



State of West Virginia  
**DEPARTMENT OF HEALTH AND HUMAN RESOURCES**  
Office of Inspector General

Joe Manchin III  
Governor

Board of Review  
PO Box 29  
Grafton WV 26354  
July 19, 2007

Martha Yeager Walker  
Secretary

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

Attached is a copy of the findings of fact and conclusions of law on your hearing held April 12, 2007. Your hearing request was based on the Department of Health and Human Resources' proposal to terminate your child's benefits and services under the MR/DD Home and Community-Based 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 and benefit levels for the MR/DD Home and Community-Based Waiver Program are determined based on current regulations. One of these regulations specifies that in order to be eligible for the Title XIX MR/DD Home & Community-Based Waiver Program, an individual must have both a diagnosis of mental retardation and/or a related condition(s), and require the level of care and services provided in an Intermediate Care Facility for individuals with Mental Retardation and /or related conditions. (MR/DD Waiver Manual § 503.1

The information provided during the hearing, failed to demonstrate substantial functional limitations in three or more of the designated major life areas, indicating that the level of care provided in an ICF/MR facility is not currently required.

It is the decision of the State Hearing Examiner to **uphold** the Department's determination as set forth in the November 16, 2005 notification to terminate benefits and services under the MR/DD- Home and Community-Based Waiver Program.

Sincerely,

Ron Anglin  
State Hearing Examiner  
Member, State Board of Review

cc: Erika Young, Chairman, Board of Review  
Stephen Brady, Office of Behavioral Health Services  
Nisar Kalwar, Esq. Assistant Attorney General- DHHR  
\_\_\_\_\_

# WEST VIRGINIA DEPARTMENT OF HEALTH & HUMAN RESOURCES

\_\_\_\_\_  
Claimant,

v.

Action Number 05- BOR- 7024

West Virginia Department of Health & Human Resources,  
Respondent.

## SUMMARY AND DECISION OF THE STATE HEARING OFFICER

### I. INTRODUCTION:

This is a report of the State Hearing Officer resulting from a fair hearing concluded on July 18, 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 held April 12, 2007 on a timely appeal filed November 30, 2005. It should be noted here that services have continued pending a hearing decision.

### 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 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). 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 to claimant

\_\_\_\_\_, claimant

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Stephen Brady, MR/DD Program, Office of Behavior Health Services (by phone)

Linda Workman, Psychologist Consultant, Bureau for Medical Services (by phone)  
Nisar Kalwar, agency's counsel (by phone)  
Presiding at the hearing was Ron Anglin, State Hearing Examiner and a member of the State Board of Review.

#### **IV. QUESTION(S) TO BE DECIDED:**

The question to be decided is whether the agency was correct in their determination that the claimant does not meet the medical eligibility criteria for continued participation in the MR/DD Home and Community-Based Waiver Program.

#### **V. APPLICABLE POLICY:**

MR/DD Waiver Manual § 503.1

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

##### Department Exhibits:

- D-1- MR/DD Waiver Manual Policy 503.1
- D-2- Annual Medical Evaluation, 2/21/05
- D-3- Individualized Education Program, 2/10/05
- D-4- Psychoeducational Evaluation, 1/11/05
- D-5- Notification of termination, 11/16/05
- D-6- Annual Medical Evaluation, 12/30/05
- D-7- Psychological Evaluation, 1/10/06
- D-8- ABS-S: 2 Scores, from D-7
- D-9- ICF/MR Level of Care Evaluation, 1/18/07

##### Claimant Exhibits:

- C-1- Statement [REDACTED] EDD, 2/28/06

#### **VII. FINDING OF FACTS:**

- 1) On November 16, 2005, a Notice of Termination (D-5) was sent to the claimant as a result of a recertification review. The basis of that decision stated that information provided: *"does not support the presence of substantial adaptive deficits in three or more of the six major life areas identified for Waiver eligibility."*
- 2) A hearing request was received by the agency November 30, 2005 and by this examiner January 3, 2006. A hearing was scheduled for March 15, 2006. A continuance was granted March 8, 2006 at claimant's request as additional testing was being completed and would not be available by the 15<sup>th</sup>. March 22, 2006 E-Mail from [REDACTED] still anticipating

additional reports from [REDACTED] Hearing rescheduled for October 12, 2006. October 11, 2006 claimant now represented by Legal Aid- continuance granted to allow agency to secure counsel. Hearing rescheduled for January 11, 2007. On January 10, with the agreement of the agency a continuance was granted to claimant.

- 3) A hearing was scheduled for and held April 12, 2007.
- 4) Exhibits as listed in Section VI above were accepted. Written closing arguments received by May 14, 2007
- 5) Testimony was heard from the individuals listed in section III above. All persons giving testimony were placed under oath.
- 6) The agency's psychologist reviewed the medical/social information. Noted that the medical evaluation (D-2) indicates independence in mobility, continence and feeding with assistance needed in personal hygiene and close supervision in mental/behavioral difficulties. Report recommends speech and occupational therapy with a diagnosis of autism. From D-3- Individualized Education Program, child was 6 and in kindergarten at the time. Noted child doing work at regular classroom level. Can spell name and copy other's and classroom words. Identifies letters and most sounds. Reads at appropriate level and is able to follow 2 to 3 step directions. Attends to activities 10-15 minutes without reminders. Speech therapist notes child communicates orally, speaks in complete sentences, asks and answers questions and initiates conversation. Test scores were in the average range- 55 the threshold used for program eligibility. Occupational report seems typical of a six year old. Report notes child is in regular Ed 96% of the day. Skills noted appear to exceed those of eligibles. D-4- Psychoeducational Evaluation indicates child's FSIQ was 80 – low average, verbal 85- low average range, and performances 92- average range. On this basis it appears child is not MR as had been thought previously. Subtest scores are mostly in average range. School readiness score was in the average range. Review of all documents indicates child is no longer in the MR range. No significant problems with language. No significant self care issues noted. Autism is an eligible diagnosis. Opinion that child not eligible in 4 of the 6 areas of functionality- self-care, learning, mobility and language. D-6, Annual Medical Evaluation essentially same as earlier evaluation (D-2). D-7- Psychological Evaluation, WRAT3 scores are in reading and spelling are in the high average range while arithmetic is in the borderline range but above the threshold of 55. Notes that section on active treatment appear typical of child's age. D-8, ABS S: 2 scores are with non MR norms and contain no MR/DD eligible scores. D-9- ICF/MR Level of Care Evaluation failed to change the agency's decision. Child seems to be self- directed – a lot of activities –initiated and involved.
- 7) Testimony offered on behalf the claimant indicates that the child must be told to bathe and must be supervised. Still uses hands occasionally when eating. Need some assistance and prompting with personal hygiene. Needs direction in selecting proper clothing but can dress herself and tie her own shoes. Has a large vocabulary but sometimes answers are inappropriate. Doesn't understand safety issues- open a car door

while moving. Receiving speech therapy through school system. Has trouble with math and has been pulled out of regular classes for math.

8) Eligibility Criteria for the MR/DD Waiver Program are outlined in the MR/DD Waiver Manual Policy § 503.1

- 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

- Substantially limited functioning in three or more of the following major life areas: **self-care**, receptive or expressive **language, learning** (functional academics), **mobility, self-direction**, and **capacity for independent living**.

- 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) An eligible individual must possess substantially limited functioning in **three** or more of the **six** designated major life areas.

2) Mobility - evidence reveals no physical impairment. The claimant ambulates independently. No substantial deficit found

3) Self-Care- evidence reveals independence with the exception of prompting and reminders with personal hygiene. Claimant can feed and dress herself. Capabilities appear age appropriate. No substantial deficit was apparent.

4) Receptive/Expressive Language- receptive and expressive language skills appear within

normal limits. The speech therapist suggests that the claimant communicates orally in complete sentences and asks and answers questions and initiates conversation. A finding of significant deficit in this area is not supported by documentation.

- 5) Learning (functional academics) – Intelligence scores range from 80- 92 which according to the psychological evaluation place the claimant in the low average to average range in intelligence. The claimant is in regular classes 96% of the time. Reading and spelling skills are age appropriate with some limitations in math skills. No substantial qualifying deficit found.
- 6) To establish eligibility, an eligible individual must possess substantially limited functioning in **three** or more of the **six** designated major life areas. Sufficient qualifying deficits were not convincingly established in 4 of the 6 designated areas therefore medical eligibility for the program cannot be established.

## **IX. DECISION**

After a thorough examination of all evidence presented, it is the decision of the State Hearing Examiner to uphold the Department's proposal in termination of the claimant's medical benefits and related services under the MR/DD Waiver Program as set forth in the November 16, 2005 notification.

While it is clear that the claimant continues to have some obvious challenges, evidence provided fails to support a finding that the claimant requires that level-of-care routinely provided in an ICF/MR facility.

## **IX. RIGHT OF APPEAL:**

See Attachment.

## **X. ATTACHMENTS:**

The Claimant's Recourse to Hearing Decision.

IG-BR-29

**ENTERED This 19<sup>th</sup> Day of July 2007,**

---

**RON ANGLIN**  
**State Hearing Examiner**