



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 16, 2007

____ for

Dear Ms. ____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held January 25, 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 your son no longer meets 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**

Claimant,

vs.

Action Number: 06-BOR-2767

**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 16, 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 25, 2007 on a timely appeal filed August 21, 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 / Representative (Participated telephonically)

Stephen Brady, Program Coordinator, MR/DD Waiver (Participated telephonically)

Linda Workman, Psychologist Consultant, BMS (Participated telephonically)

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 8/4/06
- D-3 DD-2A, Annual Medical Evaluation dated 6/20/06
- D-4 DD-3, Annual Psychological Evaluation – dated 6/2/06
- D-5 Comprehensive Psychological Evaluation (Triennial), dated 5/13/05

VII. FINDINGS OF FACT:

- 1) In accordance with the section 504 of the Department's Medicaid, MR/DD Waiver Manual, the Claimant was undergoing an annual medical evaluation to determine continued eligibility for participation in the MR/DD Waiver Program.
- 2) On or about August 4, 2006, the Claimant was notified via a Notice of Denial that his Waiver services have been terminated. This notice goes on to say, in pertinent part:

Documentation submitted for re-certification review does not support the

presence of an eligible diagnosis for the Title XIX MR/DD Waiver program. The psychologist ha [sic] not certified the need for an ICF/MR level of care.

- 3) The Department reviewed Exhibit D-3 and noted that the Claimant's only physical and neurological problem is a "decreased" attention span. This document does include an eligible diagnosis of Mental Retardation (MR), however, Exhibit D-4 was cited to show that a MR diagnosis is not appropriate for the Claimant.
- 4) Previous Psychological Testing, found in Exhibit D-5, and Section I.B., page 1 of Exhibit D-4, reveals that the Claimant has scored in the MR to Mild MR Range in earlier testing, however, current testing indicates that the Claimant is performing in the Borderline Range of intellectual functioning. Section V. of Exhibit D-4 confirms a diagnosis of Borderline Intellectual Functioning (No MR diagnosis provided) and the evaluating Psychologist states on Page 6, (Placement Recommendations) – "Although ____ exhibits some mild adaptive functioning deficits, his cognitive functioning is above the mental retardation range so he does not qualify to receive the benefits of the Title XIX Waiver Program."
- 5) Testimony presented at the hearing supports the fact that the Claimant requires some prompting and supervision in his daily activities, however, there was no clinical evidence submitted to refute the evidence presented 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 clinical evidence submitted by the Department confirms that the Claimant no longer presents a program qualifying diagnosis of Mental Retardation. While the evaluating Psychologist acknowledges that the Claimant demonstrates some mild adaptive deficits, he indicates in the recommendation section of his evaluation that the Claimant's cognitive abilities clearly disqualify him from participating in the MR/DD Waiver Program.
- 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 16th Day of February, 2007

**Thomas E. Arnett
State Hearing Officer**