



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

November 20, 2007

\_\_\_\_\_  
\_\_\_\_\_  
Dear Ms. \_\_\_\_\_:

Attached is a copy of the findings of fact and conclusions of law on your hearing held November 16, 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 continue to 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 **reverse** 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**

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**Claimant,**

**vs.**

**Action Number: 06-BOR-2398**

**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 November 20, 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 November 16, 2007 on a timely appeal filed July 11, 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

\_\_\_\_\_, Claimant's husband (observing)

Alva Page III, Esq., BMS, Assistant AG's Office

Jon Sassi, 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**

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

#### **VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED**

- |            |   |
|------------|---|
| Exhibit -1 | Medicaid, Title XIX MR/DD Home and Community-Based Waiver Program Manual, Chapter 500-8 |
| Exhibit -2 | Notice of Denial dated July 5, 2007   |
| Exhibit -3 | Investigative Review dated June 15, 2006  |
| Exhibit -4 | DD-2A, Annual Medical Evaluation dated August 13, 2007                                  |
| Exhibit -5 | Psychological Evaluation Update dated April 5, 2006                                     |
| Exhibit -6 | Psychological Evaluation Triennial dated May 2, 2007                                    |
| Exhibit -7 | Psychological Evaluation Update dated April 20, 2005                                    |
| Exhibit -8 | DD-2A, Annual Medical Evaluation dated November 28, 2005                                |

#### **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 (Exhibit 2) that Waiver services have been 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 in three or more of the six major life areas identified for Waiver eligibility nor the need for active treatment and an ICF/MR level of care.

- 2) As a matter of record, the Department stipulated that the Claimant presents an eligible diagnosis, manifested prior to the age of 22, and her condition is likely to continue indefinitely. The issue(s) to be addressed in this decision is whether the evidence demonstrates substantial adaptive deficits in three or more of the six major life areas, the need for active treatment and an ICF/MR level of care.
- 3) The Claimant contends that she should remain medically eligible to participate in the MR/DD Waiver Program as she demonstrates substantial adaptive deficits in the areas of **Self-care, Mobility, Learning, Self-direction and Capacity for Independent Living**. Additionally, the DD-2a's, Annual Medical Evaluations (Exhibits 4 & 8), as well as the Psychological Evaluations (Exhibits 5, 6 & 7) all certify the need for active treatment and an ICF/MR level of care.
- 4) Exhibit-4 (DD-2a dated 8/13/07) indicates that the Claimant is independent in all areas of **Self-care**, however, Exhibit-8 (DD-2a dated 11/28/05) indicates the Claimant needs assistance with personal hygiene. A review of the DD-3's (Exhibits 5, 6 & 7) reveal that the Claimant's physical limitations necessitate assistance with the use of a knife for cutting and spreading food, tying her shoes, fastening her bra, washing her hair, washing her back and drying herself. The Investigative Review (Exhibit 3) notes that the Claimant is capable of completing most of her personal care needs and that any other areas requiring a level of physical assistance should be met with the support of her physically capable husband. This recommendation, however, is not supported by policy or documentation.

The Claimant's deficiencies in the area of Self-care are directly related to her physical limitations. Section IV (Recommendations/Training) found in Exhibit 5 (DD-3 dated 4/5/06) and Exhibit 7 (DD-3 dated 4/20/05) state – "Training goals for Ms. \_\_\_\_\_ should include continuing to improve homemaking/daily living skills, budgeting/financing, and her ability to complete self-care tasks as independently as possible. Specific methodologies should be developed to help her adapt to her physical limitations"[Emphasis Added] . While Exhibit 6 (the most current DD-3 dated 5/2/07) fails to include the same recommendations for active treatment in Self-care, the testimony and documentation received at the hearing reveals that the Claimant requires and would benefit from active treatment in Self-care. Based on the evidence, the Claimant is substantially deficient in Self-care.

- 5) The evidence demonstrates that the Claimant is ambulatory. While the Claimant has right-side hemiparesis related to her Cerebral Palsy diagnosis, and has “difficulties” with fine and gross motor skills, the Claimant ambulates independently and, therefore, does not demonstrate a substantial adaptive deficit in **Mobility**.
- 6) The Investigative Report (Exhibit 3) completed by the Department on June 15, 2006 notes that the area of **Learning** was an identified deficit, however, the concern with a deficit in this area was the Claimant’s apparent refusal to participate in training. The Department indicated that the Claimant’s refusal to accept training “...is almost like refusing to participate on the Waiver.” The Department’s Investigative Review concludes the area of Learning by stating “...so her refusal to participate could reflect her desire to refuse Waiver services.” The Investigative Review uses the terms “almost like refusing” and “could reflect her desire to refuse Waiver service,” however, these statements are not conclusive with regard to the Claimant’s intent for receiving active treatment and cannot be construed to mean that active treatment is neither necessary nor beneficial. Exhibits 5, 6 & 7 all include recommendations from the psychologist that the Claimant should continue receiving training in budgeting/financing.

The Department acknowledged that the Claimant’s math score in the (WRAT 4) Wide Range Achievement Test 4 (Exhibit 6 Section III, page 6) falls within the eligible range (standard score of 55 and below) and agreed that an argument could be made for a substantial deficit in this area. The Department, however, was unwilling to concede a substantial adaptive deficit in Learning because the Claimant has computer skills and her reading scores exceed the eligible range. Because this area has previously been identified as a substantial adaptive deficit (as noted in Exhibit 3), and the Claimant’s computer abilities are unknown, the Claimant’s score from the WRAT 4 is the most compelling indicator of the Claimant’s abilities. Based on the evidence, the Claimant is demonstrating a substantial adaptive deficit in Learning and requires active treatment.

- 7) The Adaptive Behavior Scale scores found in the psychological evaluations (Exhibits 5, 6 & 7) are scores that fall within the eligible range (Standard Score of 12 & below) for a deficit in **Self-direction**, however, these scores are inconsistent with the narrative information in the psychological evaluations and the investigative report (Exhibit 3). The Claimant is reported to be her own guardian, capable of making her own doctor’s appointments, getting medications refilled and self administering her own medications. She enjoys writing stories, playing on her computer, doing needlepoint, listening to country music, taking walks and completing jigsaw puzzles. Testimony received at the hearing reveals that she recently asked to be moved from a job at [REDACTED] answering the phones so that she could be placed in a position as a janitor where she would be more active. There is no information to indicate the Claimant must be directed, prompted or persuaded to initiate or engage in these activities. Based on the evidence, the Claimant fails to demonstrate a substantial adaptive deficit in Self-direction.
- 8) An individual’s **Capacity for Independent Living** includes several components - *home*

*living, social skills, employment, health and safety, community use, leisure.* The Department's Investigative Review indicates the only component of concern is employment.

Although the Investigative Review indicates that an application to DRS or a level of shelter work could offer assistive supports in employment as an alternative, there was no evidence cited to support how this determination was made. Keeping in mind that an ABS Standard score of 12 or less is eligible, the Claimant's ABS-RC:2 Pre/Vocational Activity Standard Scores on Exhibits 5, 6 & 7 were between 4 and 8.

The Claimant's home was reported to be clean and well maintained although some prompting/assistance (not active treatment) is required to keep up on cleaning. The Claimant is capable of making doctor's appointments, self-administering her medications, getting prescriptions refilled, exiting her home during an emergency and contacting emergency services.

The Department cited the following findings in Exhibit 6 regarding ABS-RC:2 Part One Factor scores found in Section III,B.3: {It should be noted that findings in Exhibit-6 are consistent with the findings in Exhibit 5 & 7}

- Personal Self-Sufficiency scores indicate an ability to live alone or in a community-based residential facility.

- The Claimant's Community Self-Sufficiency factor scores reflect that she does not have to be taught behavior associated with community integration in order to move beyond her immediate home environment and be a part of the community.

- The Claimant's Personal-Social Responsibility Quotient indicates an ability to conform to society's interpersonal demands.

Testimony received at the hearing reveals that the Claimant's case management provider [REDACTED] is available by phone during the weekends and holidays in the event the Claimant needs assistance. Staff members are available at all times.

The two primary components of concern are *home living* due to the Claimant's inability to manage budgeting/finance and *employment*. Without some level of documented accomplishment in these areas, I am unconvinced the Claimant's Capacity for Independent Living is anything short of substantially deficient. Based on the evidence, I find the Claimant demonstrates 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 equal to or below the seventy fifth (75) 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 documentation submitted for review confirms that the Claimant demonstrates substantial adaptive deficits in three of the six major life areas – Self-care, Learning and Capacity for Independent Living.
- 3) The evidence further demonstrates that the Claimant requires and would benefit from active treatment in the substantially deficient major life areas. Therefore, the Claimant demonstrates a need for the same level of care and services that are provided in an ICF/MR facility.
- 4) Continued eligibility for participation in the MR/DD Waiver Program is therefore established.



**IX. DECISION:**

It is the decision of the State Hearing Officer to **reverse** 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 20<sup>th</sup> Day of November, 2007**

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**Thomas E. Arnett  
State Hearing Officer**