



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

April 19, 2006

_____ for

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held March 22, 2006. 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 Medicaid MR/DD Home and Community-Based Waiver Services Program is based on current policy and regulations. One of these regulations state that in order to be eligible for the Title XIX MR/DD Home & Community-Based Waiver Program, an individual must have both a diagnosis of mental retardation and/or a related condition(s), 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 1, Section 1)

The clinical evidence submitted at the hearing fails to demonstrate that your son has a diagnosis of Mental Retardation and/or a related condition. Because your son no longer presents an eligible diagnosis, continued eligibility cannot be established.

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
Susan Hall, Coordinator, MR/DD Waiver Program

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

_____,

Claimant,

vs.

Action Number: 05-BOR-3878

**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 April 19, 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 originally scheduled to convene on February 7, 2005 but was reassigned and rescheduled for October 14, 2005, and again on January 23, 2006 but convened on March 22, 2006 on a timely appeal filed September 16, 2004.

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

_____, Claimant's Father

_____ Claimant's Representative

Susan Hall, Coordinator, 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

West Virginia Title XIX MR/DD Waiver Home & Community Based Services Handbook
Code of Federal Regulations § 42 CFR 435.1009

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Departments= Exhibits:

- D-1 Notice of Denial dated August 20, 2004
- D-2 Annual Medical Evaluation (DD-2A) dated 7/29/04
- D-3 Comprehensive Psychological Evaluation (Triennial) dated 5/20/04
- D-4 Correspondence from _____ dated 4/13/04 with an Order from the Circuit Court of _____ entered by The Honorable Judge Louis Bloom on April 8, 2004.
- D-5 SUMMARY AND DECISION OF THE STATE HEARING OFFICER, Completed by Erika Young, State hearing Officer, Board of Review.
- D-6 Eligibility Criteria for the MR/DD Waiver Program (This policy was effective through June

30, 2005).

VII. FINDINGS OF FACT:

- 1) On May 16, 2003, an Administrative Hearing convened before Erika Young, State Hearing Officer, to appeal the Department's proposal to terminate the Claimant's benefits and services provided through the MR/DD Waiver Program. In her SUMMARY AND DECISION OF THE STATE HEARING OFFICER dated September 4, 2003 (D-5), Ms. Young upheld the Department's Proposal to terminate the Claimant's MR/DD Waiver benefits as she concluded the documentation does not show that the claimant has mental retardation or a related condition which constitutes a severe disability resulting in substantial limitation in three or more areas of major life activities.
- 2) Ms. Young's September 4, 2003 SUMMARY AND DECISION OF THE STATE HEARING OFFICER (D-5) was appealed to the Circuit Court in [REDACTED] and by an Order entered by the Honorable Judge Louis Bloom on April 8, 2004(D-4), the matter was remanded to the Board of Review. Judge Bloom ordered that a new psychological evaluation be conducted and that the report of such evaluation be submitted to the Bureau of Medical Services for consideration in conjunction with petitioner's application for recertification for the MR/DD Waiver program.
- 3) The ordered psychological evaluation was completed on May 20, 2004 (D-3) and forwarded to the Bureau for Medical Services, Behavioral Health and Health Facilities (MR/DD Waiver) Office, and was accompanied by an Annual Medical Evaluation (DD-2A) dated July 29, 2004 (D-2).
- 4) On August 20, 2004, the Claimant was notified via a Notice of Denial (D-1) that the Claimant's application for MR/DD Waiver Services was denied. This notice states in pertinent part:

The additional information has been reviewed. The DD-3 and the DD-2A submitted do not reflect a diagnosis of mental retardation nor a related condition. Also, the psychological report indicates he receives school services based upon a learning disability which is also incompatible with mental retardation. Mr. _____ does not meet eligibility criteria for ICF/MR level of care. His initial eligibility was established with an indicated diagnosis of mental retardation. He appears to have benefited from the services, but is not eligible for continued Medicaid approved ICF/MR level _____ of care.
- 5) The crux of the Department's case is predicated on the fact that the Claimant no longer has a diagnosis of Mental Retardation. According to the evidence, the Claimant was initially approved for participation in the MR/DD Waiver Program in 1996 when he presented a diagnosis of Mental

Retardation. However, the proposed termination in November 2002 that led to Ms. Young's decision and the subsequent court order, as well as the current notice identified as exhibit D-1, are based on the fact that the Claimant no longer presents a diagnosis of Mental Retardation or a related condition.

- 6) The court-ordered psychological evaluation completed on 5/20/04 (D-3), indicates in Section III, A, (Intellectual/Cognitive results), that the Claimant took a Kaufman Brief Intelligence Test and scored a Composite IQ score of 67. Ms. [REDACTED] stated that an IQ of 70 and below is recognized as Mentally Retarded.

It should also be noted that prior psychological testing, Section I,B, reveals that the Claimant was tested with the Slosson and scored an IQ of 91 on July 9, 2002 and an IQ of 95 on July 15, 1999. Section I,C, indicates that the Claimant is in LD (Learning Disabled) classes in Reading and Language Arts at [REDACTED] School.

Section III, E, of exhibit D-3 provides the Developmental Findings/Conclusions. In this section Dr. [REDACTED] states – "Results of the psychological assessment indicate that [REDACTED] is functioning within the Mild MR to Borderline Intellectual range of intelligence and has adaptive deficits."

- 7) The Department presented testimony to indicate that an Annual Medical Evaluation (exhibit D-2) was received and reviewed in addition to the psychological evaluation ordered by the [REDACTED] Circuit Court. Exhibit D-2 provides some of the following pertinent information:

Page 4 of this document states under the Diagnostic Section –

Mental: cognitive normal development

Physical: maldevelopment secondary to Vaters, Rickets and Scoliosis

The Department noted that none of the diagnoses provided are Mental Retardation or a program qualifying "related condition." Clearly the physician's statement of cognitive normal development is inconsistent with an individual who would present a MR diagnosis.

- 8) The Psychological Evaluation, exhibit D-3, includes the Claimant's diagnoses on page 7 under section V. The Claimant's diagnoses include:

Axis I: 315 .00 Reading Disorder (by history)

Axis II: r/o Borderline Intellectual Functioning

Axis III: Vaters Syndrome

Axis IV: Social: Needs Protective oversight

Axis V: 50

A diagnosis of Mental Retardation would be found under Axis II, if provided. While evidence reveals the Claimant's IQ score is now below 70, the Department noted that it is the responsibility of the psychologist to assign a diagnosis of Mental Retardation. The Department noted that even after

the previous appeal and subsequent court order for a new psychological evaluation, there is no diagnosis of Mental Retardation or a related condition. According to the testimony provided by the Department's psychologist consultant, Vaters Syndrome is not related condition because it is not associated with cognitive delays.

- 9) The Federal Code of Regulations, found at § 42 CFR 435.1009, provides that persons with related conditions means individuals who have a severe, chronic disability that is attributable to Cerebral palsy or epilepsy; or 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.

- 10) MR/DD Policy Manual, Chapter 1:

I. Level of care Criteria for medical eligibility:

- A. In order to be eligible for the Title XIX MR/DD Home & Community-Based Waiver Program an individual must have both a diagnosis of mental retardation and/or a related condition (s), 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).
- B. The following list includes some examples of related conditions. This list does not represent all related conditions.
1. Autism or Pervasive Developmental Disability, NOS
 2. Spina Bifida
 3. Cerebral Palsy
 4. Tuberos Sclerosis
 5. Traumatic Brain injury and/or Spinal Cord injuries (occurring during the developmental period).
- C. The evaluations must demonstrate that an individual has a diagnosis of mental retardation and/or a related condition which constitute a severe chronic disability which is:
1. Attributable to a mental or physical disability or a combination of both;
 2. Manifested before a person reaches twenty-two (22) years of age;
 3. Likely to continue indefinitely; and
 4. Substantially limits functioning in three or more of the following areas of major life activities;
 - a. Self-Care

- b. Learning (functional academics)
 - c. Mobility
 - d. Capacity for Independent Living (home living, social skills, health and safety, community use, leisure)
 - e. Receptive and /or expressive Language
 - f. Self-Direction
 - g. Economic Self-sufficiency (Employment)
- D. Level of care determinations are made by the Office of Behavioral Health Services (OBHS) and the Bureau for Medical Services (BMS) based on the medical, psychological and social evaluations (DD-2A, DD-3, and DD-4)
- E. Evaluations must demonstrate the need for an ICF/MR level of care and services. This is demonstrated by the individual's need for intensive instruction, services, safety, assistance and supervision to learn new skills and increase independence in activities of daily living. The level of care and services needed must be the same level which is provided in an ICF/MR facility.

VIII. CONCLUSIONS OF LAW:

- 1) The policy and 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 evidence submitted for review fails to provide a program qualifying diagnosis of Mental Retardation and/or a related condition. While the evaluating psychologist indicates that the Claimant is functioning in the Mild MR to Borderline range of intellectual ability, he failed to provide a diagnosis of Mental Retardation. It is unclear if this was an oversight on the part of the psychologist or if Mental Retardation was simply not an appropriate diagnosis for the Claimant, but Mental Retardation is not offered as a diagnosis. The Annual Medical Evaluation not only fails to include a diagnosis of Mental Retardation but indicates that the Claimant has "Cognitive Normal development." This evidence is clearly inconsistent with an individual who presents a diagnosis of Mental Retardation.
- 3) While the Claimant has documented physical difficulties and medical problems that require a high level of assistance, the evidence fails to demonstrate that the Claimant has a program qualifying diagnosis of Mental Retardation or a related condition. Based on the evidence, continued eligibility for participation in 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 19th Day of April, 2006

**Thomas E. Arnett
State Hearing Officer**