



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

February 5, 2007

\_\_\_\_ for

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Dear Mr. \_\_\_\_:

Attached is a copy of the findings of fact and conclusions of law on your hearing held January 17, 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 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  
Stephen Brady, MR/DD Waiver Program

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

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**Claimant,**

**vs.**

**Action Number: 06-BOR-2019**

**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 5, 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 convened on January 17, 2007 on a timely appeal filed June 1, 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 Mother

Nissar Kalwar, 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 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 500-8 (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 5/19/06)
- D-3 DD-2A, Annual Medical Evaluation (dated 6/7/06)
- D-4 Psychological Evaluation – Update (dated 11/29/05)
- D-5 Annual Medical Evaluation (dated 5/9/06)

### **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 19, 2006, the Claimant was notified via a Notice of Denial (Exhibit D-2) that his Waiver services were 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 as defined for eligibility for the Title XIX MR/DD Waiver program in three or more of the six major life areas.

- 3) The Claimant has a program qualifying diagnosis of Mild Mental Retardation, however, the Department contends, as indicated in Exhibit D-2, that he does not demonstrate substantial adaptive deficits in the six major life areas (Self-care, Receptive or expressive language, Learning, Mobility, Self-direction and Capacity for independent living) as required by eligibility criteria. The difference between this certification evaluation and past certifications is that a psychological evaluation is now requested and used to further evaluate adaptive deficits.
- 4) A review of the Department's evidence resulted in the following findings regarding substantial adaptive deficits in the major life areas:

The Annual Medical Evaluation, DD-2A dated 6/7/06 (Exhibit D-3), notes that the Claimant is ambulatory. Page 3 of Exhibit D-4 (Psychological Evaluation – Update dated 11/29/05) indicates that the Claimant's gross and fine motor skills are adequate for his needs and that he has normal use of his arms and legs. Based on this evidence, the Claimant does not demonstrate a substantial adaptive deficit in *mobility*.

With regard to *Self-care*, Exhibit D-3 reveals that the Claimant continent, he feeds himself and he is independent with personal hygiene. Exhibit D-4 reveals that the Claimant is able to dress, feed, groom and bathe himself independently. He is able to prepare simple meals and perform some household chores. The ABS scores (see page 5 of D-4) are as follows – Independent Functioning (95% Superior), Domestic Activity (98% Superior) and Domestic Activity (98% Superior). This document also shows that the Claimant is continent, feeds himself and that he is independent with his personal hygiene. The evidence fails to demonstrate that the Claimant has substantial adaptive deficits in *Self-care*.

Exhibit D-4 (page 4) states that the Claimant's expressive and receptive *language* skills are fairly well developed. He is able to express his needs and wants and he reportedly reads some newspaper article and books of about fourth grade level. The Claimant's ABS score in language (page 5 of Exhibit D-4) is 98% and rated Superior. The Claimant does not demonstrate substantial adaptive deficits in receptive / expressive *language*.

A review the Claimant's *Self-direction* skills reveal that he is somewhat social and enjoys the company of others. He is generally a passive participant in group activities and prefers to be alone much of the time. He makes good use of his time and enjoys playing the guitar (for which he has taken lessons in the past), keyboard, and harmonica, watching MTV on television, listening to the radio, going to church, going out to eat, shopping and walking around the mall. While the ABS score in *Self-direction* is 75% (Average) and falls on the upper end of eligibility, this score is inconsistent with the level of *Self-direction* skills described in the narrative.

Because policy requires that the Claimant demonstrate substantial adaptive deficits in at least three (3) of the six (6) major life areas in order to establish eligibility, and only two (2) areas (Learning and Capacity for Independent Living) remain, it would be moot to review these areas.

- 5) Counsel for the Claimant contends that the Claimant has been participating in the MR/DD Waiver program for 15 years and that his condition has not improved. While testimony received on behalf of the Claimant reveals that he requires prompting and supervision in some areas of functionality, there was no testimony or documentation submitted to refute the clinical findings cited by the Department.
- 6) 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 a program qualifying diagnoses of 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 it is clear that the Claimant requires prompting and supervision in some areas of functionality, he does not require the level of care and active treatment that is routinely provided in an ICF/MR facility for individuals with moderate level adaptive deficits.
- 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 5th Day of February, 2007**

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**Thomas E. Arnett**

**State Hearing Officer**