



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

March 31, 2010

----- and -----for

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held March 24, 2010. Your hearing request was based on the Department of Health and Human Resources' proposal to terminate your 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).

Clinical documentation submitted at your hearing demonstrates that you no longer meet the criteria necessary to establish medical eligibility 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 for benefits and services through the Medicaid, Title XIX, MR/DD Waiver Program.

Sincerely,

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

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

Claimant,

vs.

Action Number: 09-BOR-2368

**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 March 31, 2010 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 convened on March 24, 2010 on a timely appeal filed December 15, 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

-----, Claimant (Infant child under the age of 18 years)

-----, Claimant's Mother/Representative

-----, Claimant's Father/Representative

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

Steve Brady, Operations Coordinator, MR/DD Waiver, BMS (Participated telephonically)

Richard 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(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

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 November 20, 2009

D-3 DD-2-A – ICF/MR Level of Care Evaluation – Received July 21, 2009

D-4 DD-3, Psychological Evaluation dated July 7, 2009

D-5 Psychoeducational Evaluation ([REDACTED] County Schools) dated March 20, 2010 and March 30, 2010.

D-6 Individualized Education Program (IEP) dated April 10, 2009

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 he was notified on November 11, 2009 (D-2) that his Waiver services were being terminated. This notice states, in pertinent part:

Your Waiver services have been terminated.

Your application was Terminated because:

Documentation submitted for review does not support the presence of an eligible diagnosis for the Title XIX MR/DD program. Spina Bifida Occulta is not considered to be a related condition and the most current intellectual and academic assessment does not support the presence of mental retardation.

- 2) The Department, as noted in Exhibit D-2, contends that the Claimant does not present an eligible diagnosis for participation in the MR/DD Waiver Program. Richard Workman, a psychologist consultant for the MR/DD Waiver Program, testified that the diagnosis of Spina Bifida Occulta is not considered a related condition (related to Mental Retardation) as this condition is not severe. Mr. Workman cited Exhibit D-4, Section II.A (Physical/Sensory Deficits) which states, in pertinent part – “In 2004 it became suspected that -----might have spina bifida occulta and subsequent testing confirmed this diagnosis. Apparently, this condition does not require any treatment.” This information was not refuted by the Claimant and supports the Department’s finding that Spina Bifida Occulta is not a related condition for MR/DD Waiver eligibility.
- 3) The Department acknowledged that a diagnosis of Mild Mental Retardation was provided by the Claimant’s physician (Exhibit D-3) and the evaluating psychologist (Exhibit D-4), however, Exhibit D-5 includes clinical testing results (intellectual assessment and academic achievement) that confirm the Claimant is functioning in the Borderline Intellectual range.

The Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) was administered during this evaluation and this test has a mean (average score) of 100 and a standard deviation of 15 – scores in the range of 55-69 are considered eligible. The evaluator notes after the WISC-IV – “As can be seen from the data above, -----’s overall cognitive abilities fall in the Borderline range of intellectual functioning, based on the Full Scale Score of 76.”

The Woodcock-Johnson Test of Achievement-Third Edition (WJ-III) was also administered. With a mean of 100 and a standard deviation of 15 – scores in the range of 55-69 demonstrate eligibility. The evaluator notes the following regarding the WJ-III testing results – “According to the test results listed above, -----’s scores in the areas of Reading and Math fell in the Low Average to Extremely Low range. When compared to his same age peers, --- --’s concrete knowledge in Math Calculation and Letter-Word Identification fell in the average range. He showed difficulty with abstract concepts.” It should be noted that all of the Claimant’s scores exceed 69 with the exception of Applied Problems (65).

The Department’s psychologist noted that the Claimant has shown significant improvement since originally being certified for MR/DD Waiver eligibility, and based on the clinical testing results included in Exhibit D-5, it is clear that a diagnosis of Mild Mental Retardation

is not appropriate for the Claimant.

- 4) ----- testified that the Claimant continues to require services because he continues to require prompting with issues related to washing his hands and brushing his teeth. She testified that [REDACTED] provides training related to these tasks. -----presented testimony consistent with -----'s, however, there was no clinical documentation submitted to refute the findings in Exhibit D-5.
- 5) 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).

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 prior to age 22. "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.
- 2) The evidence fails to support a program qualifying diagnosis of Mental Retardation or a related condition. While the Claimant could benefit from additional services, in the absence of clinical documentation to support the existence of a severe and chronic qualifying diagnosis, eligibility for continued participation in the 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 March, 2010

**Thomas E. Arnett
State Hearing Officer**