



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
9083 Middletown Mall
White Hall, WV 26554

Joe Manchin III
Governor

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

May 24, 2010

Re: -----

Action No.: 09-BOR-2160

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your client's hearing held April 26, 2010. Your client's hearing request was based on the Department of Health and Human Resources' proposal to terminate her benefits and services provided through the Medicaid 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 Medicaid Regulations, Chapter 513 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07).

Information submitted at the hearing reveals that your client no longer meets the medical eligibility criteria required for participation in the Medicaid MR/DD Waiver Program.

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

Sincerely,

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

Pc: Chairman, Board of Review
Mary McQuain, Esq., AG's Office

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

-----,

Claimant,

vs.

Action Number: 09-BOR-2160

**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 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 March 8, 2010 but was rescheduled at the request of counsel for the Claimant and was subsequently convened on April 26, 2010 on a timely appeal filed October 8, 2009.

All persons giving testimony were placed under oath.

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

-----, Esq., WV Advocates, Counsel for the Claimant

-----, Claimant's Grandmother/Guardian

-----, Claimant's Aunt

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

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

Mary McQuain, Esq., Assistant Attorney General, Counsel for Respondent (Participated Telephonically)

Carol Brawley, MR/DD Waiver Hearing Coordinator (Participated telephonically)

Linda Workman, Psychologist Consultant, BMS (Participated telephonically)

Presiding at the hearing was Thomas E. Arnett, 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 proposal to terminate the Claimant's benefits and services through the Medicaid MR/DD Waiver Program.

V. APPLICABLE POLICY

West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Department's Exhibits:

- D -1 West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services.
- D-2 Notice of Denial/Termination dated March 3, 2010
- D-3 Notice of Denial/Termination dated September 2, 2009
- D-4 WVDHHR ICF/MR Level of Care Evaluation (DD-2-A-ICF/MR) dated December 19, 2008
- D-5 WVDHHR ICF/MR Level of Care Evaluation (DD-2-A-ICF/MR) dated January 11, 2010
- D-6 Psychological Evaluation (DD-3) dated June 11, 2009
- D-7 Addendum to the Psychological of 6-11-2009

Claimant's Exhibits:

- C-1 WV Medicaid Program Determination of Medical Necessity for Inpatient /Residential Services for Individuals under 21

VII. FINDINGS OF FACT:

- 1) The Claimant was undergoing a certification redetermination for continued benefits and services through the Medicaid MR/DD Waiver Program when she was notified via Notice of Denial/Termination dated September 2, 2009 (D-3) that her Waiver services were being terminated. This notice states, in pertinent part:

Your Waiver services have been terminated.

Your application was Terminated because:

The psychologist and physician have provided inconsistent diagnostic impressions with the physician not including mental retardation among the diagnostic considerations. Further -----history and previous level of achievement and special educational placement are incompatible with the presence of mental retardation. In fact, the evaluating psychologist has not offered mental retardation in previous assessments.

This notice goes on to state:

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 and Mobility.

It should be noted that substantial adaptive deficits were identified in Self-Care and Capacity for Independent Living.

- 2) Additional documentation was submitted (D-5 and D-7) and reviewed for MR/DD Waiver medical eligibility and a subsequent Notice of Denial/Termination (D-2) was issued on March 3, 2010. This notice states, in pertinent part:

Your application was Terminated because:

-----history, achievement level and special education placement are incompatible with the presence of mental retardation.

This notice again indicates that the Claimant is demonstrating substantial limitations in Self-Care and Capacity for Independent Living.

- 3) The Department acknowledged that the Claimant has been diagnosed with a program qualifying related condition, PDD NOS (Pervasive Developmental Disorder Not Otherwise Specified), however, the Department contends that a diagnosis of Mental Retardation is not appropriate. Moreover, the Department contends that the Claimant is not demonstrating three (3) or more substantial adaptive deficits in the major life areas. As indicated in Exhibits D-2 and D-3, the Department stipulated that the Claimant is demonstrating a substantial adaptive deficit in Self-Care and her Capacity for Independent Living.
- 4) The Claimant contends that Mental Retardation should be included among the diagnostic impressions and that the Claimant is also demonstrating substantial adaptive deficits in the areas of Self-Direction and Learning. If a diagnosis of Mild Mental Retardation is supported by the evidence, the MR-Norms group score recorded on the Adaptive Behavior Scale-School, Second Edition (ABS-S:2) would be appropriate and support a deficit in Self-Direction.
- 5) A diagnosis of Mental Retardation is pivotal in this case as the diagnostic impressions are used as a guide to determine the appropriate “Norms Group” [MR Norms or Non-MR Norms] when applying the results of the Adaptive Behavior Scale-School, Second Edition (ABS-S:2) included in Exhibit D-6 (Psychological Evaluation dated June 11, 2009). The Department’s psychologist testified that the psychologist who completed the evaluation (D-6) has evaluated the Claimant several times during the developmental period (prior to the age of 18) and never gave her a diagnosis of Mental Retardation previously. Moreover, there have been evaluations completed by other psychologists during the developmental period and none have provided a diagnosis of Mental Retardation (See Exhibit D-6, pages 1, 2 and 3).

The Claimant was served through the Special Education Program in public school as a result of a Learning Disability, and this, according to the Department’s psychologist, is incompatible with a diagnosis of Mental Retardation. In order to be served through the Learning Disability Program, you must have average to low-average intellectual ability with a substantial deficit in a particular learning area. The Department’s psychologist testified that after years of evaluations completed by the public school system and private psychologists, if a diagnosis of Mental Retardation was appropriate, it would have been identified before the Claimant turned 17 years, 9 months old.

Lastly, the evaluating psychologist noted on page 7 of Exhibit D-6 that – “The results of the WISC-IV may have been compromised somewhat by her [Claimant’s] difficulty with concentration and frustration tolerance, and the fact that she had an anxiety reaction in the middle of the test.” He goes on to state – “The results, however, may somewhat underestimate her true cognitive skills.” This information, according to the Department’s

psychologist, is inconsistent with the psychologist explanation of the MR diagnosis in Exhibit D-7. The WISC-IV (Wechsler Intelligence Scale for Children – Fourth Edition) resulted in a Full Scale IQ of 65 and while this falls into the range of Mild Mental Retardation (IQ of 69-55), the Department psychologist noted the discrepancy between the indexes is indicative of a learning disability – the Full Scale IQ cannot be used independently to diagnose Mental Retardation.

The Department’s psychologist cited Exhibit D-6, page 1 and noted that the same psychologist (Gregory E. Trainor, M.A.) administered a WISC-IV in June 2006 resulting in a Full Scale IQ of 63, however, Mental Retardation was not provided as a diagnosis following this evaluation. Furthermore, page 3 of Exhibit D-6 includes results from an evaluation completed by ██████████ Ph.D., in October 2000 wherein scores from a Wechsler Intelligence Scale for Children-Third Edition completed in March 2000 by the ██████████ County School System indicates the Claimant had a verbal IQ of 105, Performance IQ of 84 and a Full Scale IQ of 95. “Dr. ██████████ noted that achievement testing [A measure of learning/functional academics] completed at approximately the same time indicated achievement results consistent with her overall IQ.” While achievement testing results were not reported, the evaluating psychologist noted that Dr. ██████████ gleaned her cognitive skills were in the average range.

- 6) A substantial deficit in learning, for the purpose of MR/DD Waiver eligibility, is identified by relevant test scores recorded from an academic assessment. A Standard Score that falls three (3) standard deviations below the mean (Standard Score of 55 and below) demonstrates eligibility.

The results of two academic assessments are documented in Exhibit D-6:

A KTEA2 (Kaufman Test of Educational Achievement, Second Edition) was administered in October 2005 (page 2, Exhibit D-6) resulting in the following Standard Scores – Reading 90, Reading Comprehension 78, Spelling 102, Written Expression 52 and Math 72.

A WIAT-II (Wechsler Individual Achievement Test - Second Edition) was administered during the June 2009 evaluation and the Claimant had the following Standard Scores – Word Reading 89, Numerical Operations 79 and Spelling 100. Only one score documented in these two tests (Written Expression/hand writing) qualifies. Furthermore, as indicated in the previous finding, Dr. Boone noted that achievement in October 2000 was consistent with the Claimant’s overall IQ (Full Scale IQ 95).

Narrative information corroborates abilities in excess of individuals with moderate level deficits in learning as demonstrated in the Claimant’s 10th grading reading ability, as well as her ability to text on her phone and instant message with the computer. Based on the evidence, the Claimant is not demonstrating a substantial adaptive deficit in Learning/functional academics.

- 7) Policy states that 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. This policy is interpreted to mean that an eligible ABS score must first be identified and then supported by the narrative information. Pursuant to the Medicaid MR/DD regulations, an eligible ABS:S-2 score of less than one (1) percentile demonstrates eligibility when using Non-MR Norms. Evidence reviewed in support of a substantial adaptive deficit in Self-Direction reveals a Non-MR Norms ABS:S-2 score in the 9th percentile. Applying the language in written policy, the relevant test score fails to demonstrate a substantial adaptive deficit in Self-Direction.
- 8) West Virginia Medicaid Regulations, Chapter 513, – 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).

- 4) Based on the evidence, medical eligibility for continued participation in the Medicaid MR/DD Waiver Program cannot be established.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the proposal of the Department 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 ____ Day of May, 2010

**Thomas E. Arnett
State Hearing Officer**