



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

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

May 21, 2010

-----for -----  
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Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing originally convened on March 24, 2010 and reconvened on May 14, 2010. Your hearing request was based on the Department of Health and Human Resources' proposal to terminate your son's 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 fails to establish that your son exhibits substantial adaptive 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.

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,

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

cc: Chairman, Board of Review  
Steve Brady, MR/DD Waiver Program

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

-----,

**Claimant,**

vs.

**Action Number: 09-BOR-2265**

**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 convened on March 24, 2010 and reconvened on May 14, 2010 on a timely appeal filed December 2, 2009 and received by the Hearing Officer on December 30, 2009. The hearing was originally scheduled for February 10, 2010, but was continued by the Hearing Officer due to inclement weather.

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**

-----, Claimant's mother

-----, Claimant's step-father

Steve Brady, Operations Coordinator, MR/DD Waiver Program, DHHR (participated telephonically)

Richard Workman, Psychologist Consultant, Bureau for Medical Services, DHHR (participated telephonically)

Presiding at the hearing was Pamela L. Hinzman, State Hearing Officer and a member of the State Board of Review.

#### **IV. QUESTION 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 September 23, 2009
- D-3 DD-2-A MR Level of Care Evaluation dated September 9, 2009
- D-4 Psychological Evaluation (Update) dated March 18, 2009, completed by [REDACTED]
- D-5 Notice of Denial/Termination dated April 16, 2010
- D-6 Psychological Evaluation completed on February 9, 2010 and February 23, 2010 by Levin & Associates

#### **VII. FINDINGS OF FACT:**

- 1) The Claimant is a recipient of Title XIX MR/DD Waiver services and underwent annual medical/psychological evaluations to determine whether he continues to meet medical eligibility criteria for the program.
- 2) The Department determined that the Claimant is ineligible for Waiver services and sent a

Notice of Denial/Termination dated September 23, 2009 (D-2), which states:

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 letter indicates that the Claimant exhibits one (1) substantial adaptive deficit in the area of *Self-Care*.

- 3) Bureau for Medical Services Psychologist Consultant Richard Workman testified that the Claimant, now eleven (11) years old, has an eligible diagnosis of Autistic Disorder, however the child does not exhibit substantial adaptive deficits in the areas of *Learning, Self-Direction, Receptive or Expressive Language, Mobility and Capacity for Independent Living*.

As the Claimant's Level of Care Evaluation (D-3) indicates that he is ambulatory, the Psychologist Consultant testified that the child is not substantially impaired in *Mobility*.

The Psychologist Consultant reviewed Exhibit D-4, a Psychological Evaluation (Update) dated March 18, 2009, which indicates that the child was able to express himself verbally and in full sentences, although he could be difficult to understand. The Claimant is impaired in his ability to write and is better able to express himself using a keyboard. The Consultant maintained that this information indicates the Claimant is not substantially deficient in *Receptive or Expressive Language*.

The report states that the Claimant enjoys activities such as fishing, camping, playing video games, swimming, watching movies, playing baseball, and studying trains, the weather, history and current events. The Psychologist Consultant contended that this information reveals that the Claimant exhibits *Self-Direction*. The Psychologist Consultant reviewed the Claimant's Adaptive Behavior Scale (ABS)-School Summary Report dated March 12, 2009 in which the child was evaluated using non-mental retardation norms. The Consultant indicated that non-mental retardation norms were utilized to evaluate the Claimant as the Claimant no longer has a diagnosis of mental retardation. The Consultant explained that an individual must attain a score of less than one percentile (standard score of 1 or 2) to meet eligibility criteria for the MR/DD Waiver Program. The Claimant exhibited standard scores of 1 or 2 only in the areas of independent functioning and economic activity. It should be noted that the Claimant received a standard score of 5 in *Self-Direction*.

- 4) The Claimant's mother questioned the validity of information in the Psychological Evaluation and indicated that a new Psychological Evaluation was recently completed for her son, however, she has had difficulty obtaining the report. She contended that her son exhibits deficits in *Learning, Self-Direction and Capacity for Independent Living*. No

specific narrative information was provided in relation to these areas of functionality.

- 5) The hearing record remained open until April 7, 2010 to allow -----an opportunity to obtain the new psychological report and to submit an Individualized Education Plan (IEP) from the Claimant's school. A Psychological Evaluation from Levin & Associates (D-6) was provided to the Department on April 2, 2010 and reviewed by the Psychologist Consultant, however no school evaluations were submitted.

After reviewing the additional documentation, the Department issued a new Notice of Denial/Termination on April 16, 2010 (D-5). This notice states, in pertinent part:

Your Waiver services have been terminated. Your application was Terminated because: Following a hearing convened on 3/8/10 [sic], additional information was submitted. The additional information provides a diagnosis of PDD, NOS which is incompatible with previous diagnosis of autism. By policy, the related condition must be severe and documentation does not support that -----s [sic] diagnosis meets the severity criteria. Also, the IEP was not submitted as agreed upon in the hearing.

- 6) The hearing reconvened on May 14, 2010 so that the new Psychological Evaluation (D-6) could be reviewed. The Psychologist Consultant testified about the report, which indicates that the Claimant "is verbal and does have some appropriate language." The report states that the child enjoys watching television, playing video games and watching scary movies, which the Consultant reiterated is indicative of *Self-Direction*. While the Claimant received an eligible ABS score of 2 in the area of *Self-Direction* on the February 2010 Psychological Evaluation, that score is incompatible with the higher (ineligible) score (5) he attained during the March 2009 Psychological Evaluation. The Consultant testified that the score is also incompatible with narrative information from both evaluations regarding the child's preferred leisure activities.

The Claimant attained a full-scale IQ of 111 on the Wechsler Abbreviated Scale of Intelligence (WASI) test, placing him in the high average range of intellectual functioning. The Consultant also reviewed the Claimant's scores on the Wide Range Achievement Test (WRAT)-4 and noted that standard scores of 55 and below are required for program eligibility. The WRAT-4 measured the Claimant's reading, sentence comprehension, spelling, math computation and reading composite scores, all of which ranged from 95 to 108. The Consultant testified that these scores indicate no substantial deficit in *Learning*.

The report also indicates that the Claimant received a score of 120 on the Pervasive Developmental Disorder (PDD) Assessment Scale, which suggests moderate PDD characteristics not within severity criteria.

- 7) -----read from Exhibit D-6, which indicates that the Claimant "will continue to require

ongoing supervision and training in order to maintain his current level of functioning. It is unlikely he will ever function independently. However, it should be noted that Title 19 Waiver services could have a major impact on his daily functioning.” -----maintained that the evaluation states the Claimant requires an ICF/MR Level of Care.

- 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
    - 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 presence of substantial deficits must be supported by the documentation submitted for review, i.e., the IEP, Occupational Therapy Evaluation, narrative descriptions, etc.)

- 2) Information provided during the hearing reveals that the Claimant has an eligible diagnosis for the MR/DD Waiver Program and exhibits a substantial adaptive deficit in the area of *Self-Care*. While it is clear that the Claimant's condition poses many challenges, documentation fails to support the addition of two (2) additional deficits. Narrative information, intellectual functioning test scores and/or medical documentation reveal that the Claimant is not substantially deficient in *Mobility, Learning, and Receptive or Expressive Language*. The February 2010 Psychological Evaluation reveals an eligible Adaptive Behavior Scale score in *Self-Direction*, however this score is incompatible with narrative information contained in both the February 2010 and March 2009 psychological reports, as well as the ineligible score attained by the Claimant in the March 2009 evaluation. While the Claimant received a standard score of 2 in the area of economic activity, exploring the area of *Capacity for Independent Living* is moot as a deficit in this area would only bring the Claimant's total number of deficits to two (2).
- 3) The Department acted correctly in proposing termination of the Claimant's MR/DD Waiver 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 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 21st Day of May, 2010.**

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**Pamela Hinzman  
State Hearing Officer**