



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 III
Governor

Martha Yeager Walker
Secretary

October 23, 2006

Dear Mr. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held October 11, 2006. Your Hearing request was based on the Department of Health and Human Resources' proposal to terminate your 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 your hearing confirms that you no longer meet the criteria necessary to establish 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 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
Susan Hall, MR/DD Waiver Program
Alva Page III, Esq., BMS

_____, Esq., Legal Aid of WV

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

Claimant,

vs.

Action Number: 06-BOR-1980

**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 October 23, 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 convened on October 11, 2006 on a timely appeal filed April 28, 2006.

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 Father/Guardian
_____, Claimant's Mother/Guardian
_____, Esq., Legal Aid of WV
Alva Page III, Esq., BMS, Assistant AG's Office
Susan Hall, Program Manager, 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. 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

- D-1 Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500-8 (Effective July 1, 2005)
- D-2 Notice of Denial dated 5/4/06
- D-3 DD-2A, Annual Medical Evaluation dated 10/27/05
- D-4 Psychological Evaluation – Triennial, dated 10/27/05

VII. FINDINGS OF FACT:

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

- 2) On or about May 4, 2006, the Claimant was notified via a Notice of Denial that Waiver services have been terminated. This notice goes on to say, in pertinent part:

Documentation submitted for re-certification review does not support the presence of substantial adaptive deficits in three or more of the six major life areas considered for Title XIX MR/DD Waiver eligibility.

- 3) Representatives appearing on behalf the Claimant contend that the Claimant's MR/DD Waiver eligibility should be continued as the Claimant demonstrates substantial adaptive deficits in the following major life areas: *Capacity for Independent Living, Communication and Self-Direction*.
- 4) As a matter of record, the Department stipulated that the Claimant demonstrates a substantial adaptive deficit in his *Capacity for Independent Living*, however, the Department was unwilling to concede that the Claimant demonstrates any additional deficits in the major life areas.
- 5) A review of the evidence resulted in the following findings regarding the Claimant's ability to *communicate*:

The Annual Medical Evaluation (Exhibit D-3) completed by the Claimant's physician on October 27, 2005 indicates that the Claimant's speech is normal.

The Psychological Evaluation (Exhibit D-4) states under section II.C.3 (Page 4, Language) – "Brian exhibits a significant vocabulary and the ability to communicate relatively well {emphasis added}. His speech has an echolalic nature to it at times. Although usually appropriate, at times he tends to loosely associate. He can read books suitable for children nine years or older. He can answer simple questions. He can write or print whole sentences."

Section II.C.2. of Exhibit D-4 states – "He will initiate telephone calls and answer the telephone appropriately."

The ABS-RC:2 scores found on page 7 of Exhibit D-4 indicates that the Claimant Language Development is in the 91st percentile and is rated "above average" (must be in the 75th percentile and below to qualify).

While testimony received on behalf of the Claimant indicates that his speech pattern is sometimes repetitive (echolalic) and he often talks for long periods of time, the evidence fails to demonstrate a substantial adaptive deficit in receptive or expressive language.

- 6) The evidence indicates that the Claimant's *Self-Direction* skills do not qualify as "substantially limited." This finding is based on the following:

The narrative information found in Exhibit D-4 (Section II.C.6.) indicates that the Claimant is interested in flags, big rigs, belts, belt buckles, caps and jewelry. He collects flags, hats, belts and belt buckles and he enjoys listening to oldies music on the radio. He enjoys watching television, playing video games, dining out and he continues to be the assistant manager for the high school basketball team. He is generally uncomfortable in unfamiliar places. This evidence indicates that the Claimant chooses activities to be involved in and he is capable of making his likes and dislikes known.

The ABS-RC:2 Part One Domain Scores reveal that the Claimant scored in the 91st percentile in Self-Direction and is rated “Above Average.”

- 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 (Effective 7/1/05).

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).

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), which must be severe and chronic, in conjunction with substantial deficits. Substantially limited functioning in three or more of the major life areas is required. Substantial limits is defined on standardized measures of adaptive behavior scores three (3) standard deviations below the mean or equal to or below the seventy fifth (75) percentile when derived from MR normative populations.
- 2) The Claimant presents program qualifying diagnoses of Autistic Disorder and Mild Mental Retardation, however, the clinical evidence fails to demonstrate that he has substantial adaptive deficits in three (3) or more of the major life areas. While the Department conceded that the Claimant demonstrates a substantial adaptive deficit in his *Capacity for Independent Living*, the standardized measures of adaptive behavior scores, as well as the clinical and narrative documentation, fail to confirm substantial adaptive deficits in *Communication or Self-Direction*.
- 3) Based on the evidence, continued eligibility for the MR/DD Waiver Program cannot be established.

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 23rd Day of October, 2006

**Thomas E. Arnett
State Hearing Officer**