



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
227 Third St.
Elkins, WV 26241

Joe Manchin
Governor

Martha Yeager Walker
Secretary

August 2, 2005

____ for

Dear Mr.____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held June 10, 2005. Your hearing request was based on the Department of Health and Human Resources' proposal to terminate your nephew's 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 Manual Chapter 502.1).

The information submitted at the hearing revealed that while your nephew has a program qualifying diagnosis, his condition does not require the "level of care" that is provided in an ICF/MR Facility.

It is the decision of the State Hearing Officer to **uphold** the proposal of the Department to terminate your nephew's 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
Stephen Brady, Acting Program Coordinator, MR/DD Waiver Program

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

Claimant,

vs.

Action Number: _____

**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 August 2, 2005 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 June 10, 2005 on a timely appeal filed January 13, 2005.

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 uncle

Stephen Brady, Acting Program Coordinator, MR/DD Waiver Program

Richard Workman, Psychologist Consultant, Bureau for Medical Services

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

The hearing was conducted telephonically with all participants.

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

Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual Chapter 500-8 (revised October 2004).

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Department's Exhibits:

- D-1 Notice of Denial dated December 28, 2004 and Medical Eligibility Criteria
- D-2 DD-3, Comprehensive Psychological Evaluation (Triennial) dated October 26, 2004
- D-3 DD-3, Psychological Evaluation Update dated October 26, 2004
- D-4 DD-4, Social History Update dated September 17, 2004
- D-5 DD-5, Individual Program Plan
- D-6 Adaptive Behavior Scale
- D-7 DD-2A, Annual Medical Evaluation

VII. FINDINGS OF FACT:

1. On December 28, 2004, a Notice of Denial (D-1) was sent to the Claimant. The notice states:

Your Waiver services have been terminated.

Documentation submitted for review does not support the presence of substantial adaptive deficits and the need for an ICF/MR level of care.

2. The Claimant has an eligible diagnosis of Pervasive Developmental Disorder- NOS, autism and mild mental retardation. However, the Department contends that the Claimant does not exhibit substantial adaptive deficits (substantial limitations associated with the presence of mental retardation) and therefore does not meet level of care criteria necessary in establishing medical eligibility.
3. Mr. Workman reviewed the Claimant's DD-2A (D-7) and the DD-3 Psychological Evaluation (D-2). He testified that the Claimant is ambulatory and does not exhibit a substantial deficit for mobility. The information revealed the Claimant is continent, feeds/dresses himself and has self-help skills. Mr. Workman testified that the Claimant's scores on the Wechsler Adult Intelligence Scale and the Wais III are greater than 70 and are not considered within the range of mental retardation. Scores on the Wechsler Individual Achievement Test indicate the Claimant has basic academic skills and his learning is not substantially delayed. Exhibit 2 indicates the Claimant has a well-developed vocabulary and speaks clearly so he does not demonstrate substantial delays in expressive/receptive language. The Claimant had participated in a course of study in food service, however, that program closed. The Claimant prefers solitary activities such as watching television and playing on the computer, enjoys going to the shopping mall and likes to dine in restaurants. Mr. Workman testified that this is indicative of the Claimant's level of self-direction. Mr. Workman stated that the Weschler Intelligence Scale mostly revealed scores in the average range compared to the normal population. Results yielded a verbal IQ of 86, a performance IQ of 99 and a full-scale IQ of 91. Mr. Workman stated that the Claimant's scores on the Vineland Adaptive Behavior Scales would be in the range for MR/DD Program consideration, however, those scores are incompatible with other test results.

Mr. Workman addressed a Psychological Evaluation Update dated October 26, 2004 (D-3) with adaptive behavior measurements obtained on June 6, 2005. He indicated the Department's proposal to terminate services was based on information and scores obtained in Exhibit 2. Scores obtained on June 6, 2005 dropped considerably and appear inconsistent with the information on which the Department's decision was based. He also indicated that factor skills obtained on June 6, 2005 seem incompatible with the Claimant's level of self-sufficiency.

Mr. Workman discussed differences between Exhibits 2 and 3. Exhibit 3 indicates that the Claimant displays significant deficits in communication, daily living skills and socialization as compared to his non-disabled peers. Narratives in Exhibit 3 indicate that Mr. ____ served as informant for the evaluation and "has been more observant of the Claimant's behavior since his eligibility for MR/DD services was called into question."

Mr. Workman addressed Exhibit D-5 which indicates one of the Claimant's behavioral objectives includes writing a check and balancing his checkbook with one verbal prompt on six consecutive trials. Mr. Workman said this type of objective concerns a high-level skill and is not indicative of an individual who is in need of an ICF/MR level of care.

The Social History Update dated September 17, 2004 (D-4) indicates that the Claimant's social skills have improved. The Claimant requires very little prompting to do his laundry, is independent with his self-care and requires only minimal supervision for shaving. The Claimant works for his uncle and follows direction well, has learned to fill out job applications and has memorized all of his personal information. The Claimant likes to collect and watch DVDs.

Mr. _____ testified that the Claimant's scores as indicated in Exhibit D-2 are not indicative of his level of functioning. He stated that he had first responded to questions about the Claimant incorrectly because his expectations of the Claimant are higher than the Claimant's actual abilities. He indicated the Claimant requires a great deal of prompting with self-care, has problems with lying and could not look after himself in the community.

5. Eligibility criteria for the MR/DD Waiver Program are outlined in Chapter 500 of the Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual (Revised October 1, 2004).

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/or 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, 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
- Tuberous 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).
 - Economic Self-Sufficiency

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. Testimony and information submitted at the hearing failed to establish substantial adaptive deficits in the areas of self-care, receptive or expressive language, learning, mobility and self-direction. The Claimant is able to complete his own self-care with prompting and the DD-3 (Exhibit 2) reveals that he has a well-developed vocabulary and speaks clearly. Exhibit 2 indicates the Claimant has basic academic skills and his learning is not substantially delayed. In addition, the Claimant is ambulatory and his level of activity demonstrates that he exhibits self-direction skills.
2. The Claimant's capacity for independent living and economic self-sufficiency came into question during the hearing, however if deficits were awarded in these areas the Claimant would continue to lack the required three (3) deficits to qualify for the MR/DD Program.
3. While the Claimant appears to face challenges in various levels of functioning, evidence fails to demonstrate that he exhibits substantial adaptive deficits in three (3) or more of the seven (7) major life activities as required by policy.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the Department's proposal to terminate 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 2nd Day of August, 2005

State Hearing Officer