



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

September 11, 2008

\_\_\_\_\_ for  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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

Attached is a copy of the findings of fact and conclusions of law on your hearing held August 27, 2008. 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, Medicaid Chapter 500, Volume 13).

The information submitted at your hearing fails to demonstrate 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 **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

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

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**Claimant,**

**vs.**

**Action Number: 07-BOR-1419**

**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 September 11, 2008 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 August 27, 2008 on a timely appeal filed May 22, 2008.

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

\_\_\_\_\_, Claimant's father/representative

Steve Brady, Program Coordinator, MR/DD Waiver, BMS (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 provided through the Medicaid MR/DD Waiver Program.

### **V. APPLICABLE POLICY**

West Virginia Medicaid Regulations, Chapter 500 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07.

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

#### **Department's Exhibits:**

- D -1 West Virginia Medicaid Regulations, Chapter 500– Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07
- D-2 Notice of Denial/Termination dated 5/12/08
- D-3 ICF/MR Level of Care Evaluation (DD-2A) – 1/7/08
- D-4 Psychological Evaluation (Update) – Completed on 7/26/07
- D-5 Adaptive Behavior Scale-School Second Edition (ABS-S:2) dated 7/26/07
- D-6 Individualized Education Plan (IEP) dated 4/26/07
- D-7 Psychoeducational Evaluation dated 5/3/06
- D-8 [REDACTED] County Schools Evaluation Report dated 5/4/06
- D-9 ICF/MR Level of Care Evaluation dated 7/2/08
- D-10 Correspondence from [REDACTED] DPT, (undated)

D-11 Comprehensive Psychological Evaluation (Triennial) dated 5/28/08

**Claimant's Exhibits:**

- C-1 Summary of Therapy Report, [REDACTED] MS-CCC-SLP, Speech Services, dated 6/10/08
- C-2 Correspondence from [REDACTED] [REDACTED] MOT, OTR/L – (undated but notes Claimant's age as 7 years, 7 months.)

**VII. FINDINGS OF FACT:**

- 1) The Claimant was undergoing an annual reevaluation to determine continued eligibility for participation in the Medicaid MR/DD Waiver Program and was notified via a Notice of Denial/Termination dated May 12, 2008 (D-2) that Waiver services have been terminated/denied. This notice states, in pertinent part:

Your Waiver services have been terminated.

Your application was terminated because:

Documentation submitted does not support the presence of substantial adaptive deficits in three or more of the six major life areas identified for Waiver eligibility. Specifically, the documents failed to demonstrate substantial limitations in the following major life areas: Learning, Self Direction, Receptive or Expressive Language, Mobility and Capacity for Independent Living.

It should be noted that *Self-Care* was identified as a substantial adaptive deficit.

- 2) The Department reviewed MR/DD eligibility requirements and introduced Exhibits D-1 through D-11. The Department's psychologist consultant reviewed the evidence and provided detailed testimony regarding the Claimant's condition and how the evaluations were compared to the eligibility criteria. The Department maintains, as noted in Exhibit D-2, that the Claimant no longer demonstrates substantial adaptive deficits in three (3) of the six (6) major life areas as required by the eligibility criteria.
- 3) The Claimant's representatives contend that the Claimant is still deficient in Self-Care, Self-Direction, Receptive or Expressive Language and Capacity for Independent Living. They purported that every day is different with a child who has Autism. The Claimant is improving, in part because of this program and the therapies offered, but some of the scores cited in the evaluations are slightly over the level for eligibility. The Claimant's representatives are concerned that her abilities could potentially regress without services. Claimant's Exhibits C-1 and C-2 were provided in support of continued eligibility for MR/DD Waiver Services.

- 4) The major life area of **Self-Care** was identified in the Department's notice as a substantial adaptive deficit, therefore, this major life area does not need to be explored.

The following evidence was reviewed in evaluating the contested areas:

**Self-Direction:**

Self-Direction indicates whether an individual initiates activities on his/her own and whether he/she demonstrates likes and dislikes regarding different activities. The ABS:S 2 report (D-5) was completed using MR Norms and the Claimant scored a Standard Score of 14 (12 and below are eligible). The most current ABS Scores can be found in Exhibit D-11 wherein Non-MR Norms were appropriately used to assess the Claimant (an eligible ABS Score is less than 1 percentile when using Non-MR Norms). In the area of Self-Direction, the Claimant scored in the 5<sup>th</sup> percentile (in excess of eligibility criteria). There was no testimony presented specific to the Claimant's Self-Direction abilities and narrative documentation is limited.

In the absence of evidence to the contrary, a substantial adaptive deficit in Self-Direction cannot be identified.

**Receptive or Expressive Language:**

Testimony presented at the hearing reveals that the Claimant continues to have challenges in this area. Exhibit D-5 includes the results of a Preschool Language Scale-4 test administered to the Claimant on 5/4/06. An eligible score on this test (three standard deviations below the mean) is 55 and below. The Claimant scored as follows: Auditory Comprehension Standard Score 78, Expressive Communication Standard Score 81, and Total Language Standard Score of 77.

ABS Scores (MR Norms) in Exhibit D-5 reveal a Standard Score of 14 (12 or under is eligible) and the ABS Scores found in D-11 (Non-MR Norms - eligible scores are less than 1 percentile) reveal a percentile score of 25. Page 4 of 13 on the Claimant's IEP (D-6) indicates that while she struggles with initiating and maintaining conversations, she has mastered telling a short story of at least three sentences about a picture, formulating questions with correct syntax and answering when and why questions. It is noted that she continues to receive speech therapy as scheduled.

Exhibit D-11 notes on Page 2 that the Claimant communicates verbally and she is able to make her needs/wants known. Page 4 notes that on the WISC-IV, the Claimant received a Full Scale I.Q. score of 81. This places her at the 10<sup>th</sup> percentile when compared with other individuals her age and suggests a level of functioning in the Low Average to Borderline range. The Verbal Comprehension subtest scores range from 6 to 13 with an average score of 9.6. Her overall performance on this index places her at the 45<sup>th</sup> percentile with a Composite Score of 98. Documentation goes on to say "Her abilities in general verbal intelligence and social judgment are within the expected range, given her Full Scale I.Q.

score.” Page 6 of D-11 notes that a Vineland II and WRAT-4 II were administered and the Claimant received a Communication Standard Score of 72 (55 and below is an eligible score).

Claimant’s Exhibits C-1 & C-2 were reviewed but failed to provide information contrary to the aforementioned evidence.

Based on the evidence, the Claimant is not demonstrating a substantial adaptive deficit in Receptive or Expressive Language (communication).

**Capacity for Independent Living** – It is moot to review this major life area as three (3) substantially deficient areas cannot be identified.

- 4) West Virginia Medicaid Regulations, Chapter 500, Volume 13 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07, includes the following pertinent medical eligibility criteria:

**Medical Eligibility Criteria**

The MR/DD State Waiver Office determines the medical eligibility for an applicant in the MR/DD Waiver Program. In order to be eligible to receive MR/DD Waiver Program Services, an applicant must meet the following medical eligibility criteria:

- Have a diagnosis of mental retardation and/or a related condition,
- Require the level of care and services provided in an ICF/MR (Intermediate Care Facility for the Mentally Retarded) as evidenced by required evaluations and corroborated by narrative descriptions of functioning and reported history. An ICF/MR provides services in an institutional setting for persons with mental retardation or related condition. An ICF/MR facility provides monitoring, supervision, training, and supports.

MR/DD State Waiver Office determines the level of care (medical eligibility) based on the Annual Medical Evaluation (DD-2A), the Psychological Evaluation (DD-3) and verification if not indicated in the DD-2A and DD-3, that documents that the 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. Other documents, if applicable and available, that can be utilized include the Social History, IEP for school age children, Birth to Three assessments, and other related assessments.

The evaluations must demonstrate that an applicant has a diagnosis of mental

retardation and/or a related developmental condition, which constitutes a severe and chronic disability. For this program individuals must meet the diagnostic criteria for medical eligibility not only by the relevant test scores, but also the narrative descriptions contained in the documentation. To be eligible, the member:

- Must have a diagnosis of mental retardation, with concurrent substantial deficits (substantial limitations associated with the presence of mental retardation), and/or

- Must have a related developmental condition which constitutes a severe and 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, and requires services similar to those required for persons with mental retardation.

- Autism

- Traumatic brain injury

- Cerebral Palsy

- Spina Bifida

- Tuberous Sclerosis

Additionally, the member who has a diagnosis of mental retardation and/or related conditions and associated concurrent adaptive deficits must have the following:

- Manifested prior to the age of 22, and

- Likely to continue indefinitely.

- Must have the presence of a least three (3) substantial deficits out of five of the major life areas (term is defined in Title 42, Chapter IV, Part 435.1009 of the Code of Federal Regulations or CFR.

Refer to 503.1, Functionality section for a list of the major life areas.

## **Functionality**

- Substantially limited functioning in three (3) or more of the following major life areas; (“substantially limited” is defined on standardized measures of adaptive behavior scores as three (3) standard deviations below the mean or less than one (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 not only by the relevant test scores, but also the narrative descriptions contained in the documentation submitted for review, i.e., psychological, the IEP, Occupational Therapy evaluation, etc.). Applicable categories regarding general functioning include:

- 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 and leisure activities).

For applicable major life functioning areas, refer to Code of Federal Regulation (CFR): 42 CFR435.1009.

## **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:
  - o A need for intensive instruction, services, assistance, and supervision in order to learn new skills, maintain current level of skills, and increase independence in activities of daily living,
  - o A need for the same level of care and services that is provided in an ICF/MR institutional setting.

The applicant or legal representative will be informed of the right to choose between ICF/MR services and home and community-based services under the MR/DD Waiver Program and informed of his/her right to a fair hearing at the time of application (Informed Consent, DD-7).



### **Conditions Ineligible**

- Substantial deficits associated with a diagnosis other than mental retardation or a related diagnosis do not meet eligibility criteria.
- Additionally, any individual needing only personal care services does not meet the eligibility criteria.
- Individuals diagnosed with mental illness whose evaluations submitted for medical eligibility determination indicate no previous history of co-occurring mental retardation or developmental disability prior to age 22. The member's clinical evaluators must provide clinical verification through the appropriate eligibility documentation that their mental illness is not the primary cause of the substantial deficits and the mental retardation or developmental disability occurred prior to the age of twenty-two (22).

### **VIII. CONCLUSIONS OF LAW:**

- 1) 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 in three (3) or more of the major life areas. "Substantially limited" is defined on standardized measures of adaptive behavior scores as three (3) standard deviations below the mean or less than one (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. 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 area of policy for which the Claimant was found to be ineligible is confined to functionality – the individual must demonstrate substantial adaptive deficits in three (3) of the six (6) major life areas. The Department conceded in its Notice of Termination that the Claimant continues to demonstrate a substantial adaptive deficit in Self-Care, however, a review of the evidence confirms that the Claimant no longer demonstrates three (3) substantial adaptive deficits in the major life areas.
- 3) Based on the evidence, the Department was correct in its proposal to terminate the Claimant's benefits and services provided through the Medicaid MR/DD Waiver Program.

### **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 provided 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 11<sup>th</sup> Day of September, 2008**

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**Thomas E. Arnett  
State Hearing Officer**