evidence provided also shows qualifying adaptive deficits in the areas of self care, receptive or expressive language, learning and self-direction. She testified that the Claimant was diagnosed with mild mental retardation in early school, but she does not have the supporting evidence available. She testified that in the area of self care the Claimant often refuses to shower, wash her hair and brush her teeth. She indicates this behavior occurs for various reasons, but she can be prompted at times to comply. She states the Claimant is unable to organize her personal area, although she makes attempts when prompted, and will sometimes search for hours to find a certain item rather than complete the task at hand. She states that in the area of learning the Claimant graduated from high school with many accommodations. In the area of receptive or expressive language, she states that the Claimant was unable to speak intelligibly at the age of four, but her language skills improved with speech and language therapy at some point near the fifth grade. She states that her anxiety and agitation increased as she was mainstreamed into the regular classroom; she had no peer support and would become uncomfortable if engaged in a conversation away from a family member. In the area of self direction, she states the Claimant needs prompting and assistance with almost any activity, and has a high level of anxiety. She will avoid family get-togethers due to the anxiety of having to converse with people. She takes her medication with supervision. She has attempted suicide in the past, and has used sharp instruments in a threatening manner toward her parents and herself.
- 6) West Virginia Medicaid Regulations, Chapter 500, Volume 13 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07, includes the following pertinent medical eligibility criteria:

Medical Eligibility Criteria

The MR/DD State Waiver Office determines the medical eligibility for an applicant in the MR/DD Waiver Program. In order to be eligible to receive MR/DD Waiver Program Services, an applicant must meet the following medical eligibility criteria:

- Have a diagnosis of mental retardation and/or a related condition,
- Require the level of care and services provided in an ICF/MR (Intermediate Care Facility for the Mentally Retarded) as evidenced by required evaluations and corroborated by narrative descriptions of functioning and reported history. An ICF/MR provides services in an institutional setting for persons with mental retardation or related condition. An ICF/MR facility provides monitoring, supervision, training, and supports.

MR/DD State Waiver Office determines the level of care (medical eligibility) based on the Annual Medical Evaluation (DD-2A), the Psychological Evaluation (DD-3) and verification if not indicated in the DD-2A and DD-3, that documents that the 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. Other documents, if applicable and available, that can be utilized include the Social History, IEP for school age children, Birth to Three assessments, and other related assessments.

The evaluations must demonstrate that an applicant has a diagnosis of mental retardation and/or a related developmental condition, which constitutes a severe and chronic disability. For this program individuals must meet the diagnostic criteria for medical eligibility not only by the relevant test scores, but also the narrative descriptions contained in the documentation. To be eligible, the member:

- Must have a diagnosis of mental retardation, with concurrent 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, and requires services similar to those required for persons with mental retardation.

- Autism
- Traumatic brain injury
- Cerebral Palsy
- Spina Bifida
- Tuberous Sclerosis

Additionally, the member who has a diagnosis of mental retardation and/or related conditions and associated concurrent adaptive deficits must have the following:

- Manifested prior to the age of 22, and
- Likely to continue indefinitely.
- Must have the presence of a least three (3) substantial deficits out of five of the major life areas (term is defined in Title 42, Chapter IV, Part 435.1009 of the Code of Federal Regulations or CFR.
Refer to 503.1, Functionality section for a list of the major life areas.

Functionality

- Substantially limited functioning in three (3) or more of the following major life areas; (“substantially limited” is defined on standardized measures of adaptive behavior scores as three (3) standard deviations below the mean or less than one (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 not only by the relevant test scores, but also the narrative descriptions contained in the documentation submitted for review, i.e., psychological, the IEP, Occupational Therapy evaluation, etc.). Applicable categories regarding general functioning include:
 - 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 and leisure activities).

For applicable major life functioning areas, refer to Code of Federal Regulation (CFR): 42 CFR435.1009.

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:
 - o A need for intensive instruction, services, assistance, and supervision in order to learn new skills, maintain current level of skills, and increase independence in activities of daily living,
 - o A need for the same level of care and services that is provided in an ICF/MR institutional setting.

The applicant or legal representative will be informed of the right to choose between ICF/MR services and home and community-based services under the MR/DD Waiver Program and informed of his/her right to a fair hearing at the time of application (Informed Consent, DD-7).

Conditions Ineligible

- Substantial deficits associated with a diagnosis other than mental retardation or a related diagnosis do not meet eligibility criteria.
- Additionally, any individual needing only personal care services does not meet the eligibility criteria.
- Individuals diagnosed with mental illness whose evaluations submitted for medical eligibility determination indicate no previous history of co-occurring mental retardation or developmental disability prior to age 22. The member's clinical evaluators must provide clinical verification through the appropriate eligibility documentation that their mental illness is not the primary cause of the substantial deficits and the mental retardation or developmental disability occurred prior to the age of twenty-two (22).

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 substantially limited functioning in three or more of the major life areas 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 30th Day of June, 2008

**Cheryl Henson
State Hearing Officer**