



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

December 10, 2007

_____ for _____

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held November 8, 2007. 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 500).

The information submitted at your hearing reveals that you no longer meet the criteria necessary to establish medical 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
Jon Sassi, MR/DD Waiver Program
Alva Page III, Esq., BMS
[REDACTED]

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

Claimant,

vs.

Action Number: 06-BOR-1540

**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 December 10, 2007 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 on October 13, 2006, and again on February 9, 2007 and May 4, 2007, but was convened on November 8, 2007 on a timely appeal filed March 30, 2006.

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

[REDACTED]
_____, Claimant's Grandmother / MPOA
_____, Claimant's Aunt
[REDACTED]
[REDACTED]
[REDACTED]

Alva Page III, Esq., BMS, Assistant AG's Office
Steve Brady, Operations Coordinator, MR/DD Waiver Program
Linda 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 its proposal to terminate the Claimant's benefits and services through the MR/DD Waiver Program.

V. APPLICABLE POLICY

Medicaid, Title XIX MR/DD Home and Community-Based Waiver Program Manual, Chapter 500-8

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 Memorandum from Susan Hall dated 1/11/06
- D-2 Memorandum from Susan Hall dated 1/19/06
- D-3 DD-2A, Annual Medical Evaluation, dated 1/20/05
- D-4 DD-3, Psychological Evaluation, dated 5/26/05 & ABS-S:2 rating.
- D-5 DD-2A, Annual Medical Evaluation, dated 2/10/06
- D-6 DD-3, Psychological Evaluation, dated 6/22/06
- D-6a Addendum from [REDACTED] MA., dated 1/19/07 & Non-MR ABS-S:2 dated 6/22/06
- D-7 Psychoeducational Reevaluation dated 10/13/05
- D-8 Notice of Denial dated 3/16/07
- D-9 DD-2A, Annual Renewal, dated 1/25/07
- D-10 DD-3, Psychological Evaluation, dated 6/21/07
- D-11 Individualized Education Program, _____ County Schools (4/10/06)

Claimant's Exhibits:

- C-1 Westest Student Report - Test Date 5/14/07
- C-2 Correspondence from MED Plus, [REDACTED] CRNP for Dr. [REDACTED] M.D.
- C-3 Adaptive Behavior Scale – School (ABS-S:2) dated 6/22/06 (included in Exhibit D-6)
- C-4 Internet (Website source unknown) information on Periventricular Leukomalacia (PVL)
- C-5 Two (2) letters from Dr. [REDACTED] M.D., one letter is dated 12/12/05 and the other is undated.
- C-6 ABS-S:2 Examination Booklet dated 5/26/07
- C-7 Individualized Education Program (IEP) dated 10/21/05

VII. FINDINGS OF FACT:

- 1) The Claimant was undergoing an annual medical evaluation to determine continued eligibility for participation in the MR/DD Waiver Program when she was notified via a Notice of Denial dated March 16, 2006 (Exhibit D-8) that Waiver services were being terminated. This notice states, in pertinent part:

Your waiver services have been terminated.

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

- 2) The evidence reveals that the Claimant presents a program qualifying diagnosis/related condition of PDD/NOS, her condition was manifested prior to the age of 22 and it is likely to continue indefinitely. The Department contends, however, that the Claimant's condition is not severe as she does not demonstrate substantial adaptive deficits in three (3) of the six (6) major life areas.
- 3) Counsel for the Claimant contends that the Claimant demonstrates substantial adaptive deficits in the areas of *Self-Care, Self-Direction, Learning and Capacity for Independent Living*.
- 4) Dr. [REDACTED] purported that the Claimant's diagnoses of PDD/NOS and Periventricular Leukomalacia (PVL) cause her to be hyper-sensitive to different types of stimuli. Things like tight clothing or hair in her face can prompt inappropriate responses. The Claimant's condition causes her to appear like an Autistic individual who performs at a level consistent with individuals who have Mild to Moderate level Mental Retardation. Dr. [REDACTED] acknowledged that someone with Moderate Mental Retardation would likely spend 0% of

their time in the regular classroom setting and that the IEP's (Exhibit D-11 and C-7) are an indication that the school system does not understand the Claimant's PDD/NOS diagnosis.

- 5) The Claimant's *Self-Care* abilities described in Exhibits D-5 (DD-2a dated 2/10/06) and D-9 (DD-2a dated 1/25/07) are inconsistent with regard to incontinence, however, Exhibit D-6 indicates the Claimant is toilet trained, without accident. Exhibit D-9 states that the Claimant needs assistance with eating "at times," however, Exhibit D-5 indicates she is able to feed herself. Both of these exhibits indicate that the Claimant needs assistance with personal hygiene.

Information found on page 4 of Exhibit D-6 (DD-3 dated 6/22/06) reveals that the Claimant is able to feed herself, but spills considerably and drops food on the floor. She still prefers to eat with her fingers. She can bathe herself without assistance, but tends to resist. She can dress herself completely, but has a great deal of difficulty picking out appropriate and clean clothing. Exhibit D-6a (Addendum dated 1/19/07), also states that the Claimant can dress herself adequately, but will tend to wear dirty clothes and tends to resist bathing.

Testimony received at the hearing regarding the Claimant's Self-Care skills is consistent with the documentation submitted for review and further indicates that the Claimant must be reminded to brush her teeth and change feminine pads. While the evidence indicates that the Claimant requires prompting to complete some Self-Care needs, it fails to demonstrate that the Claimant requires hands-on physical assistance or active treatment to learn how to complete these tasks. The Claimant has the mental and physical capacity to complete Self-Care needs but often chooses to be non-compliant. Based on the evidence, the Claimant is not demonstrating a substantial adaptive deficit in Self-Care.

- 6) The Claimant's *Self-Direction* skills were a noted concern by her representatives, however, the evidence fails to demonstrate a substantial deficit in this area. The ABS-S:2 (Exhibit D-6a) shows a percentile score of 9 (Less than 1% is eligible) and the testimony and documentation reveal that the Claimant self-initiates activities. Page 5 of Exhibit D-6 (DD-3 dated 6/22/06) states that the Claimant continues to be more interested in socializing although other documents continue to note this is a weakness. She likes swimming and thought about joining the swim team. She has gone to movies with her friend and will shop. She likes to "IM" others on the computer but was reported to have misused this in the past by talking to a 19-year-old. She likes to play the Sims game and enjoyed visiting the [REDACTED] State University campus. While the Claimant may not always use her Self-Direction skills to the satisfaction of others, it is clear that the Claimant knows her likes and dislikes and self-initiates activities. The evidence demonstrates that the Claimant does demonstrate a substantial adaptive deficit in Self-Direction.

- 7) *Learning* – Exhibit D-6 notes under section I,B that a Wechsler Intelligence Scale for Children-Third Edition was completed during psychological testing completed by Dr. [REDACTED] PhD on March 16, 2000. The Claimant scored as follows – Verbal IQ 105,

Performance IQ 84 and a Full Scale IQ of 95. Achievement testing completed at approximately the same time indicated achievement results consistent with her overall IQ. Subsequent IQ testing in 2001 provided a Verbal IQ of 84, Performance IQ of 68 and a Full Scale IQ of 74, and testing conducted in October 2005 resulted in a Full Scale IQ of 70.

A WISC-IV was administered during the June 22, 2006 Evaluation (D-6) and the Claimant scored a Full Scale IQ of 63. The evaluator noted that the results of the WISC-IV were questionable in their validity due to the Claimant's tendency to give up, and at times distract herself, but estimated that the Claimant is more capable of intellectual functioning in the borderline range. Several documents (Exhibits D-6, D-10, D-11 & C-7) note that the Claimant has difficulty with concentration, and keeping on task, but attribute this behavior to her Attention Deficit Hyperactivity Disorder (ADHD) diagnosis.

Exhibit D-6, Section IV (Recommendations) found on page 8 states – "Interventions need to focus primarily on behavioral support as records suggest that she is up grade level academically."

The Psychoeducational Reevaluation completed on 10/13/05 (Exhibit D-7) states that the Claimant's uncertain levels of motivation probably serve to negatively bias many of her test results. As a result, the following scores may well constitute an under-estimation of her true potential. The Summary sheet reveals that the Claimant scored the following on the WISC-IV; a Full Scale IQ of 70, Verbal Comprehension Index of 77, Perceptual Reasoning Index of 69, Working Memory Standard score of 86 and a Processing Speed of 73. A Kaufman Test of Educational Achievement (KTEA-II) was also administered during the Psychoeducational Reevaluation. The mean (average) Standard Score on this test is 100, therefore, 3 standard deviations below the mean (an eligible score) is 55 and below. The Claimant scored a 52 in Written Expression, however, the other eight (8) areas tested resulted in scores between 69 and 102.

Exhibit C-7, 10/21/05 IEP, states that the Claimant attended regular education classes 64% of the time and attended special education classes 36% of the time. Exhibit D-11 (IEP dated 4/10/06) reveals that the Claimant attends special education classes 24% of the time (regular education classes 76%) - A reduction in special education classes by 12% from 2005 to 2006

The evidence clearly indicates that while the Claimant demonstrates some delays in learning, she is performing in the Borderline Range of intellectual functioning. These findings do not support a substantial adaptive deficit in Learning.

- 8) The components that are considered when determining an individual's *Capacity for Independent Living* (home living, social skills, employment, health and safety, community use, leisure) are the areas in which the evidence appears to support the finding of a substantial adaptive deficit. Testimony and documentation received at the hearing notes several instances where community use and leisure has resulted in unsafe circumstances. As documented in the findings above, the Claimant has exposed herself to unsafe circumstances

with the use of her computer and she has reportedly left school grounds with unknown individual(s). Her social skills are poorly developed as she is unable to respond to social cues or interact effectively with same-age peers. She is reported to be unable to use a stove or make simple meals, use a checkbook or manage money. Although the ABS-S:2 scores in Economic Activity (1%) and Pre/Vocational Activity (2%) are not qualifying scores (eligible scores are less than 1%), when considered in conjunction with the testimony and documentation, the Claimant is not presently employable.

Based on the evidence, the Claimant is demonstrating a substantial adaptive deficit in her Capacity for Independent Living.

- 9) Eligibility Criteria for the MR/DD Waiver Program are outlined in Chapter 500-8 of the Title XIX MR/DD Home and Community-Based Waiver Program 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).

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 less

than 1 percentile when derived from non MR normative populations or equal to or below the seventy-fifth (75th) percentile when derived from MR normative populations. Additionally, policy states that the individual must require and benefit from continuous active treatment and need the same level of care and services that is provided in an ICF/MR institutional setting.

- 2) The evidence submitted at the hearing confirms that the Claimant demonstrates a substantial adaptive deficit in her Capacity for Independent Living, however, no other substantial deficits were confirmed.
- 3) Testimony received on behalf of the Claimant clearly demonstrates delays when compared to her same-age 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.
- 4) 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 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 10^h Day of December, 2007

Thomas E. Arnett
State Hearing Officer