



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 29, 2008

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Dear Ms. \_\_\_\_\_:

Attached is a copy of the findings of fact and conclusions of law on your hearing held January 28, 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 confirms 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 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, MR/DD Waiver

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

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**Claimant,**

**vs.**

**Action Number: 07-BOR-2002**

**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 29, 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 28, 2008 on a timely appeal filed August 27, 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's mother / representative  
\_\_\_\_\_, Claimant / infant child  
Steve Brady, Operations Coordinator, MR/DD Waiver Program  
Linda 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 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**

- D-1 Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500-8.
- D-2 Notice of Denial / Termination dated 8/8/07
- D-3 DD-2A, ICF/MR Level of Care Evaluation 3/20/07
- D-4 DD-3, New Waiver Psychological Evaluation, dated 4/4/07
- D-5 Addendum To Psychological Evaluation, dated 4/4/07

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

- 1) On or about August 8, 2007, the Claimant was notified via a Notice of Denial / Termination (Exhibit D-2) that her application for participation in the MR/DD Waiver Program was denied. This notice states, in pertinent part:

Your application was denied because:

Documentation submitted does not 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 limitation in the following major life areas: Learning, Self-

### Direction, Mobility and Capacity for Independent Living.

- 3) As a matter of record, the Department stipulated that the Claimant presents a program qualifying diagnosis of Autism, and that her condition, manifested prior to the age of 22, is likely to continue indefinitely. However, the Department contends that the evidence fails to demonstrate substantial adaptive deficits in three (3) of the six (6) major life areas as required by policy.
- 4) The Department acknowledged that while the clinical evidence reviewed for eligibility identified substantial adaptive deficits in two (2) of the six (6) major life areas (Self-Care and Receptive or Expressive Language), a third deficit could not be confirmed. As a result, the Department indicated that eligibility for participation in the MR/DD Waiver Program could not be established.
- 5) The Claimant's representative expressed concern about deficiencies in Self-Direction and Capacity for Independent Living. The Claimant's representative indicated that the Claimant self-stimulates (Self-Direction) and fails to recognize safety issues (Capacity for Independent Living).
- 6) The Claimant was 2 years old (almost 3) when the psychological evaluation was completed. The gap between the Claimant's Capacity for Independent Living (home living, social skills, employment, health and safety, community and leisure activities) and same-age peers at this point is minimal. Additionally, it was noted by the Department that two and three year old children are not expected to have independent living skills. While this area may become more of a problem as the Claimant gets older, there is no clinical evidence to confirm a substantial adaptive deficit (when compared to same-age peers) at this time.
- 7) The Claimant's Self-Direction skills are difficult to fully assess at her age. It is noted in the testimony and documentation (Exhibit D-4) that the Claimant engages in self-stimulatory behavior, however, it is also noted that the Claimant spends much of her free time pacing around her home, climbing furniture and occasionally interacting with toys. While the Claimant's Self-Direction judgment may not always be appropriate, she is initiating and participating in several activities without prompting/intervention. Based on these findings, there is insufficient evidence to demonstrate that the Claimant has a substantial adaptive deficit in Self-Direction.
- 8) 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 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., 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) The Claimant presents program qualifying diagnoses of Autistic Disorder Mental Retardation, Severity Unspecified, however, the clinical evidence fails to demonstrate substantial adaptive deficits in three (3) or more of the major life areas. While the Claimant demonstrates substantial adaptive deficits in Self-Care and Receptive or expressive language, the evidence fails to confirm any additional deficits.
- 3) Based on the evidence, 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 decision to deny your 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 29th Day of January, 2008**

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**Thomas E. Arnett  
State Hearing Officer**