



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

June 17, 2008

_____ and _____ for

Dear Mr. & Mrs. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held June 2, 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).

Information submitted at your hearing fails to demonstrate that you 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,

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

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

_____,

Claimant,

vs.

Action Number: 08-BOR-899

**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 June 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 June 2, 2008 on a timely appeal filed February 25, 2008.

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 mother/representative
Steve Brady, Program Coordinator, MR/DD Waiver, BMS
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.

All parties participated via a telephone conference call.

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

West Virginia Medicaid Regulations, Chapter 500, Volume 13 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

- D -1 West Virginia Medicaid Regulations, Chapter 500, Volume 13 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07
- D-2 Notice of Denial/Termination dated 2/8/08
- D-3 ICF/MR Level of Care Evaluation (DD-2A) – 11/15/07
- D-4 Comprehensive Psychological Evaluation dated 1/9/08
- D-5 Individualized Education Plan (IEP)
- D-6 Multidisciplinary Team Evaluation Report dated 12/7/07
- D-7 Evaluation Report, Pre-School Special Needs dated 11/26/07

VII. FINDINGS OF FACT:

- 1) In response an application completed for benefits and services through the Medicaid MR/DD Waiver Program, the Claimant was notified via a Notice of Denial/Termination (D-2) that Waiver services have been denied. This notice states, in pertinent part:

Your Waiver Application is hereby denied.

Your application was Denied because:

Documentation does not support the presence of mental retardation or a related condition which is severe.

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 limitations in the following major life areas: Learning, Self-Direction, Receptive or Expressive Language, Mobility and Capacity for Independent Living. *(Only Self-Care was identified as a substantial adaptive deficit.)*

- 2) The Department cited the ICF/MR Level of Care Evaluation (D-3), and noted on page 3 of 3 that the Claimant has conflicting diagnoses "Autism/Aspergers." [sic] Autism is considered an eligible diagnosis when it is severe, and while Asperger's is considered to be in the Autism "spectrum," it is not an eligible diagnosis because there is no correlation with Mental Retardation and these individuals do not typically demonstrate substantial adaptive deficits or require an institutional level of care. The Department's psychologist testified that you cannot have both of these diagnoses as they are mutually exclusive [you can only have one or the other, not both]. The Department's psychologist testified that if this individual had severe Autism, there would be question about the appropriate diagnosis.
- 3) Exhibit D-4, Comprehensive Psychological Evaluation, completed on 1/9/08 indicates under section B (Prior Psychological testing) that the Claimant was evaluated at WVU Behavioral Health by Dr. [REDACTED] and Dr. [REDACTED] and was diagnosed with high functioning Asperger's/Autism. This information is inconsistent with an individual who would have a severe condition that requires an ICF/MR level of care. The evaluating psychologist also provides a diagnosis of Autistic Disorder (high functioning) in section V (page 9). The Department also noted that there is no objective measure of Autism available in the evaluation i.e., Gilliam Autism Rating Scale (GARS) or Child Autism Rating Scale (CARS), to assist in determining if Autism is the appropriate diagnosis and/or the severity.
- 4) The Individualized Education Plan (IEP) completed by _____ County Schools is accompanied by an Eligibility Committee Report dated 12/11/07. It was noted that while Autism is an area of exceptionality for which the committee could have chosen as a means to identify eligibility for services, the _____ County Schools identified "Preschool Special Needs / Developmental Delay." This information (developmental delays) is again inconsistent with an individual who requires an institutional level of care.
- 5) In addition to the documentation failing to indicate diagnostic clarity/eligibility, the ABS-S:2 scores (Non-mental Retardation Norms) are not eligible (Note that the Non-MR Norms documented on page 6 of Exhibit D-4 are actually MR-Norms. The correct ABS Scores

accompany Exhibit D-4 and are identified as “10-22-08 Non-MR Norms Per Psychologist rated on 10/25/08.”) An eligible standard score (Non-MR Norms) is a one (1) or two (2), or less than one (1) percentile in the percentile rank scoring column. The two lowest standard scores recorded are in Independent Functioning “9” (average) and Economic Activity “7” (below average). This assessment indicates that the Claimant is not demonstrating any substantial adaptive deficits [at the level of individuals who would require institutional / facility level of care].

- 6) Page 4 of Exhibit D-6 (Multidisciplinary Team Evaluation Report dated 12/7/07) was cited by the Department as further evidence that the Claimant is not demonstrating substantial adaptive deficits. In the area of Self-Help the Claimant scored a 60%, which is nearing eligibility range(55 and below), however, the Claimant scored at or above age level in Physical/Motor Development, Social Age, Academic Age and Communication Age.

- 7) The Department cited narrative documentation in the exhibits to further demonstrate functional abilities are not substantially deficient for a four (4) year old child:

Learning – There is no official assessment of academic achievement, however, documentation indicates the Claimant can spell over 200 words and count to 1,000 and is thought of as gifted by some teachers.

Self-direction – The Claimant knows his likes and dislikes, he is reported to initiate activities by himself (playing on computer etc.)

Receptive and Expressive Language – While this area is reported to be delayed and he will not typically speak to strangers, he can communicate his wants and needs to his mother and is more comfortable speaking around family members. His receptive language is reported to be a strength, according to documentation.

Mobility – The Claimant is physically independent in ambulation, although it was noted by his representative that she must carry him in public due to his anxiety.

Capacity for Independent Living – This area is difficult to assess on younger individuals as most four (4) year old children are dependent upon adults for community and leisure activities, home living, health and safety, and socialization - to some extent. While it is difficult to speculate how well the Claimant will do in the future, the primary concerns noted by the Claimant’s representative at this time are related to his social skills and anxiety in public places.

- 8) The Claimant’s representative testified that there has not been any official Autism testing completed on her son. She testified, however, that he will no longer go out to eat, bowling or to the park because he is scared of loud noises. She stated that her son is almost “paralyzed” with fear. The only way they can get him out of the house is if he is carried. She contends that he doesn’t have a social life and really only plays with his sister. The

Claimant's representative contends that the evaluator only saw her son for approximately 40 minutes.

- 9) 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. 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. Additionally, policy states that the individual must require and benefit from continuous active treatment and need the same level of care and services that is provided in an ICF/MR institutional setting.
- 2) The documentation submitted for review fails to confirm an eligible diagnosis. While Autism is an eligible diagnosis for MR/DD Waiver participation, the clinical information also provides a diagnosis of Asperger's, a condition that is not related to mental retardation and incompatible with a mutually exclusive diagnosis of Autism. The fact that there has been no clinical Autism assessment done further complicates confirmation of an Autism diagnosis and the severity. The conflicting diagnostic information affirms the Department's position that the Claimant's condition is not severe or diagnostic clarity would not be an issue.
- 3) While the Department indicated in its notice that the Claimant is demonstrating a substantial adaptive deficit in Self-care, when compared to same-age Non-MR peers, the documentation submitted for review fails to identify substantial adaptive deficits in any of the remaining major life areas.
- 4) Based on the evidence, the Department was correct in denying the Claimant's application for participation in the Medicaid MR/DD Waiver Program.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the Department's decision to deny the Claimant's application 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 June, 2008

**Thomas E. Arnett
State Hearing Officer**