



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
1027 N. Randolph Ave.
Elkins, WV 26241

Joe Manchin
Governor

Martha Yeager Walker
Secretary

August 7, 2009

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held July 24, 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).

Evidence presented during the hearing indicates that you have an eligible diagnosis of Autism and exhibit three (3) or more substantial adaptive deficits in major life areas.

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

Sincerely,

Pamela L. Hinzman
State Hearing Officer
Member, State Board of Review

cc: Chairman, Board of Review
Carol Brawley, Hearings Coordinator, MR/DD Waiver Program

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

-----,

Claimant,

vs.

Action Number: 09-BOR-1246

**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 August 7, 2009 for ----- . This hearing was conducted telephonically 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 July 24, 2009 on a timely appeal filed May 22, 2009.

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 father

-----, Service Coordinator, [REDACTED]

-----, Therapeutic Consultant, [REDACTED]

Carol Brawley, Hearings Coordinator, MR/DD Waiver Program

Richard Workman, Psychologist Consultant, Bureau for Medical Services

Presiding at the hearing was Pamela L. Hinzman, 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 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 Revised Operations Manual, Chapter 513
- D-2 Notice of Denial/Termination dated May 6, 2009
- D-3 Notice of Denial/Termination dated May 29, 2009
- D-4 Notice of Denial/Termination dated July 1, 2009
- D-5 ICF/MR Level of Care Evaluation dated October 24, 2008
- D-6 Comprehensive Psychological Evaluation dated November 13, 2007
- D-7 Psychological Update dated November 10, 2008
- D-8 WVU Speech and Hearing Center Diagnostic Evaluation dated February 2, 2009
- D-9 SWAT Meeting Minutes dated November 20, 2008
- D-10 Speech-Language Pathology Observations dated January 31, 2008
- D-11 Individualized Education Plan-[REDACTED] County Schools, dated June 4, 2008
- D-12 WVDHHR Adaptive Behavior Assessment dated June 11, 2009

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 he continues to meet medical/psychological eligibility requirements for the program.
- 2) The Department determined that the Claimant is ineligible for Waiver services and sent him Notices of Denial/Termination dated May 6, 2009 (D-2), May 29, 2009 (D-3) and July 1, 2009 (D-4), which state:

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 notices indicate that the Claimant fails to demonstrate substantial limitations in the check-marked areas of *learning, receptive or expressive language, mobility and capacity for independent living*.

- 3) The Bureau for Medical Services (BMS) Psychologist Consultant testified that the Claimant, who is seven years old, has a potentially eligible diagnosis of autism, although he questioned the severity of the condition. The Claimant was awarded deficits in the areas of *self-care* and *self-direction*, however no additional substantial adaptive deficits could be identified by the Department. The Claimant's witnesses contended during the hearing that additional deficits should be awarded in the areas of *capacity for independent living* and *receptive or expressive language*.
- 4) The Psychologist Consultant reviewed Exhibit D-5, the ICF-MR Level of Care Evaluation completed on October 24, 2008, explaining that the Claimant's diagnoses were listed as Obsessive Compulsive Disorder and Autism. The reviewing physician recommended an ICF-MR Level of Care for the Claimant.

The Psychologist Consultant testified regarding Exhibit D-6, a Comprehensive Psychological Evaluation completed on November 13, 2007. At the time of the evaluation, the Claimant was in a regular kindergarten class at [REDACTED] Elementary School. The report states that the child speaks in simple sentences, names familiar objects and reads books suitable for children seven or eight years of age. He can answer simple questions and uses the phrases "please and thank you." The report indicates that the Claimant conveys his wants by imitating "the sounds of objects or animals and expresses pleasure or anger by vocal noises." He does not nod his head or smile. The Claimant achieved a full-scale IQ score of 75 on the Wechsler Intelligence Scale for Children, 4th Edition, which places him in

the borderline range of intellectual functioning. His verbal comprehension score of 63 falls in the mild range of mental retardation. The Psychologist Consultant testified that the Claimant attained a score of 43.5 on the Childhood Autism Rating Scale, which places him in the moderate to severe range of autistic behavior. The evaluating psychologist listed a diagnosis of Autistic Disorder and Borderline Intellectual Functioning, and recommended an ICF-MR Level of Care for the Claimant, as well as speech and occupational therapy.

The Psychologist Consultant reviewed Exhibit D-7, a Psychological Update completed on November 11, 2008. The report states that the Claimant had been administered medication for obsessive compulsive behaviors and the consultant clarified that an individual cannot obtain MR/DD Waiver services based on mental illness. The report states that the Claimant is able to write or print whole sentences, uses simple sentences and reads books. He answers simple questions, but does not engage in conversation and has difficulty with reasoning. He was again diagnosed with Autistic Disorder and Borderline Intellectual Functioning, and the evaluator recommended an ICF-MR Level of Care. Based on his independent functioning and self-direction scores on the Adaptive Behavior Scale-School, Second Edition (using non-mental retardation norms), the Claimant was awarded deficits in *self-care* and *self-direction*.

In regard to *receptive and expressive language*, the consultant reviewed Exhibit D-8, a Diagnostic Evaluation from the West Virginia University Speech and Hearing Center dated February 2, 2009. During language testing, the evaluator found that the Claimant's receptive language skills were within normal limits, although his ability to process complex information is delayed. The evaluator indicated that the child exhibits a mild to moderate impairment in expressive language and pragmatic skills.

The Psychologist Consultant reviewed Exhibit D-10, Speech-Language Pathology Observations dated January 31, 2008, which indicates that the Claimant's speech and language skills are within normal limits and that - despite his Autism diagnosis - the child's communication skills were appropriate throughout the assessment.

The consultant testified that no significant indicators of learning challenges were noted in the Claimant's Individualized Education Plan (D-11). The report states that the child spends 80 percent of his time in the general education environment.

The Psychologist Consultant reviewed Exhibit D-12, an Adaptive Behavior Assessment completed on June 11, 2009, which indicates that the Claimant achieved a standard score of 48 in the communication domain of the Vineland Adaptive Behavior Scales. While the score is below 55 (an eligible score for MR/DD Waiver Program purposes), the consultant contended that it is inconsistent with information contained in Exhibit D-8.

In regard to *capacity for independent living*, the consultant testified that children of the Claimant's age are not expected to live independently.

The Claimant's witnesses testified that an aide accompanies the Claimant in the classroom

because he goes off task frequently and requires constant supervision and redirection. He receives 30 minutes per day of special education up to five times per week. The Service Coordinator testified that the Claimant can complete tasks well when he is being cooperative, but that he refuses to cooperate at other times. She stated that his test scores could differ depending on the day. The Service Coordinator pointed out that the Department makes no differentiation between an adult and child when considering *capacity for independent living*. She testified that the Claimant does not initiate interaction with peers or community members. He speaks when spoken to, but recites learned responses as opposed to having actual conversations. At a recent birthday party, the child would not interact with children, cried and asked to go home. The Service Coordinator stated that the Claimant prefers to engage in singular activities such as reading and playing video games. The Claimant reportedly has no sense of danger, believes everything that he hears on television, and stands too close to the roadway. Recently, the Claimant had to be physically moved out of the path of a vehicle. The Service Coordinator testified that the Claimant does not express pain like normal children and would say “I’m red,” if he was bleeding. He would likely have no reaction to an emergency situation and does not know how to use the telephone or obtain assistance. He could not go into the community and obtain items necessary for daily living. The Service Coordinator explained that the Claimant obsesses over video games to the point of isolation. He no longer takes medication for Obsessive Compulsive Disorder because it was ineffective. The child can reportedly memorize and recite facts, but does not comprehend what he has memorized. His parents have trained him to say “please” and “thank you.”

The Therapeutic Consultant reviewed the Claimant’s goals, which include the creation of a chart to recount the day’s activities, addressing food sensitivities, attending to basic toileting concerns (such as hand washing), and brushing teeth, as the child does not exhibit the fine motor skills required to manipulate toothpaste. The consultant testified that the Claimant has difficulty pulling up his pants and that he must be closely supervised in public. She stated that she is assisting the Claimant in improving his socialization skills as he is aggressive with his younger sister and does not know he could harm her. He has no concept of time, dislikes changes in routine, could not balance a checkbook and could not cook for himself. The consultant also testified that the Claimant’s responses to questions are scripted and he does not express feeling.

The Claimant’s father testified that his son must maintain a routine and would go to a corner alone, engaging in no interaction with others at family functions. The Claimant wears a pull-up diaper at night, but has been found lying awake in his own urine. He is disturbed by crying and loud noises and will attempt to squeeze infants’ heads. The Claimant has reportedly placed a pillow on his 18-month-old sister’s head and then sat on it. The Claimant’s father maintained that the child must be continually supervised as he has also killed animals, including a pet Chihuahua which he “body slammed” three times.

- 10) 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
 - Tuberos 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 Autism which manifested prior to the age of 22, but determined that the Claimant has only two (2) substantial adaptive deficits in *self-care* and *self-direction*.
- 3) Evidence reveals that the Claimant scored in the moderate **to severe range** (emphasis added)

on the Child Autism Scale. In addition, he obtained ABS scores in the 1 percentile range in independent functioning, self-direction, responsibility and socialization during testing in November 2008. While the Department awarded the Claimant deficits for *self-care* and *self-direction* based on these scores, this information also suggests the child is substantially deficient in his *capacity for independent living*. While an individual is not expected to exhibit a mature *capacity for independent living* at the age of seven, it is clear that the areas in which the Claimant is deficient are vital factors when considering both his *capacity for independent living* in the future and when compared to his same-age peers at the present time.

- 4) Based on information provided during the hearing, one (1) additional deficit is awarded for *capacity for independent living*. Because the three (3) required deficits have been established for eligibility, the issue of *receptive or expressive language* is moot and will not be addressed in this decision.

IX. DECISION:

It is the decision of the State Hearing Officer to **reverse** 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 7th Day of August, 2009.

**Pamela Hinzman
State Hearing Officer**