



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

January 6, 2006

Dear Mr. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held February 18, 2005 and reconvened on December 7, 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).

Evidence and testimony presented at the hearing reveals that you have substantial adaptive deficits in three (3) or more of the major life areas and require an institutional level of care.

It is the decision of the State Hearing Officer to **reverse** the proposal of the Department to terminate 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 Director, MR/DD Waiver Program
[REDACTED]

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

_____,

Claimant,

vs.

Action Number: 05-BOR-1743

**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 January 6, 2006 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 first convened on February 18, 2005 on a timely appeal filed June 8, 2004. The hearing record remained open pending the completion of a speech pathology report, an achievement battery and a narrative/Vineland adaptive behavior measure. The hearing was reconvened on December 7, 2005 at the request of the Department.

It should be noted that benefits and services have 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

Participants on February 18, 2005

, Claimant

[REDACTED]

Susan Hall, Program Manager, MR/DD Waiver Program (participating telephonically)
Richard Workman, Psychologist Consultant, Bureau for Medical Services (participating telephonically)

Participants on December 7, 2005

[REDACTED]

(participating telephonically)

Susan Hall, Program Manager, MR/DD Waiver Program (participating telephonically)
Richard Workman, Psychologist Consultant, BMS (participating telephonically)

Presiding at the hearing on both dates was Pamela L. Hinzman, 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 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 1

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Department's Exhibits:

- D-1 Notice of Denial
- D-2 Comprehensive Psychological Evaluation (Annual) - Evaluation date January 20, 2004
- D-3 DD-1A Report
- D-4 Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 1
- D-5 Speech Therapy Evaluation- Evaluation date June 29, 2005

VII. FINDINGS OF FACT:

- 1) In accordance with the Department's Medicaid, MR/DD Waiver requirements, the Claimant underwent an annual medical evaluation to determine eligibility for continued participation in the MR/DD Waiver Program.
- 2) On May 24, 2004, 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.

Documents submitted for review do not support the presence of substantial adaptive deficits in three of the seven major life areas identified for Waiver eligibility and the need for 24 hour supervision, protective oversight and active treatment such as that provided in an institutional setting.

- 3) The Claimant has an eligible diagnosis of cerebral palsy and the Department found that he demonstrates substantial limitations in both self-care and capacity for independent living. However, no additional substantial adaptive deficits could be established by the Department based on the documentation submitted.

- 4) Based on information provided in the psychological evaluation (D-2), the Department also determined that the Claimant does not require the level of 24-hour supervision, protective oversight and active care as provided in an institutional setting.

Placement recommendations on the psychological evaluation, however, include community and home-based services. These recommendations, made by licensed psychologist [REDACTED] state that the Claimant must have consistent daily assistance and would likely require placement in an intermediate care facility or other such supervised living facility as an alternative to the MR/DD Waiver Program. Under training recommendations, the report states that the Claimant would benefit from a variety of basic living skills and behavior management services to focus on deficit skill areas. These areas include personal care, ability to be employed at a productive wage level without systematic long-term supervision or support, learning skills without aggression/consistent training and applying such skills, demonstrating appropriate behavior without direct supervision, and making decisions. Ms. [REDACTED] indicates the Claimant has a need for current training through habilitation focusing on activities of daily living and behavior management.

- 5) At the recommendation of the Department, the hearing record remained open pending the completion of a speech pathology report, an achievement battery and a narrative/Vineland adaptive behavior measure. The hearing was reconvened on December 7, 2005, at the request of the Department, at which time the speech pathology report (D-5), completed by Ms. [REDACTED] was reviewed. No additional documentation was presented concerning an achievement battery or Vineland adaptive behavior measure.
- 6) Witnesses for the Claimant testified that the Claimant has a substantial limitation in expressive language, however the Department disagreed.

Mr. Workman referred to the speech pathology report, which states that the Claimant has a profound impairment in articulation but has a mild impairment in expressive language. The report indicates that the Claimant's receptive language is functional and that he is able to express his wants and needs using speech and gestures. Mr. Workman testified that a limitation in articulation does not equate to a limitation in expressive language. The psychological evaluation (D-2) indicates that the Claimant understands simple commands and can find alternative ways to express his basic wants and needs. However, the Claimant's score on the Adaptive Behavior Scale attached to the psychological report is 10, which represents a low age equivalent but seems incompatible with narrative information, according to Mr. Workman. The Department did not determine the specific age equivalent.

Ms. [REDACTED] testified that she would consider the Claimant's expressive language as profoundly impaired as he would have great difficulty communicating with an untrained listener.

Ms. [REDACTED] testified that she administered the Goldman-Fristoe Test of Articulation. On

this test, the Claimant produced 44 errors, resulting in a percentile rank of less than one (1) for an individual of his age and gender. In addition, the Short Form of the Minnesota Test of Aphasia was informally administered to assess the Claimant's receptive and expressive language skills but no scores were obtained since the Claimant was unable to complete standardized tests as a result of inadequate reading skills.

Ms. [REDACTED] testified that she was able to understand 25 percent of the Claimant's speech without context clues and 50 percent with context clues. The Claimant could sustain an "ah" sound for four seconds compared to 15 seconds for an individual with normal capabilities. The "ah" test primarily concerns articulation and the results are equivalent to an individual at the age level of two (2) years and two (2) months. Ms. [REDACTED] testified that these results could affect the Claimant's language because of the limited amount of breath he can produce and that he might use more telegraphic speech to communicate. In addition, Ms. [REDACTED] testified that the Claimant reported a sufficient comfort level when she administered the test, but she learned that he becomes nervous in his speech when dealing with others in the community, which further hinders his ability to communicate. Ms. [REDACTED] testified that she would classify the Claimant as having a profound expressive language impairment when communicating with members of the community as his skills are greatly hindered by poor articulation, inadequate breath and lack of fluency.

- 7) Eligibility Criteria for the MR/DD Waiver Program are outlined in Chapter 1 of the Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual.

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) 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. In addition, an eligible individual must exhibit substantially limited functioning in three (3) or more major life areas.
- 2) Testimony from the Department indicated that the Claimant has an eligible diagnosis and exhibits substantial deficits in the two (2) major life areas of self-care and capacity for independent living.
- 3) Eligibility criteria reveal that another major life area in which the Claimant can exhibit substantial limitations is receptive and/or expressive language. Testimony from the Department indicated that the definition of receptive and/or expressive language does not concern the Claimant's ability to articulate.
- 4) Policy does not specifically define receptive and/or expressive language.
- 5) A written evaluation from a speech pathologist indicates that the Claimant demonstrates functional receptive language, a mild impairment in expressive language and a profound impairment in articulation. During her testimony, however, the pathologist stated that she considers the Claimant's expressive language as profoundly impaired when communicating with untrained listeners in the community. Testimony indicates that the Claimant's oral expression is greatly impaired by poor articulation, inadequate breath and lack of fluency.
- 6) While the Department contends that articulation is not considered in determining expressive language limitations, the Claimant's articulation deficiencies have a direct impact on his ability to express his basic needs to members of the community through language.
- 7) In absence of a specific written policy definition for receptive and/or expressive language, it is the Hearing Officer's opinion that the Claimant exhibits a substantial deficit in expressive language.
- 8) While the Department determined that the Claimant does not require an ICF/MR Level of Care, the psychological evaluation indicates that the Claimant continues to require consistent daily assistance as well as training to develop life skills. The evaluation states the Claimant

would likely require placement in an ICF/MR facility as an alternative to the MR/DD Waiver Program.

- 9) Based on information and testimony presented during the hearing, the Claimant is awarded one (1) additional deficit in the area of receptive/expressive language which brings his total number of substantial delays to three (3), the required amount for MR/DD Waiver Program eligibility.
- 10) The Hearing Officer also finds that the Claimant requires the level of care provided in an institutional setting.

IX. DECISION:

It is the decision of the State Hearing Officer to **reverse** the Department's proposal 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 6th Day of January, 2006

**Pamela Hinzman
State Hearing Officer**