



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
P.O. Box 1736
Romney, WV 26757

Joe Manchin
Governor

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

October 21, 2009

-----for -----

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your son's hearing held September 9, 2009. Your hearing request was based on the Department of Health and Human Resources' proposal to terminate benefits and services under 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 & 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 in three (3) or more major life areas that require the level of care and services provided in an Intermediate Care Facility for individuals with mental retardation and/or related conditions and must have manifested prior to the age of 22. (West Virginia Title XIX MR/DD Home & Community-Based Waiver Revised Operations Manual, Chapter 513).

Based on evidence presented during the hearing, your son did not have the substantial deficits in three or more major life areas that require the level of care and services provided in an Intermediate Care Facility.

It is the decision of the State Hearing Officer to **uphold** the proposal of the Department to terminate benefits and services through the MR/DD Waiver Program.

Sincerely,

Eric L. Phillips
State Hearing Officer
Member, State Board of Review

cc: Chairman, Board of Review
Steve Brady, Operations Coordinator MRDD
[REDACTED]

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

-----,

Claimant,

vs.

Action Number: 09-BOR-1107

**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 October 21, 2009 for ----- . This hearing was conducted 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 convened on September 9, 2009 on a timely appeal filed April 29, 2009.

Hearing was originally scheduled for July 8, 2009 and rescheduled per Claimant's advocates' request.

All persons giving testimony were placed under oath.

II. PROGRAM PURPOSE:

The *Medicaid Home and Community-Based MR/DD Waiver Program* (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 representative, ██████████
Steve Brady, Operations Coordinator MRDD Waiver Services
Richard Workman, Psychologist Consultant, Bureau for Medical Services

Presiding at the hearing was Eric L. Phillips, 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 or not the Department was correct in its proposal to terminate the Claimant's 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 513

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Department's Exhibits:

- D-1 Title XIX MR/DD Home and Community-Based Waiver Program Operations Manual, Chapter 513
- D-2 Notice of Denial/Termination dated April 15, 2009
- D-3 ICF/MR Level of Care Evaluation (DD 2-A-ICF) dated September 2, 2008
- D-4 West Virginia Department of Health and Human Resources Comprehensive Psychological Evaluation, dated June 26, 2008.
- D-5 West Virginia Department of Health and Human Resources Comprehensive Psychological Evaluation (Triennial) dated September 22, 2008.
- D-6 Individualized Education Program, ██████████ County Schools dated May 21, 2008

VII. FINDINGS OF FACT:

- 1) The Claimant is a recipient of Title XIX MR/DD Waiver services and the Department conducted an annual reevaluation to determine whether or not the Claimant continued to meet medical and psychological eligibility requirements for the program.
- 2) The Department, through the reevaluation process, determined that the Claimant was ineligible for Waiver services and sent a Notice of Denial/Termination, Exhibit D-2, dated April 15, 2009. The Exhibit documents in pertinent part:

“Your Waiver services have been terminated. Your application was terminated 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.”

The notice indicated that the Claimant failed to demonstrate substantial limitations in the check-marked areas of receptive or expressive language, learning, mobility, self-direction, and capacity for independent living.

- 3) The Bureau for Medical Services (BMS) Psychologist Consultant testified that the Claimant, age six years old, has a diagnosis of pervasive developmental disorder not otherwise specified, and this diagnosis can be considered an eligible diagnosis for program purpose review. Testimony revealed that an individual, to be considered eligible for the program must meet entry level criteria at each reevaluation. The Claimant was awarded a deficit in the area of self-care and no additional substantial adaptive deficits could be identified by the Department. The Claimant’s representative contended during the hearing that additional deficits should be awarded in the areas of self-direction, capacity for independent living, as well as learning.
- 4) Exhibit D-4, the Comprehensive Psychological Evaluation, indicated that the Claimant has a significant personal strength in the area of abstract categorical and fluid reasoning abilities which indicate that the Claimant has a good ability to separate essential from non essential detail and visual perceptual reasoning and organization. The Psychologist Consultant testified that this assessment was a measure of the Claimant’s ability to learn.

The Department further testified that the Claimant has the ability to write and print his name, talk in complex sentences when he is describing pictures and understands instructions that involve a series of steps. The Claimant has adequate conversational skills and responds when talked to and communicates sensibly though he cannot be reasoned with. During evaluations the Claimant repeated stories with little or no difficulties. These abilities relate to the area of self-direction

Testimony from the Psychologist Consultant revealed a very poor score in community self-sufficiency. Community use is defined as home living, social skills, health and safety, community use leisure and employment. The Psychologist Consultant purported that individuals five years of age are not expected to have a capacity and are not expected to have employment. Testimony concerning this exhibit revealed that scores on personal self-sufficiency and community self-sufficiency are average and the Department recognizes that the Claimant does have difficulties and challenges but these obstacles do not require an institutionalized level of care.

It shall be noted that some pages from exhibits were missing in presentation. The Claimant’s representative testified a score of 45.5 was noted on the severe range of

autistic behavior.

- 5) A second psychological evaluation, Exhibit D-5, was completed September 22, 2008. This exam was conducted to assess Claimant's continued medical eligibility for participation in the Title XIX Waiver program.

The Vineland II was administered as part of the reevaluation. Scores compiled were as follows:

	SS	%ile
Communication	63	1
Daily Living Skills	60	<1
Socialization	60	<1
Motor Skills	64	1
Adaptive Behavior	59	<1

The Claimant was awarded a deficit in the area of self-care from the established scores. The evaluation indicated that the Claimant is able to understand simple commands and communicate basic needs and wants. The documentation further indicated that the Claimant is unable to learn new skills without aggressive and consistent training.

The evaluation listed the Claimants behavior skills in part:

“Claimant exhibits significant deficits in all areas of adaptive behavior skills. These deficits substantially limit his functioning in self-care, self-direction, receptive/expressive communication, and learning. These deficits will ultimately have a negative impact on his capacity for independent living”

Psychologist Consultant contends that examination of substantial deficits must occur in present time and cannot be based on how they will affect the individual in the future.

- 6) Exhibit D-6, Individualized Educational Plan, specified that the Claimant follows one and two step directions well with verbal prompting. The Claimant participated in “circle time” activities with complex verbal responses. The Claimant continues to require speech therapy to improve articulation and overall speech intelligibility. The Psychologist Consultant affirmed that the ability to follow one and two step directions showed that the Claimant has the ability for some self-direction.
- 7) Claimant's representative stated that the Claimant cannot cross the street or use the telephone in a typical manner. Testimony from Claimant's mother addressed her son's inability to recognize home and community dangers, and that the Claimant cannot pick up the telephone and dial emergency services in the event of an emergency. The

Claimant's mother testified that the Claimant lives in his "own little world" and rarely interacts with peers when engaged in social activities. The Claimant's mother indicated that the Claimant is excluded when participating in these activities with his peers. The Claimant's mother also testified that her son could not participate in any organized activities such as sports; as he would have to be directed in the coordination of the activity. Claimant's mother further testified that her son cannot learn new skills without aggressive and consistent training.

- 8) Eligibility requirements for the MR/DD Waiver Program are outlined in Chapter 513 of the Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual (D-1).

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 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 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

- 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 of 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) Regulations governing the MR/DD Waiver Program require eligible individuals to have a

diagnosis of mental retardation and/or a related developmental condition, which must be severe and chronic, in conjunction with substantial deficits (substantial limitations associated with the presence of mental retardation). The individual must exhibit substantial adaptive deficits in three (3) or more major life areas to qualify for the program.

- 2) The Department established that the Claimant has a potentially eligible diagnosis of Pervasive Developmental Disorder Not Otherwise Specified. This diagnosis of PDDNOS allowed the Department to evaluate the functionality of the Claimant for eligibility purposes of the program. Testimony revealed that during the application process that Claimant was awarded a substantial deficit in the area of self-care; other deficits could not be awarded from factual evidence outlined in both of the psychological evaluations. Claimant's representative contended that substantial deficits should be awarded in the areas of language, self-direction, capacity for independent living and learning.
- 3) MR/DD Waiver Services policy Chapter 513 outlines that 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 evaluations, Occupational Therapy evaluations, etc.
- 4) Testimony revealed that the Claimant lacks the necessary skills to process danger and emergency situations. The Claimant's mother testified that the Claimant could not function properly when faced with an adverse condition or emergency and the Claimant would lack the ability to communicate effectively if placed in an emergency situation.

*The inability of the Claimant to communicate and process danger shows a deficit in the area of safety, a component to the area of Capacity for Independent living. Test scores from the Vineland II show that the Claimant had standard score of sixty and less than one percentile in the areas of Socialization and Daily Living Skills. The inability of the Claimant to have a functional capacity in this area demonstrates a substantial deficit in the area contested; therefore a deficit **can be** awarded in the area of Capacity for Independent Living.*

- 5) Testimony revealed that Claimant lacked the necessary scores and narrative descriptions during the evaluation process to be awarded substantial deficits in the areas language and self-direction. Testimony illustrated that the Claimant has delays in the areas in which deficits can be awarded, but narrative descriptions did not support delays in the evaluations that were reviewed by the Department. The Department conceded a deficit in the area of self-care to the Claimant and an additional deficit was awarded in the area of Capacity for Independent Living. The total number of deficits award to Claimant is two, and no other deficits could be awarded from testimony presented during the hearing process; therefore the Department was corrected in its proposal to terminate the Claimants benefits under the Title XIX Waiver program.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the Department's decision to terminate the Claimant's 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 ____st Day of October, 2009.

Eric L. Phillips
State Hearing Officer