



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 12, 2009

Legal Aid of WV  
\_\_\_\_\_  
\_\_\_\_\_

Attn: \_\_\_\_\_, Esq.

RE: \_\_\_\_\_

Case No.: 06-BOR-2054

Dear \_\_\_\_\_:

Attached is a copy of the findings of fact and conclusions of law on your hearing held November 20, 2008. Your hearing request was based on the Department of Health and Human Resources' proposal to terminate your 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, Medicaid Chapter 500, Volume 13).

Information submitted at your hearing fails to demonstrate that you continue to meet the medical eligibility criteria necessary for participation in the MR/DD Waiver Program.

It is the decision of the State Hearing Officer to **uphold** the Department's proposal to terminate your 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  
Michael Bevers, Esq., AG's Office

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

\_\_\_\_\_

**Claimant,**

vs.

**Action Number: 06-BOR-2054**

**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 12, 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 originally scheduled to convene on September 18, 2006 and again on June 8, 2007 and February 13, 2008 but was convened on November 20, 2008 on a timely appeal filed June 5, 2006.

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

\_\_\_\_\_, Esq., Legal Aid of WV

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.

### **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**

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**

#### **Department's Exhibits:**

- Exhibit-1 Policy Criteria Manual, Medicaid Chapter 500 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services
- Exhibit-2 Psychological Evaluation dated August 9, 2007
- Exhibit-3 DD-2A – Annual Medical Evaluation dated February 9, 2008
- Exhibit-4 Damous Psychological Services Discharge Summary and Behavior Intervention Guidelines dated February 29, 2008
- Exhibit-5 Notice of Denial/Termination dated July 25, 2008

#### **Claimant's Exhibits:**

- Exhibit-1 Psychological Evaluation completed by \_\_\_\_\_ dated July 8, 2008
- Exhibit-2 DD-2-A Completed by \_\_\_\_\_ dated July 9, 2008
- Exhibit-3 Addendum Review to ISP dated July 18, 2008
- Exhibit-4 ISP completed July 18, 2008

## VII. FINDINGS OF FACT:

- 1) On or about July 25, 2008, the Claimant was notified via a Notice of Denial /Termination (Department's Exhibit-5) that Waiver services were terminated. This notice states, in pertinent part:

Your application was Terminated because:  
Additional documentation has been reviewed. As stated previously, mental retardation was diagnosed without psychometric data to support the presence of mental retardation particularly at the level that typically results in the need for active treatment and an ICF/MR level of care. The additional information in the form of discharge summary does not provide an eligible diagnosis as neither mental retardation nor a condition related to mental retardation has been diagnosed.

This notice goes on to indicate that "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. It should be noted that Self-Care is identified as an area wherein a substantial adaptive deficit has been identified.

- 2) The Department, by counsel, contends that the Claimant fails to present an eligible diagnosis for participation in the MR/DD Waiver Program and further states, as indicated in the termination notice, that the Claimant is not demonstrating substantial adaptive deficits in three of the six major life areas. The Department conceded, however, that the Claimant is substantially deficient in the major life area of Self-Care.
- 3) Counsel for the Claimant contends that the Claimant continues to present a potentially eligible diagnosis of Mental Retardation, and that in addition to Self-Care, he is demonstrating substantial adaptive deficits in Self-Direction and Capacity for Independent Living.
- 4) Specific to the diagnosis of Mental Retardation, the Department's psychologist consultant testified that a diagnosis of Mental Retardation and/or a related condition does not automatically qualify an individual for participation in the MR/DD Program - Mental Retardation and/or the related condition must be severe. She stated that historically the Claimant has been diagnosed with Asperger's Disorder, an Autism spectrum disorder, and while severe Autism would meet eligibility criteria, Asperger's Disorder is not considered a related condition because there is no correlation between Asperger's and cognitive deficits/Mental Retardation.

The Department's psychologist consultant indicated that she is not convinced the Claimant has Mental Retardation but stated "if he does, it is not severe"{Emphasis Added}. She

stated that the documentation demonstrates that the Claimant does not apply himself when testing as several evaluators have indicated the Claimant is uncooperative. Exhibit-2, Section I.B (Prior Psychological Testing) provides historical testing results that include IQ scores from 77 to 48. Section III.A.3 further confirms that the Claimant required “prompts and encouragement” to participate with testing; he is reported to be easily frustrated and the evaluator states – “It is likely that his Full Scale IQ score of 67 is a slight underestimate of his cognitive abilities due to his low threshold for frustration and high distractibility and impulsivity.” This, according to the Department’s psychologist, indicates that the scores are not reliable.

The DD-2A (ICF/MR Level of Care Evaluation) identified as Department’s Exhibit-3 fails to include neurological findings consistent with individuals who require an ICF/MR level of care (see Page 2 of 3) and includes the following notation next to Attention Span – “decreased/Asperger’s Syndrome/ODD Behavior D/O.” Pages 1 and 2 of this Exhibit appear to be copies of a previously submitted DD-2A (received on June 9, 2007 and completed on June 7, 2007). Page 3 of Exhibit-3 appears to be a supplement (completed at a later date - February 9, 2008) that includes a diagnosis of “mild mr” and a different physician’s signature. The Department submitted Exhibit-3a to show that the original page 3 from June 7, 2007 failed to include a diagnosis of Mental Retardation, but instead includes “ODD/Behavioral D/O, ADHD, Aspergers Syndrome” (consistent with the notation on page 2).

The Claimant’s variations in IQ testing scores, difficulty with testing and the questionable DD-2a forms (Department’s Exhibit D-3 and Exhibit D-3a) submitted for eligibility are noted discrepancies. However, the current psychological evaluation (Department’s Exhibit-2) presents an IQ score consistent with the diagnosis of Mild Mental Retardation provided by the evaluating psychologist. This evidence, considered in conjunction with the Department’s psychologist’s acknowledgement that MR may be present, warrants the determination that the Claimant has been appropriately diagnosed with Mild Mental Retardation.

- 5) The severity of the Claimant’s adaptive deficits, as it relates to a diagnosis of MR, is a matter of contention by the Department. The Department contends that the substantial adaptive deficit identified in Self-Care appears to be the result of Axis-1 diagnoses - ODD (Oppositional Defiant Disorder) / ADHD (Attention Deficit Hyperactivity Disorder) and Behavior Disorder - indicating that while the Claimant knows how to perform Self-Care tasks (i.e. brushing teeth), he requires only prompting (not active treatment) and is often non-compliant. It should also be noted that Department’s Exhibit-3 and Exhibit 3a indicate the Claimant is independent in personal hygiene/self care. However, because the Claimant was awarded this deficit in Department’s Exhibit-5, and conceded as a matter of record at the hearing, the finding of a substantial adaptive deficit in Self-Care remains for the purpose of this eligibility review.
- 6) The major life area of Self-Direction, according to the Department’s psychologist, is evaluated by determining if the individual has the ability to choose an active lifestyle.

Individuals who demonstrate a deficit in Self-Direction must be directed to participate in activities. The ABS-S:2 scores found in Claimant's Exhibit-2 provides an eligible score (37<sup>th</sup> Percentile), however, the narrative documentation provides information that is in conflict with the psychometric data.

Claimant's Exhibit-2, Section I.C.6. (Page 3 of 6), states – “\_\_\_\_\_ reports he ‘loves it’ in his new environment. He feels his housemates are peers. He likes watching TV, playing games, and going on outings. Social skills are immature and underdeveloped. He does, however, appear to like interaction and initiates appropriate interaction at times.”

Department's Exhibit-2 further demonstrates the Claimant knows his likes and dislikes and states in Section I.C.6. (Page 4 of 7) – “\_\_\_\_\_ enjoys playing outside and watching educational television programs. He stated that he liked to watch the National Geographic channel, as well as the Discovery channel. \_\_\_\_\_ likes to engage in the community with the assistance of a staff person.” In addition to the noted activities, the fact that the Claimant can demonstrate frustration and choose to not participate in an evaluation further demonstrates Self-Direction skills.

The evidence reveals that while the Claimant may often demonstrate poor judgment (consistent with his Axis-I diagnoses), and the self-directed activities may not always be appropriate or preferred, the Claimant initiates several activities, knows his likes and dislikes and is, therefore, not demonstrating a substantial adaptive deficit in Self-Direction.

- 7) The Claimant's Capacity for Independent Living is clearly a concern, however, because there is an unfavorable finding in Self-Direction - and eligibility cannot be established without a positive finding in both contested areas - the finding would be moot.
- 8) West Virginia Medicaid Regulations, Chapter 500– Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services:

**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
- Tuberos 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 in three (3) or more of the 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. 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 Claimant presents an eligible diagnosis of Mild Mental Retardation, however, he is not demonstrating substantial adaptive deficits in three (3) or more of the major life areas.

While it is clear that the Claimant has challenges, there is insufficient evidence to demonstrate that the Claimant requires an ICF/MR (institutional setting) level of care.

- 3) Based on the evidence, the Department was correct in its proposal to terminate the Claimant's MR/DD Waiver benefits and services.

**IX. DECISION:**

It is the decision of the State Hearing Officer to **uphold** the Department's proposal to terminate the Claimant's benefits and services through the Medicaid 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 12<sup>th</sup> Day of January, 2009**

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**Thomas E. Arnett  
State Hearing Officer**