



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

Joe Manchin  
Governor

Martha Yeager Walker  
Secretary

November 17, 2005

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Dear Ms. [REDACTED]

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 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 clinical evidence submitted at the hearing fails to demonstrate that you have a diagnosis of Mental Retardation and/or a related condition. In addition, the evidence fails to show that you have substantial adaptive deficits in three (3) or more of the major life areas.

It is the decision of the State Hearing Officer to **uphold** the Department's proposal to terminate benefits and services provided through the Medicaid, Title XIX MR/DD Waiver Program.

Sincerely,

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

cc: Chairman, Board of Review  
Stephen Brady, Acting Director, MR/DD Waiver Program

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

\_\_\_\_\_,

**Claimant,**

**vs.**

**Action Number: 05-BOR-6010**

**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 November 17, 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 October 26, 2005 on a timely appeal filed June 17, 2005.

It should be noted that benefits and services continued pending a hearing decision.

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 mother / representative

\_\_\_\_\_, Claimant's grandmother

\_\_\_\_\_, Program Director

Susan Hall, Program Manager, MR/DD Waiver Program

Richard Workman, Psychologist Consultant, Bureau for Medical Services

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 the Department was correct in their 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**

Departments' Exhibits:

D-1 Notice of Denial dated 5/23/05

D-2 DD-2a, Annual Medical Evaluation completed on 6/28/05

D-3 DD-2A, Annual Medical Evaluation completed on 7/15/05

D-4 Comprehensive Psychological Evaluation (Triennial) - Evaluation date 2/11/05

D-5 Neuropsychological Evaluation – Dates of Evaluation: 8/3/05 and 8/27/05

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

- 1) In accordance with the section 504 of the Department's Medicaid, MR/DD Waiver Manual, the Claimant was undergoing an annual medical evaluation to determine eligibility for continued participation in the MR/DD Waiver Program.

- 2) On May 23, 2005, the Department sent a Notice of Denial (D-1) to the Claimant which includes some of the following pertinent information:

Your Waiver services have been terminated.

Documentation submitted for re-certification review does not support continued eligibility for the Title XIX MR/DD Waiver program. Mr. \_\_\_\_\_ no longer merits an eligible diagnosis nor manifests substantial, adaptive deficits in three or more of the seven major life areas identified for Waiver eligibility, according to the psychological evaluation.

- 3) As indicated in the notification letter, the Department contends that the Claimant no longer presents an eligible diagnosis for participation in the MR/DD Waiver Program. The Department cited clinical evidence found in Exhibit D-4, Comprehensive Psychological Evaluation (Triennial), dated February 11, 2005.

This evaluation, exhibit D-4, eliminates the diagnosis of Pervasive Developmental Disorder and Mild Mental Retardation (the diagnoses that originally made the Claimant eligible for the program) and clearly places the Claimant's cognitive ability and Adaptive Behavior skills in the Borderline Range.

Section I, B, states that the Claimant visited the \_\_\_\_\_ in November 2004 and it was determined that he did not meet the criteria for an autism spectrum diagnosis. This would include Pervasive Developmental Disorder.

Section III, A, includes testing results from the Wechsler Preschool and Primary Scale of Intelligence – Third Edition. The results are as follows: Full Scale IQ – 75, Verbal IQ – 75 and Performance IQ – 82. This report goes on to say – “The results suggest the he functions in the Borderline range of intelligence.”

Section III,C, states – \_\_\_\_\_ is an individual with multiple delays which are most likely secondary to fetal depakote effects.” In addition, Section V of the evaluation (Diagnosis) includes the following: Axis I, Other Substance-Related Disorder Not Otherwise Specified (PRIMARY) and Axis II, Borderline Intellectual Function. In conclusion, Section V fails to include a program qualifying diagnosis of Mental Retardation and/or a related condition.

The Department reviewed narrative information and Adaptive Behavior (ABS-S:2) Scores in the evaluation that affirm the determination that the Claimant does not exhibit substantial deficits in three (3) or more of the Major Life Areas. Section IV, Record of ABS-S:2 Factor Scores reveal that the Claimant's Adaptive Scores are consistently in the Borderline Range.

- 4) Exhibits D-2 & D-3, Annual Medical Evaluation (DD-2A) dated June 28, 2004 and July 15, 2005 respectively were cited to show inconsistencies within each report and to show that the diagnosis provided “Pervasive Developmental Delay” is inconsistent with the information found in exhibits D-4 and D-5.
- 5) The Neuropsychological Evaluation (D-5) states, in the Health History Section, that the Claimant has been worked up for chromosomal abnormalities and the determination was made that he does not have any genetic anomalies. This report goes on to say that his unusual facial features and behavior could be explained by fetal Depakote exposure. Previous evaluations are noted including the results of the WPPSI-III, indicating Borderline Category of Intellectual Development, and the Vineland revealing an Adaptive Behavior Composite standard score of 69 (also Borderline).

The WISC-IV was administered to the Claimant during this evaluation and his performance yielded a Verbal Comprehension Index of 65, a Perceptual Reason Index of 92, a Working Memory Index of 74 a processing Speed Index of 75 and a General Ability Index of 77. “The General Ability Index suggests that he is currently functioning within the borderline range of intellectual functioning.”

The Conclusions and Recommendations section states – “The results of this neuropsychological evaluation are fairly consistent with previous psychological evaluation in that Hayden continues to demonstrate borderline intellectual functioning.” It should also be noted that while this evaluator concludes by suggesting that intensive services continue for the foreseeable future, he does not certify that the Claimant requires an ICF/MR level of care.

- 6) Representatives speaking on behalf of the Claimant testified that [REDACTED] does not interact well with other children and that his abilities are limited. He continues to have toileting accidents and must be taken to the bathroom every 20-30 minutes or he will have an accident. While the reports note that he plays soccer, testimony reveals that he requires a significant amount of direction from the coach in order to participate.
- 7) 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, 2003).

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.

## **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.
- 2) The clinical evidence submitted for recertification, Comprehensive Psychological Evaluation completed in February 2005 and the Neuropsychological Evaluation completed in August 2005, fail to provide a program qualifying diagnosis. Additional testing has confirmed, at least to this point, that the diagnoses of Mental Retardation and Pervasive Developmental Disorder are no longer accurate.
- 3) Although the issue of determining substantial adaptive deficits is moot without a qualifying diagnosis, the narrative information included in the evaluations, as well as adaptive behavior scores, fail to identify moderate level deficits. Testimony received on behalf of the Claimant clearly indicates that his abilities are delayed when compared to his peers, however, there is insufficient evidence to demonstrate that the Claimant requires the level of care and services provided in an ICF/MR institutional setting.

**IX. DECISION:**

It is the decision of the State Hearing Officer to **uphold** the Department's proposal to terminate your 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 17th Day of November, 2005**

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**State Hearing Officer**