



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
2699 Park Avenue, Suite 100
Huntington, WV 25704

Joe Manchin III
Governor

Patsy A. Hardy, FACHE, MSN, MBA
Cabinet Secretary

September 9, 2009

RE: -----

Dear Mr. Rogers:

Attached is a copy of the findings of fact and conclusions of law on the hearing held August 12, 2009. The hearing request was based on the Department of Health and Human Resources' proposed exit of Title XIX MR/DD Waiver services for -----.

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 Waiver Program is based on current policy and regulations. Policy states that a member will be discharged from the MR/DD Waiver Program following an evaluation demonstrating that he/she no longer requires an ICF/MR level of care. (MR/DD Waiver Manual, Chapter 513 – *Covered Services, Limitations, and Exclusions for MR/DD Waiver Services*, effective November 1, 2007, §513.5)

Information submitted at your hearing revealed that the Department acted correctly to implement exit from MR/DD Waiver services, following a determination that medical eligibility was not met.

It is the decision of the State Hearing Officer to **uphold** the Department's proposed exit of Title XIX MR/DD Waiver services.

Sincerely,

Todd Thornton
State Hearing Officer
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review
Mary McQuain, Esq., Assistant Attorney General
Carol Brawley, Department Representative

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

-----,

Claimant,

v.

Action Number: 09-BOR-1062

**West Virginia Department of
Health and Human Resources,**

Respondent.

DECISION OF STATE HEARING OFFICER

I. INTRODUCTION:

This is a report of the State Hearing Officer resulting from a fair hearing concluded on September 9, 2009 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 August 12, 2009 on a timely appeal, filed March 5, 2009.

II. PROGRAM PURPOSE:

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 attorney
-----*, Claimant's witness
-----*, Claimant's witness
-----*, Claimant's witness
Mary McQuain, Esq., Assistant Attorney General
Carol Brawley, Hearings Coordinator
Steve Baisden*, State Hearing Officer
Eric Phillips*, State Hearing Officer

* observing; did not offer testimony

Presiding at the Hearing was Todd Thornton, State Hearing Officer and a member of the State Board of Review.

IV. QUESTION TO BE DECIDED:

The question to be decided is whether or not the Department was correct in its action to terminate Title XIX MR/DD Waiver Program services to the Claimant.

V. APPLICABLE POLICY:

MR/DD Waiver Manual, Chapter 513 – *Covered Services, Limitations, and Exclusions for MR/DD Waiver Services*, effective November 1, 2007; §513.5
Code of Federal Regulations - 42 CFR §§441.301(b)(1)(iii), 441.302(c)(2)(iii)

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 DD Termination Transition Grant Approval Letter dated March 19, 2009
- D-2 Application for DD Termination Transition Grant dated March 19, 2009
- D-3 Medicaid Billing Screen for -----
- D-4 2009 Hearing Request
- D-5 Letter from BHHF to ██████████ County DHHR dated February 9, 2009
- D-6 October 12, 2007 Agreed Order
- D-7 2007 Hearing Request
- D-8 Termination notice dated June 27, 2007
- D-9 MR/DD Waiver Manual, Chapter 513 – *Covered Services, Limitations, and Exclusions for MR/DD Waiver Services*, effective November 1, 2007; §513.5, and Code of Federal Regulations - 42 CFR §§441.301(b)(1)(iii), 441.302(c)(2)(iii)

VII. FINDINGS OF FACT:

- 1) The Claimant has previously appealed the decision of the Department regarding medical eligibility for the Title XIX MR/DD Waiver Program. The Claimant initially appealed a September 2, 2005 denial of medical eligibility for the MR/DD Waiver Program. The hearing was rescheduled multiple times, but never held.

On June 27, 2007, a new Notice of Denial was issued to the Claimant. A request for hearing signed by the Claimant on September 19, 2007 was submitted to the Board of Review.

On October 12, 2007, Hearing Officer entered an Agreed Order prepared by counsel for Respondents and approved by counsel for Claimant. This Order noted the new, June 27, 2007, Notice of Denial. The Order also noted that the Claimant withdrew her appeal of the September 2, 2005 denial and, if she wished to appeal the June 27, 2007 denial, she would file a request for hearing within 13 days of the entry of the Agreed Order. No such request was filed.

The Claimant continued to receive services through the MR/DD Waiver Program until February 2009. At that time, the Department terminated services, and counsel for the Claimant responded on March 25, 2009 with a new request for hearing. This hearing was held solely on termination from the MR/DD Waiver Program; with the initial request withdrawn by Agreed Order and no subsequent request made timely according to that Agreed Order, no issues of medical eligibility were heard.

- 2) Testimony from the Department explained that the unusual lag between the October 2007 Agreed Order and the February 2009 termination of services was an oversight and ultimately discovered through review of records.
- 3) The Code of Federal Regulations, 42 CFR §441.301(b)(1)(iii), states (emphasis added):

(b) If the agency furnishes home and community-based services, as defined in Sec. 440.180 of this subchapter, under a waiver granted under this subpart, the waiver request must—

(1) Provide that the services are furnished—

(i) Under a written plan of care subject to approval by the Medicaid agency;

(ii) Only to recipients who are not inpatients of a hospital, NF, or ICF/MR; and

(iii) Only to recipients who the agency determines would, in the absence of these services, require the Medicaid covered level of care provided in—

(A) A hospital (as defined in Sec. 440.10 of this chapter);

(B) A NF (as defined in section 1919(a) of the Act); or

(C) An ICF/MR (as defined in Sec. 440.150 of this chapter);

4) The Code of Federal Regulations, 42 CFR §441.302(c)(2)(iii), states (emphasis added):

(c) Evaluation of need. Assurance that the agency will provide for the following:

(1) Initial evaluation. An evaluation of the need for the level of care provided in a hospital, a NF, or an ICF/MR when there is a reasonable indication that a recipient might need the services in the near future (that is, a month or less) unless he or she receives home or community-based services. For purposes of this section, "evaluation" means a review of an individual recipient's condition to determine—

(i) If the recipient requires the level of care provided in a hospital as defined in Sec. 440.40 of this subchapter, a NF as defined in section 1919(a) of the Act, or an ICF/MR as defined by Sec. 440.150 of this subchapter; and

(ii) That the recipient, but for the provision of waiver services, would otherwise be institutionalized in such a facility.

(2) Periodic reevaluations. Reevaluations, at least annually, of each recipient receiving home or community-based services to determine if the recipient continues to need the level of care provided and would, but for the provision of waiver services, otherwise be institutionalized in one of the following institutions:

(i) A hospital;

(ii) A NF; or

(iii) An ICF/MR.

- 5) The MR/DD Waiver Manual, Chapter 513, §513.5, states, in pertinent part (emphasis added):

513.5 MEMBER DISCHARGE

A member will be discharged from the MR/DD Waiver Program under the following conditions:

- A member's income or assets exceed the limits specified in Section 513.3.2 of this chapter. The county DHHR office must be contacted, in addition to the state MR/DD Waiver Program Coordinator's office, any time an individual's income or assets exceed the limits. The county DHHR office will close the Medicaid file upon notification of the increase in income or assets and notify the individual and the MR/DD Waiver Program office of termination of the medical card. The Service Coordinator is responsible for monitoring the member's assets and is also the responsible party for reporting when the member's income or assets exceed the limits specified in Section 513.3.2. The Service Coordinator may request information from the member's payee or member's legal representative to ensure that financial eligibility is not "lost" throughout the year due to excessive assets or other reasons.

- **The evaluations, which are used by the MR/DD Waiver Program to determine a member's level of care (medical eligibility), demonstrate that he/she no longer requires an ICF/MR level of care and therefore, is not medically eligible for the MR/DD Waiver Program. The State MR/DD Waiver office will notify the member of termination of services and of his/her right to appeal.**

VIII. CONCLUSIONS OF LAW:

- 1) The regulations that govern the MR/DD Waiver Program require that services only be granted to those meeting medical eligibility, that periodic reviews of medical eligibility are completed to assure continued need, and that services are terminated following a determination that an individual no longer meets medical eligibility. All issues of medical eligibility for the Claimant were concluded with the October 12, 2007 Agreed Order.
- 2) Testimony and evidence clearly revealed that program services continued for the Claimant – in error – after the determination of medical eligibility. Although the progression from an unfavorable finding of medical eligibility to the termination of services would normally be seamless, the untimely response of the Department does not create medical eligibility for the Claimant. Further, policy and law do not provide an exception to the medical eligibility requirement; termination of services follows naturally. The Department was correct to terminate the Title XIX MR/DD Waiver services of the Claimant.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the action of the Department to terminate the Claimant's Title XIX MR/DD Waiver services.

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this ____ Day of September, 2009.

**Todd Thornton
State Hearing Officer**