



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

February 3, 2006

Dear Mr. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held January 25, 2006. Your hearing request was based on the Department of Health and Human Resources' proposal to terminate benefits and services under 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 500).

Evidence presented during the hearing does not support the presence of three (3) or more substantial adaptive deficits in major life areas or that you require the level of care provided in an ICF/MR facility.

It is the decision of the State Hearing Officer to **uphold** 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

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

_____,

Claimant,

vs.

Action Number: 05-BOR-6740

**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 February 3, 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 convened on January 25, 2006 on a timely appeal filed October 4, 2005. The hearing was originally scheduled for December 28, 2005, but was rescheduled 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

_____, mother of Claimant
_____, Case Manager, _____
_____, Supervised Psychologist, _____
Susan Hall, Program Manager, MR/DD Waiver Program (participating telephonically)
Richard Workman, Psychologist Consultant, Bureau for Medical Services (participating telephonically)

Presiding at the hearing 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 500

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Department's Exhibits:

- D-1 Notice of Denial dated September 14, 2005
- D-2 Psychological Evaluation dated May 13, 2005
- D-3 Psychological Evaluation dated October 20, 2005 from _____
- D-4 Letter from Dr. _____
- D-5 Letter from _____
- D-6 Letter from _____
- D-7 Occupational Therapy Evaluation Report
- D-8 Social History Update dated May 3, 2004
- D-9 Individualized Education Program
- D-10 Social History Update dated October 11, 2005

Claimant's Exhibits:

- C-1 Written statement from Dr. [REDACTED]
- C-2 Report from [REDACTED] dated May 13, 1993
- C-3 Speech-Language Pathology Report dated August 16, 1993
- C-4 Speech-Language Pathology Report dated June 30, 1994
- C-5 Speech-Language Pathology Report dated February 15, 1995
- C-6 Speech-Language Pathology Report dated November 9, 1989
- C-7 Psychological Evaluation by [REDACTED] (Department's D-3)
- C-8 Letter from [REDACTED] Autism Aide
- C-9 Letter from Dr. [REDACTED] (Department's D-4)
- C-10 Letter from [REDACTED] (Department's D-5)
- C-11 Occupational Therapy Evaluation Report (Department's D-7)
- C-12 Letter from [REDACTED] (Department's D-6)
- C-13 Letter from Dr. [REDACTED]

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 September 14, 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 does not support the presence of substantial adaptive deficits in three or more of the six major life areas identified for Waiver eligibility.

- 3) The Claimant has an eligible diagnosis of autism and is 16 years old. The Department found that he demonstrates substantial limitations in capacity for independent living and self-care, however, no additional substantial adaptive deficits could be established by the Department based on the documentation submitted. All parties agreed that the Claimant has no substantial adaptive deficit in mobility.
- 4) In addition to deficiencies in capacity for independent living and self-care, the Claimant's mother believes that her son has substantial deficits in language, learning and self-direction.
- 5) Mr. Workman testified that Psychological Evaluation comments listed on Exhibit D-2 indicate that the Claimant understands and can use language, but requires verbal prompting. Scores on the Wechsler Intelligence Scale reveal that the Claimant has a verbal IQ of 59, a

performance IQ of 94 and a full-scale IQ of 74. Mr. Workman testified that, while the verbal score of 59 is deficient, scores of 55 and below are normally considered as eligible scores for the MR/DD Waiver Program. He stated that a low verbal IQ is typical of an individual with autistic tendencies. The Claimant's full-scale IQ score falls in the borderline range of intellectual functioning.

Mr. Workman testified that Adaptive Behavior Scale scores of less than one (1) percentile (very poor range) are considered as eligible scores for the Waiver Program in comparison to the non-mentally retarded population. The Claimant's language development score was five (5), which does not fall in the very poor range. His standard score in self-direction was seven (7). The only areas in which the Claimant scored less than one (1) percentile are independent functioning and economic activity.

In addition, Exhibit D-2 lists the Claimant's scores on the Wide Range Achievement Test as 101 (high school level) in reading, 100 (8th grade level) in spelling and 73 (4th grade level) in arithmetic. Based on this information, Mr. Workman testified that the Claimant is considered to have functional academics and no substantial delay can be determined in the area of learning.

The Claimant attained factor scores of 86 in personal self-sufficiency, 61 in community self-sufficiency, and 78 in personal-social responsibility. Mr. Workman stated that all of those scores are out of range for program eligibility.

Additionally, Psychological Evaluation comments by Ronald Pearse (D-3) state:

Mr. _____ has fair language skills. He does seem to make some words that are recognizable. His mother reports that his receptive language skills are normal. His mother reports at times he has to be verbally prompted to respond to others.

Regarding social interaction/use of time/leisure activities, the _____ report states that the Claimant enjoys video games, riding his bicycle, roller skating, and collecting Yu-Gi-Oh cards and action figures. Mr. Workman testified that the Claimant's good leisure skills are indicative of self-direction.

- 6) A letter (D-4) from Dr. _____ Assistant Superintendent for Secondary/Special Education for _____ Schools, states:

_____ is not independent in the area of learning or functional academics. Without the assistance of constant supervision and prompting, he would be unable to attend to any lesson presented by his teachers; he would wander out of the classroom and away from the building. With the supervision he is currently receiving, _____ has grown both academically and socially. Without the

funding from the Title 19 Waiver program, the progress in learning, in functional daily living skills, and personal growth he has achieved to date, would be lost.

- 7) A letter (D-5) from care provider _____ indicates that some growth has occurred, but that the Claimant continues to have problems on a social level and in independent self-sufficiency. In addition, the letter states that the Claimant has learning disabilities and would be unable to function in a school atmosphere without an aide.
- 8) A letter (D-6) from _____, autism teacher for _____ Schools, states that the Claimant is successfully participating in a high school environment, but much of his success is attributed to the supervision of an adult aide. Mr. _____ writes:

In addition to adult supervision, _____'s Individualized Education Program provides for many modifications to help him achieve academically. The result of these modifications, _____'s successful grades, may mask the deficits that are inherent to his disorder. Deficits in areas of reciprocal social interaction; communication; and restricted, repetitive behaviors, interests, or activities are very real for _____ and would in my opinion, preclude him from living and functioning in a self-sustained, functional manner. Except on a very basic level, I personally would have serious questions about _____'s capability of providing self-care to sustain himself, receiving and expressing information required of an individual while interacting with those involved in our daily lives, having the focus to learn those things necessary to independently support oneself, provide the self-direction to function on a daily basis, and having the capacity for independent living without adult supervision.

- 9) An Occupational Therapy Report (D-7), completed by Occupational Therapist Anita Nesland and dated January 6, 2006, indicates that the Claimant shows significant delays in fine motor skills, self-help skills and independent living skills. The report states that the Claimant has done well in school, enjoys sports and is a manager of the school basketball team.
- 10) Exhibit D-8, a Social History Update dated May 3, 2004, indicates that the Claimant requires verbal prompting, but does speak. He interacts well with his peers, rides his bicycle and plays in a local park. The report states that the Claimant does well in school and has the ability to remain on task when he wants to do so. Regarding recreation/leisure, the report states that the Claimant enjoys bicycling, roller skating, video games and traveling to different places for "gaming" with his peers.
- 11) Exhibit D-9, an Individualized Education Program dated March 24, 2005, reveals that the

Claimant's educational program will lead to a standard diploma. He performs on the average to below average range (with modifications) in the regular classroom. He can read well aloud and can comprehend fairly well when reading silently, but often does not verbalize all that he has comprehended. The Claimant can perform addition and subtraction of whole numbers with or without decimals, but cannot consistently solve multiplication and division problems. He is in the regular classroom 58 percent of his school time and in special education for 42 percent of the time. He had taken an algebra/geometry prep course, with his mother accompanying him to that class.

- 12) A Social History dated October 11, 2005 (D-10) states that the Claimant interacts well with peers, spends time with his immediate family attending soccer games, and enjoys the rodeo, fireworks, shopping, games at the mall, dining out and going to the races. The report states that the Claimant communicates well with his sister and talks to her more than other individuals. Mr. Workman testified that this information reveals that the Claimant has communication skills, but may not use them regularly.
- 13) Ms. _____ testified that individuals tend to highlight positive attributes when providing information, but that her son's skills appear more advanced on paper than they are in reality. She stated that, without Waiver services, her son would be in a group home should something happen that would render her unable to care for him. Ms. _____ testified about her son's mathematical abilities, stating that these abilities are the result of his autistic memory. She addressed her son's lack of self-care skills and added that he has no concept of legal versus illegal actions or safe versus dangerous situations. She stated that her son would walk out of a store with merchandise because he has no concept that the action would be inappropriate or illegal. In addition, Ms. _____ stated that the Claimant has no concept of strangers, cannot handle money, and will simply throw down his money, walk away, and fail to take his merchandise or change when making a purchase. He cannot tell time and cannot tolerate excessive stimuli (lights, sounds, smells, etc.). Ms. _____ stated that the school basketball coach allows _____ to sit with the team during games and that _____ wears earplugs to curtail loud noises. She testified that _____ has no sense of direction, and has no capabilities concerning monthly budgeting, keeping appointments or housecleaning. He would forget to eat if not reminded and will not attend to his own hygiene following a bowel movement. Ms. _____ stated that while _____ could functionally complete these tasks, he is unable to do so because of his autism. Regarding language skills, Ms. _____ stated that her son has a substantial deficit in receptive language because he "zones out" and will not hear unless the speaker is looking directly at him. She also believes he lacks self-direction skills. Mr. _____ voiced concerns about _____'s ability to function as well academically without consistent supervision and modifications.
- 14) Ms. _____ referred to a letter from Dr. _____ (C-13), who has been one of _____'s physicians for 13 years. The letter indicates that the Claimant has difficulty receiving and processing information due to his autism. In regard to functional academics, Dr. _____ wrote that the Claimant can follow directions, but his responses are odd and unpredictable. Dr. _____ stated that, although _____'s intellect is average or above, it would be "virtually impossible" for him to proceed through the educational process without

direct and continued lifetime supervision. The letter cites areas in which the Claimant requires direct supervision in daily living such as dressing, selecting academic fields, shopping, and obtaining food and other necessities. The letter states that _____ is “virtually incapable of self-direction.”

- 15) Eligibility requirements 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.

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 and 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 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) The Department testified that the Claimant has an eligible diagnosis of autism and the

condition was manifested before the age of 22. The Department found that the Claimant exhibits substantial deficits in two (2) major life areas, including self-care and capacity for independent living.

- 3) Eligibility criteria reveal that other major life areas in which the Claimant can exhibit substantial limitations are mobility, receptive and/or expressive language, self-direction and learning. All parties agreed that the Claimant exhibits no substantial limitations in mobility.
- 4) While the Claimant faces challenges in learning due to his autistic condition and requires supervision in the educational environment, Adaptive Behavior Scale, IQ and Wide Range Achievement Test (WRAT) scores do not reflect that the Claimant has substantially limited functioning in this major life area. The Claimant scored at the high school level in reading, at the eighth grade level in spelling and at the fourth grade level in arithmetic on the WRAT. The Individual Education Program reveals that the Claimant's educational program will lead to a standard diploma, that he performs addition/subtraction problems and has taken an algebra/geometry prep class. Evidence reveals that the Claimant falls in the borderline range of intellectual functioning and indicates that the Claimant has functional academics.
- 5) The Psychological Evaluation of May 13, 2005 indicates that the Claimant understands and can use language, although this evaluation and other documents submitted consistently state that the Claimant requires verbal prompting. The Claimant attained a 59 verbal IQ on the Wechsler Intelligence Scale, but Mr. Workman testified that scores of 55 and below are considered as eligible scores for the Waiver Program. The Claimant's language development score was five (5) on the Adaptive Behavior Scale, which is not less than one (1) percentile and does not fall in the very poor range. The Psychological Evaluation completed by Ronald Pearse indicates that the Claimant has fair language skills. Social Histories dated May 3, 2004 and October 11, 2005 state that the Claimant requires verbal prompting, but does speak and communicates well with his sister. Test scores and evidence do not support the presence of a substantial adaptive deficit in language.
- 6) Regarding self-direction, evidence indicates that the Claimant enjoys sports and sitting with the basketball team as "manager" during games. He also enjoys bicycling (although his mother testified that she must assist him), roller skating, video games, dining out, collecting Yu-Gi-Oh cards and action figures, and a variety of other activities. This information indicates that he exhibits self-direction in choosing the activities he enjoys. In addition, he attained a standard score of seven (7) in self-direction on the Adaptive Behavior Scale, which is not an eligible score for the MR/DD Program. Dr. [REDACTED] letter states that the Claimant requires direct supervision in his activities of daily living, but many of the problems cited concern independent living functions. A deficit under capacity for independent living was awarded by the Department and is not in question. Based on the evidence provided, a deficit for self-direction cannot be clearly substantiated.
- 7) While the Claimant unquestionably faces many challenges and deficiencies as a result of his

autism, evidence and testimony presented do not support the presence of a third substantial adaptive deficit or that the Claimant requires the degree of active treatment provided in an ICF/MR facility. Therefore, the Hearing Officer finds that the Department's proposal to terminate MR/DD Waiver services is valid.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** 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 3rd Day of February, 2006

**Pamela Hinzman
State Hearing Officer**