



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

June 11, 2010

-----for-----

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held May 12, 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).

Information submitted at your hearing demonstrates that your daughter 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 daughter's 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
Carol Brawley, MR/DD Waiver

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

Claimant,

vs.

Action Number: 09-BOR-2471

**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 via telephone conference call on February 17, 2010 but was rescheduled and convened on May 12, 2010 on a timely appeal filed December 16, 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's Mother / Representative

-----, Ph.D, Assistant Professor, Psychology Department, [REDACTED]

-----, Ph.D, Psychologist / Member of Claimant's Interdisciplinary Team (IDT)
Carol Brawley, Hearings Coordinator, MR/DD Waiver Program (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 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 February 18, 2009
- D-3 DD-2-A – ICF/MR Level of Care Evaluation – signed January 8, 2009
- D-4 Comprehensive Psychological Evaluation dated October 16, 2008
- D-5 Psychological Assessment dated November 13, 2008
- D-6 Correspondence from -----, Special Education Teacher, dated October 28, 2008
- D-7 Correspondence from -----dated October 29, 2008
- D-8 -----, Ed.D., Evaluation dated October 19, 2009
- D-9 Notice of Denial /Termination dated November 20, 2009
- D-10 DD-2-A-ICF/MR Level of Care Evaluation signed January 20, 2010
- D-11 Notice of Denial /Termination dated February 4, 2010

Claimant's Exhibits:

- C-1 WVDHHR Bureau for Medical Services Title XIX MR/DD Waiver Program – Inventory for Client and Agency Planning - Evaluation dated June 16, 2009
- C-2 ██████████ County Schools Teacher IEP Input Form dated January 25, 2010
- C-3 Additional documentation with cover letter dated April 28, 2010 from -----

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 on February 18, 2009 (D-2) that her Waiver services were being terminated. This notice states, in pertinent part:

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. 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 was identified as a substantial adaptive deficit.

- 2) Additional documentation was submitted for review and the Department issued two (2) subsequent Notice of Denial/Termination letters dated November 20, 2009 (D-9) and February 4, 2010 (D-11). These notices provide the same reason for denial and again indicate the Claimant is only demonstrating a substantial adaptive deficit in the area of Self-Care.
- 3) The Department's Psychologist Consultant, Linda Workman, testified that the Claimant's eligibility determination focused on the diagnostic information provided in the clinical documentation. The Claimant's Mental Retardation diagnosis is disputed by the evaluations submitted as it was only given as a provisional diagnosis. Ms. Workman testified that the psychometric testing scores are inconsistent with a diagnosis of Mental Retardation and while Autism is not in dispute, clinical data, as well as the narrative information, fails to demonstrate the Claimant's Autism is severe.

The Department stipulated that Autism is a potentially eligible diagnosis for participation in the MR/DD Waiver Program, however, the Claimant is demonstrating only one substantial adaptive deficit in the area of Self-Care.

- 4) The Claimant, through her representatives, contends that a diagnosis of Mental Retardation is supported by the documentation and that she is demonstrating substantial adaptive deficits in all of the major life areas.

-----, Ph.D., is a licensed psychologist in West Virginia and has been practicing for the last

40 years. He referred to Exhibit C-1, the Inventory for Client and Agency Planning (ICAP) done by APS Healthcare, which indicates a primary diagnosis of Autism (Mild). He went on to note that the Claimant has significant developmental delays in adaptive skills as well as problem behaviors. The service score on the ICAP indicates she needs total personal care and intensive supervision. He believes that prior IQ testing in 2008 supported Mental Retardation, and that there is a margin of error that must be considered. It is his opinion that Mental Retardation is an appropriate diagnosis for the Claimant. He went on to state that the testing scores cannot be disputed but they are just a snapshot of her ability on that day. His concern is that she will stop making progress without Waiver services.

Dr. ----, testified that she has a Ph.D. in Special Education. She currently works as an assistant professor in the Psychology Department at [REDACTED] specializing in behavior analysis. She has 16 years experience in working with individuals who have Autism and Mental Retardation. The Claimant was referred to her from ----to address behavioral problems. They were able to decrease the Claimant's problem behavior to zero in the clinic. They have also had two students working with the Claimant in her home addressing adaptive behavior deficits. ----purported that the Claimant needs constant supervision and constant rewards for self-care tasks. She does not retain information and demonstrates inconsistencies with her ability. The evaluations are a snapshot of her ability and may not adequately document the inconsistencies in her performance. The Claimant is doing better, but it is with one-on-one supervision throughout her day.

- 5) The following information was given considerable weight in reviewing the disputed diagnosis of Mental Retardation:

The Comprehensive Psychological Evaluation dated 10/16/08 (D-4) indicates in Section III that a Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) was administered to the Claimant resulting in a Verbal IQ of 73, Performance IQ of 75 and a Full Scale IQ of 70. This score is indicative of a Borderline Range of ability, however, a provisional diagnosis of Mild Mental Retardation was given. A Wide Range Achievement Test-Fourth Edition (WRAT-4) was administered and this assessment tool measured five (5) areas of academic functioning. Eligible scores with this testing instrument are 55 and below and the Claimant scored as follows: Word Reading 82, Sentence Comprehension 65, Spelling 81, Math Computation 73 and Reading Composite 71. The evaluator provides a diagnosis of Autistic Disorder and Mild Mental Retardation (Provisional, R/O Borderline Intellectual Functioning) in Section V, and in Section VII, the psychologist states that the Claimant is diagnosed with Autistic Disorder and that she exhibits significant deficits in all areas of adaptive behavior skills.

Exhibit D-5, a Psychological Assessment with a report date of 11/13/08, was completed at the request of the Claimant's mother because – "She obtained a previous evaluation on October 16, 2008. Mother indicated that the intelligence test on this previous evaluation found that ---- no longer meets the criteria for mental retardation." Page 4 of this evaluation reveals that cognitive and achievement testing was conducted to gauge the Claimant's

overall cognitive abilities and to assess for any learning problems in the school environment. The Stanford Binet Intelligence Scale-Fifth Edition (SB-5) was administered to the Claimant on 11/4/08 and the following IQ scores were obtained: Non Verbal IQ 70, Verbal IQ 81 and Full Scale IQ 74. This evaluation goes on to note – “-----’s Full Scale IQ is 74 and in the Borderline range. Her Non-Verbal IQ is in the Borderline range and her Verbal IQ is in the Low Average range.” A Wechsler Individual Achievement Test-Second Edition (WIAT-II) was administered on 11/5/08 resulting in the following scores (55 and below indicate a substantial adaptive deficit in Learning): Word Reading 78, Reading Comprehension 87, Numerical Operations 69, and Spelling 84. The evaluator notes – “-----’s scores in Reading, Mathematics, and Spelling were consistent or greater than her cognitive abilities. Therefore, this indicates that ----- does not meet the criteria for any learning disabilities.” To the contrary, however, on page 7 the evaluator again notes the Claimant’s Full Scale IQ was in the Borderline range but states – “The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) range for mild retardation is individuals with an intellectual quotient (IQ) up to 75.” The evaluator subsequently includes Mild Mental Retardation, in addition to Autistic Disorder (Mild), as an Axis I diagnosis.

Exhibit D-8 (Psychological Evaluation) was completed on 10/19/09 and according to the evaluator – “----- was referred for an evaluation by her mother as recommended by REM of [REDACTED]. The focus of this evaluation is to assess -----’s eligibility for Title XIX Waiver Programming. -----’s mother indicated that she had Title XIX Waiver in the past, and it was terminated in February 2009. She indicated that she appealed this decision, and that they currently need IQ testing, as well as other documentation that would determine if she requires further eligibility.” Page 3 of Exhibit D-8 provides the scores of a Wechsler Abbreviated Scale of Intelligence (WASI) administered during the evaluation. The Claimant’s scores were: Verbal IQ 88 (Low average intellectual functioning range), Performance IQ 75 (Borderline intellectual functioning range) and Full Scale IQ 79 (Borderline intellectual functioning range). The evaluator notes – “A letter written by -----’s mother indicated that in the past she had testing which indicated scores of 74 and 75 on past IQ testing. These scores tend to support the conclusion of borderline intellectual functioning.” Section V includes an Axis I diagnosis of Autistic Disorder and Axis II provides a diagnosis of Borderline Intellectual Functioning.

The clinical documentation fails to support a diagnosis of Mental Retardation. The first evaluation offered Mental Retardation as a provisional diagnosis, and although the Claimant report higher verbal and full-scale IQ scores on the second evaluation, the evaluator fails to provide support for this diagnosis after indicating on several occasions the Claimant is performing in the Borderline range. In the third evaluation, the Claimant’s IQ scores clearly exceed diagnostic criterion for Mental Retardation and again the evaluator indicates she is functioning in the Borderline range. Based on the clinical data, a diagnosis of Mental Retardation is not appropriate. As a result, Non-MR Norms will be used when reviewing the ABS:S-2 results.

- 6) As indicated previously, the Department stipulated that a diagnosis of Autism is supported

by the clinical documentation, however, the Department contends this condition is not severe. Exhibit D-4 includes the results of a GARS-2 test with an index of 98. According to the evaluator, the Claimant “Very Likely” meets the criteria for a diagnosis of an autism spectrum diagnosis.

A Childhood Autism Rating Scale (CARS) was given to the Claimant by the evaluator in Exhibit D-5 to further assess her prior diagnosis of Autism and to determine her current functioning level. “-----’s score on the CARS was a 30. This indicates that ----- presents with symptoms consistent with mild autism.” The Department’s psychologist noted that the Claimant’s Autism is very mild as a score of 29.5 is not considered Autistic.

- 7) This finding includes a review of the six major life areas, in conjunction with the supporting documentation and Non-MR Norms from the ABS:S-2 results. *Self-Care* was previously identified and will not be reviewed in this finding. 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.

Receptive or expressive language (communication) – The ABS:S-2 percentile score for language in Exhibit D-4 is 2, and the percentile score in D-8 is 1. Both of these scores are very poor, but outside the eligibility criteria established by policy. In the absence of an eligible ABS score, the narrative information will not be reviewed.

Learning (functional academics) – Achievement testing results recorded in Exhibits D-4 (WRAT-4) and D-5 (WIAT-II) fail to identify a substantial adaptive deficit in learning (see Finding of Fact #4).

Mobility – ABS:S-2 scores found in Exhibits D-4 and D-8 for physical development are in the 37th and 16th percentile, and according to Exhibits D-3 and D-10, the Claimant is independent with ambulation. Based on the evidence, the Claimant is not demonstrating a substantial adaptive deficit in mobility.

Self-Direction – The ABS:S-2 percentile score found in Exhibit D-4 is “5”, and Exhibit D-8 is a “2”. These scores do not demonstrate a substantial adaptive deficit, therefore narrative information will not be reviewed.

Capacity for independent living (home living, social skills, employment, health and safety, community and leisure activities) – An eligible ABS score of less than 1 percentile is found in D-8 (Economic Activity / employment). D-4 provides an eligible ABS score of less than 1 percentile (Standard Score of 2) in socialization and according to testimony and narrative documentation, the Claimant has limited interaction with others. Health and safety concerns are relevant due to behavior problems that include self-injurious behaviors and the need for

intensive supervision. The Claimant is reported to be sensitive to changes in her routine or changes in her regular environment, she has a history of non-compliant behavior and she has difficulty attending to tasks. The Claimant's mother testified that she forced her daughter into cheerleading and Girl Scouts and she hated both functions. While the Claimant is not of an age where she would be expected to fully demonstrate the capacity for independent living, ABS scores as well as narrative information supports a finding that she is demonstrating a substantial adaptive deficit in this area.

- 8) West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services (D-1), 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
- 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, maintains 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) 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 Department acknowledged that the Claimant presents a potentially eligible diagnosis of Autism and that she is demonstrating a substantial adaptive deficit in Self-Care. Because the evidence demonstrates that a diagnosis of Mild Mental Retardation is not appropriate in the Claimant's case, the Non-MR Norms group, in conjunction with supporting narrative documentation, was correctly used to evaluate the Claimant for substantial adaptive deficits. While the evidence submitted at the hearing identified an additional substantial adaptive deficit in the Claimant's Capacity for Independent Living, eligibility criteria requires three (3) or more substantial adaptive deficits be identified. Whereas the Claimant is demonstrating only two (2) substantial adaptive deficits in the major life areas, medical eligibility cannot be established.
- 3) 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 June, 2010

**Thomas E. Arnett
State Hearing Officer**