



**State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
Post Office Box 2590
Fairmont, WV 26555-2590**

**Joe Manchin III
Governor**

**Martha Yeager Walker
Secretary**

November 30, 2005

Dear Mr. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held October 26, 2005. Your hearing request was based on the Department of Health and Human Resources' proposal to terminate your benefits and services provided through the Medicaid, Title XIX Waiver Program.

In arriving at a decision, the State Hearings 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. A related condition means any other 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 treatment or services similar to those required for these persons. The condition must be severe and chronic with concurrent substantial deficits manifested prior to the age of 22 years and 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 which was submitted at your hearing revealed that you were inappropriately diagnosed with Mental Retardation after the age of 18. Further, evidence indicates that your primary diagnosis of mental illness is not a related condition and the related condition of Pervasive Developmental Disorder, with concurrent adaptive deficits, was not manifested prior to the age of 22-years.

It is the decision of the State Hearing Officer to uphold the proposal of the Department to terminate your Title XIX Medicaid MR/DD Waiver benefits and services.

Sincerely,

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

cc: Erika H. Young, Chairman, Board of Review
Susan Hall, Program Director, MR/DD Waiver
[REDACTED]

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

_____,

Claimant,

v.

Action Number: _____

**West Virginia Department of
Health and Human Resources,**

Respondent.

DECISION OF STATE HEARING OFFICER

I. INTRODUCTION:

This is a report of the State Hearing Officer resulting from a fair hearing concluded on November 30, 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 convened on October 26, 2005 on a timely appeal, filed June 1, 2005.

It should be noted here that the Claimant's benefits have continued pending a hearing decision.

II. PROGRAM PURPOSE:

The Program entitled MR/DD Waiver is set up cooperatively between the Federal and State governments and administered by the West Virginia Department of Health & 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

_____, Claimant's mother

[REDACTED]
[REDACTED]
[REDACTED]
Susan Hall, Program Director, MR/DD Waiver Program
Richard Workman, Psychologist Consultant, BMS

Presiding at the Hearing was Thomas E. Arnett, State Hearing Officer and a member of the State Board of Review.

IV. QUESTIONS TO BE DECIDED:

The question to be decided is whether the Department was correct in their proposal to terminate the Claimant's benefits and services through the Medicaid, MR/DD Waiver Program.

V. APPLICABLE POLICY:

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

The Code of Federal Regulations - 42 CFR 435.1009(a)(2), 42 CFR 441.302 (c)(2) and 42 CFR 483.440(a)(2).

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 Code of Federal Regulations - 42 CFR 435.1009
- D-2 Code of Federal Regulations - 42 CFR 483.440
- D-3 DSM4TR (pg 49) Diagnostic Criteria for mental Retardation
- D-4 Memorandum from [REDACTED] - 10/16/01
- D-5 Correspondence from [REDACTED] - 8/20/98
- D-6 Correspondence from [REDACTED] M.D.- 8/3/01
- D-7 Correspondence from [REDACTED] Showalter, QMRP 8/3/01
- D-8 Medical report from completed by [REDACTED] MD
- D-9 Memorandum from [REDACTED] - 2/6/02
- D-10 Memorandum from [REDACTED] - 3/7/05
- D-11 Notice of Denial - 5/11/05
- D-12 Memorandum from Stephen Brady - 7/29/05
- D-13 DD-2a, Annual Medical Evaluation - 1/18/05
- D-14 DD-2a, Annual Medical Evaluation - 6/27/05

- D-15 Psychological Evaluation - 11/12/04
- D-16 Social History Update – 11/19/04
- D-17 Individual Program Plan – 3/9/05
- D-18 Correspondence from [REDACTED] MD, To Whom it May Concern – 6/3/03
- D-19 Correspondence from [REDACTED] MD to [REDACTED] MD - 9/21/05
- D-20 Correspondence from [REDACTED] Service Coordinator – 8/18/05

Claimants' Exhibits:

- C-1 Decision of Erika Young, State Hearing Officer – 3/15/04.
- C-2 Psychological evaluation - 11/10/03

VII. FINDINGS OF FACT:

- 1) In accordance with the Code of Federal Regulations found at 42 CFR 441.302 (c) (2) and the Department's Medicaid, MR/DD Waiver Manual, the Claimant was undergoing annual recertification to determine eligibility for continued participation in the MR/DD Waiver Program.
- 2) The Claimant was approved for participation in the MR/DD Waiver Program by a Hearing Decision dated March 15, 2004 (C-1), and upon completion of the recertification review, the Department issued a Notice of Denial on May 11, 2005 (D-11). This notice states in pertinent part:

Your Waiver services have been terminated.

Upon initial application to the Title XIX MR/DD Waiver program, it was determined that Mr. _____ did not meet the eligibility criteria for the program because his primary diagnosis was mental illness as verified by his treating psychiatrist at that time and he did not manifest substantial adaptive deficits in three or more of the seven major life areas identified for Waiver eligibility due to mental retardation or a related condition. Although Mr. _____ was later awarded eligibility for a one year period through an administrative hearing decision, it remains the review team's opinion that he does not meet eligibility criteria. Please note previous denial letters.

- 3) Representatives speaking on behalf of the Department stated that the Department's position following the March 15, 2004 Administrative Hearing Decision remains unchanged. They contend that the Claimant's eligibility cannot be established because Mental Illness, not Mental Retardation or a related condition, is the Claimant's primary diagnosis. The Department contends that their position is based on the Claimant's history of Mental Illness, a written statement from the Claimant's treating psychiatrist, and the lack of an eligible diagnosis (Mental Retardation and/or a related condition) within the developmental period. The Department's psychologist consultant testified that there is no evidence of a Mental Retardation diagnosis, prior to the age of 18, as required by the DSM-IV, or a related condition (Pervasive Developmental Disorder) prior to the age of 22 as required by policy and regulations.

- 4) Exhibit D-5 is correspondence from [REDACTED] M.D., Medical Director, Child/Adolescent Unit, [REDACTED] dated August 20, 1998. In this document, Dr. [REDACTED] states that the Claimant has been under his care for many years and he contends that the Claimant's serious conditions include Tourette's Disorder, Obsessive Compulsive Disorder and Attention Deficit Hyperactivity Disorder. It was noted that the Claimant was 19-years old at this time and neither Mental Retardation nor Pervasive Development Disorder was provided as a diagnosis. The DSM-IV (D-3) reveals that the diagnostic criteria for Mental Retardation includes (C) – Onset is before age 18 years.
- 5) Correspondence from [REDACTED] M.D (8/3/01), Board Certified Psychiatrist, and [REDACTED] (8/3/01), QMHP, QMRP, from [REDACTED] exhibits D-6 and D-7 respectively, state that the Claimant's Mental Retardation is secondary to his Mental Health issues.
- 6) Section I,B of exhibit D-15, Psychological Evaluation Update (11/12/04) reveals that on 12/5/96 (at age 17 years and 8 months) the Claimant was administered the Wechsler Adult Intelligence Scale Revised (WAIS-R) by [REDACTED] Schools. The Claimant's scores were as follows: Verbal IQ 83 (low average), Performance IQ of 76 (Borderline), and Full Scale IQ of 79 (Borderline - one point short of low-average). WIAT Composite scores recorded at the same time reveal a reading standard score of 85 (age equivalent of 12-9), mathematics score of 60 (age equivalent of 9-9) and spelling standard score of 90 (age equivalent of 14-0). This evidence confirms that the Claimant was not diagnosed with Mental Retardation prior to the age of 18 (as required by the DSM-IV). According to this evaluation, additional testing completed in 2000 and in 2001 continued to yield scores in the Borderline range.

In Section II,C,4 the evaluator states – “Mr. _____’s mood remains labile.” He has temper tantrums, will cry when upset, and has a negative attitude toward rules.

Section V of the Psychological Evaluation Update provides the following diagnoses: Axis I - Pervasive Developmental Disorder, With Atypical Autism, Obsessive Compulsive Disorder and Oppositional Defiant Disorder. Axis II includes – Mild Mental Retardation and Schizotypal Personality Disorder.

- 7) The Psychological Evaluation Update (D-15) and The Social History Update (D-16) reveal that the Claimant has been admitted to [REDACTED] in [REDACTED] on two different occasions, December 1993 and June 1996, for violent outbursts of screaming and yelling and a violent outburst in which he punched a glass window.
- 8) The Individual Program Plan dated March 9, 2005 includes a diagnosis of Mild MR, and although this document includes Bipolar Affective D/O, Tourettes Syndrome and ADHD, it was noted that it fails to include a Pervasive Developmental Disorder diagnosis.
- 9) In correspondence dated June 3, 2003, [REDACTED] MD, states that the Claimant has a chromosome abnormality, a balanced chromosome translocation that was present at birth. She goes on to say that “Although the chromosome rearrangement appears balanced, with this kind of chromosome translocation, it can result in an individual having a loss of information or genes that can be associated with intellectual impairments. This is most likely the explanation for _____’s CNS dysfunction and intellectual problems.” While Dr. [REDACTED] findings were

unchallenged, the Department noted that the Claimant has continued to demonstrate abilities in the Borderline Range.

- 10) Evidence cited in support of the Claimant's eligibility includes exhibit D-19. This exhibit is a reported update from Dr. [REDACTED] dated September 20, 2005, wherein Dr. [REDACTED] provides the following Diagnostic Impression - (2) Pervasive Developmental Delays, which are of a congenital origin. The Department conceded that the Claimant has delays, but indicated that this is not a diagnosis of Pervasive Developmental Disorder.
- 11) The March 15, 2004 Administrative Hearing Decision by Erika Young indicates on page 14, Section VIII (Decision), that evaluations completed in 2000 and 2003 provide a diagnosis of Pervasive Developmental Disorder, however, the psychological evaluation completed in 2000 was not submitted into evidence at the October 26, 2005 hearing. Ms. Young goes on to state that - "The evaluations performed in the claimant's infancy show global developmental delay and low muscle tone. A June 2003 report by and testimony from Genetic Pediatrician [REDACTED] indicated that the claimant has a genetic defect in the form of chromosomal translocation which she believes most likely explains the claimant's intellectual problems. In her testimony, Dr. [REDACTED] assigned a diagnosis of Pervasive Developmental Disorder." This evidence, however, fails to establish a diagnosis of Pervasive Developmental Disorder (a related condition) prior to the age of 22-years.
- 12) 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 November 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 daily living.
- A need for the same level of care and services that is provided in an ICF/MR institutional setting.

- 13) The Federal Code of Regulation - 42 CFR 435.1009(a)(2) *Persons with related conditions* means any other 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 treatment or services similar to those required for these persons. Section (b) states – It is manifested before the person reaches age 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, and require an ICF/MR Level of Care. Further, policy requires that each recipient receiving home and community-based services be reevaluated at least annually to determine continued eligibility.
- 2) [REDACTED] indicated that the Department has the “burden of proof” to show what changes have taken place to render the Claimant no longer eligible for participation in the MR/DD Waiver Program, however, regulations were not cited and this Hearing Examiner was unable to substantiate this claim. The policy and regulations identified indicate that a redetermination of medical eligibility must be completed annually.
- 3) The Code of Federal Regulations found at 42 CFR 435.1009 indicates that mental illness does not qualify as a related condition. Further, policy requires that the evaluations must demonstrate that the individual’s diagnosis of a related condition, with associated concurrent adaptive deficits, must be manifested prior to the age of 22.
- 4) Evidence submitted on behalf of the Claimant fails to demonstrate that the Claimant presented an eligible diagnosis - Mental Retardation prior to the age of 18 (according to DSM-IV diagnosis criteria) or Pervasive Developmental Disorder prior to the age of 22. While the Claimant’s genetic chromosomal translocation defect is clearly congenital, the Claimant has historically performed in the Borderline Range of abilities and the Claimant’s treating psychiatrist clearly indicated that Mental Illness is the Claimant’s primary diagnosis.
- 5) Whereas medical eligibility for participation in the MR/DD Waiver Program can not be established, the Department is correct in their proposal to terminate the Claimant’s benefits and services through the Title XIX Waiver Program.

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 Title XIX Medicaid 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 30th Day of November, 2005.

Thomas E. Arnett
State Hearing Officer