



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

July 9, 2008

[REDACTED]

Attn: \_\_\_\_\_, APS

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

Attached is a copy of the findings of fact and conclusions of law on your hearing held June 25, 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 Manual, Chapter 502.1).

The information submitted at your hearing confirms that you no longer 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

Pc: Chairman, Board of Review  
Mekell Golden, Hearing Coordinator, MR/DD

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

\_\_\_\_\_,

**Claimant,**

vs.

**Action Number: 07-BOR-2155**

**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 July 9, 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 June 25, 2008 on a timely appeal filed September 14, 2007.

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**

\_\_\_\_\_, APS, DHHR (DHHR is Claimant's Guardian)  
\_\_\_\_\_, Services Coordination Supervisor, \_\_\_\_\_  
\_\_\_\_\_, Program Coordinator / Therapeutic Consultant, \_\_\_\_\_  
\_\_\_\_\_, RN, \_\_\_\_\_  
\_\_\_\_\_, Service Coordinator, \_\_\_\_\_  
Mekell Golden, Hearings Coordinator, 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.

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

- D-1 Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500
- D-2 Notice of Denial dated 1/11/07
- D-3 Notice of Denial/Termination dated 12/5/07
- D-4 DD-2A, Annual Medical Evaluation, dated 1/3/06
- D-5 DD-2-A- ICF/MR Level of Care Evaluation, dated 10/16/07
- D-6 Psychological Evaluation (Triennial), dated 4/5/06
- D-7 Psychological Evaluation (Triennial), dated 9/25/07
- D-8 Psychological Evaluation dated 3/13/08
- D-9 Psychological Evaluation dated 5/1/08

#### **VII. FINDINGS OF FACT:**

- 1) The Claimant was undergoing annual recertification to determine continued medical eligibility for participation in the MR/DD Waiver Program. On or about January 11, 2007, the Claimant was notified via a Notice of Denial (D-3) that her Waiver services were terminated. This notice states, in pertinent part:

While the physician has offered a mental retardation diagnosis for Miss \_\_\_\_\_, this diagnosis is not supported by the psycho-metric data contained in the DD-3 and the psychologist lists Borderline Intellectual Functioning which is not an eligible diagnosis on Axis II. Records available to the reviewers at the time of review did not support the presence of the PDD, NOS diagnosis within the developmental period. Therefore, Miss \_\_\_\_\_ is not considered to have an eligible diagnosis for the Title XIX MR/DD Waiver program.

- 2) Additional information was submitted to the MR/DD Waiver office for review and on December 5, 2007, a Notice of Denial/Termination (D-3) was issued. This notice states:

Your Waiver services have been terminated.

Your application was terminated because:

Although the physician has offered a diagnosis of mental retardation, this diagnosis is not supported by the psycho-metric data and the psychologist has diagnosed Borderline Intellectual functioning. Therefore, Miss \_\_\_\_\_ does not have an eligible diagnosis for the Title XIX MR/DD Waiver program.

- 3) The Department's psychologist noted that while the DD-2A's (D-4 & D-5) include a diagnosis of Mild MR, this diagnosis is inconsistent with the clinical evidence found in the psychological evaluations.

Page 5 of Exhibit D-6 (Psychological Evaluation dated 4/5/06), shows that a Wechsler Adult Intelligence Scale III (WAIS-III) was administered during the evaluation. The results include the following IQ scores: Verbal IQ - 74, Performance IQ - 77 and Full Scale IQ-74. The evaluator states on Page 6, - "Ms. \_\_\_\_\_'s general cognitive ability is in the Borderline range of intellectual functioning, as measured by the Wechsler Adult Intelligence Scale - Third Edition (WAS-III)." Recommendations, found on page 9, were noted by the Department's psychologist as inappropriate for individuals who would require an ICF/MR level of care and page 17 again notes that the Claimant's IQ falls within the Borderline intellectual range. An Axis II diagnosis of Borderline Intellectual Functioning (Not Mild MR) is provided in Section V. The Department's psychologist also noted that both of the individuals who completed this evaluation (\_\_\_\_\_) Psychometrician and (\_\_\_\_\_) (\_\_\_\_\_) MA, Licensed Psychologist) participated in subsequent evaluations (D-7 & D-9).

Exhibit D-7, (Psychological Evaluation completed on 9/25/07) was completed under the supervision of Cynthia Sapulding approximately 1.5 years later. The Wechsler Adult Intelligence Scales-Third Edition (WAIS-III) was again administered for this evaluation. The results show a Verbal IQ of 66, Performance IQ of 86 and a Full Scale IQ of 74. While

there was a difference noted in the split (Verbal vs. Performance IQ), the Full Scale IQ (FSIQ) remained at 74. Under Section III.A.3 (Discussion) the evaluator notes – “Ms. \_\_\_\_\_ obtained a FSIQ score of 74, which placed her general cognitive ability in the Borderline range of intellectual functioning.” The evaluator goes on to state – “There was a 95% likelihood that her true FSIQ fell within the range of 70-79.” Page 14 provides an Axis II diagnosis of Borderline Personality Disorder and Borderline Intellectual Functioning – neither of which are MR/DD program qualifying diagnoses. The Department noted that while the evaluator indicates on page 15 (Placement Recommendations) that the Claimant continues to require an ICF/MR level of care, eligibility for the MR/DD program requires an eligible diagnosis.

The WASI-III was also administered in the Psychological Evaluation completed by \_\_\_\_\_ (D-8) on March 13, 2008. This evaluation reveals the following scores: Verbal IQ-68, Performance IQ-83 and Full Scale IQ of 73. These scores are consistent with the IQ testing completed previously and the Axis II diagnosis provided on page 10 is Borderline Personality Disorder and Borderline Intellectual Functioning. This evaluation fails to provide an eligible diagnosis of MR and/or a related condition.

On May 1, 2008 (two months after the completion of D-8), a new Psychological Evaluation (D-9) was completed. The Department’s psychologist noted that no new or additional intellectual testing was done for this evaluation (as indicated on page 6, Section III.A.1), yet the evaluator \_\_\_\_\_ MA, LSW, Psychometrician) who also completed Exhibit D-6 and provided a diagnosis of Borderline Intellectual Functioning, summarized the previous intellect scores and provided an Axis II diagnosis of Mild Mental Retardation.

The Department’s psychologist indicated that the psychometric documentation does not support the diagnosis of Mild Mental Retardation provided in Exhibit D-9 as this finding is inconsistent with the results of previous evaluations.

- 4) The Claimant’s representatives cited Exhibits D-4 and D-5 (medical evaluations completed by two different physicians) that indicate the Claimant has a Mental Retardation diagnosis. This information, in conjunction with the fact that she had to have presented a MR diagnosis in the past, and the MR diagnosis provided in the current psychological evaluation (D-9), indicates that she has an eligible diagnosis. Also noted were concerns that the Claimant’s medical health could suffer without supervision due to poor hygiene and failure to follow recommendations made by her physician(s). The Claimant’s representatives contend that the Claimant continues to demonstrate medical eligibility to participate in the MR/DD Waiver Program.

- 5) 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 7/1/06).

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.

- 6) Chapter 500, Section 503.4, Re-Determination of Medical Eligibility (Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual Effective 7/1/06) states that re-determination of medical eligibility must be completed annually for each member. Pursuant to federal law, an individual must qualify for recertification at least annually. Eligibility determinations must be made on current eligibility criteria, not on past Waiver Eligibility. The fact that a recipient had previously received waiver services shall have no bearing. The date of the member's medical re-eligibility is the date the annual medical evaluation (DD-2A) was signed.

Once the annual re-certification packet is received by the state MR/DD Waiver office, the required evaluations (DD-2A, DD-3, etc) are reviewed by the State Waiver Office. If indicated, additional information may be requested provided the information is applicable and available as needed in order to determine recertification.

#### **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. Re-determination of medical eligibility must be completed annually for each member. Pursuant to federal law, an individual must qualify for recertification at least annually. Eligibility determinations must be made on current eligibility criteria, not on past Wavier Eligibility. The fact that a recipient had previously received waiver services shall have no bearing.
- 2) It is clear that the Claimant was previously determined to be medically eligible for participation in the MR/DD Waiver program, however, policy requires annual recertification based on current eligibility criterion – “The fact that a recipient had previously received wavier services shall have no bearing.” Although it was noted that the medical evaluations (D-4 & D-5), as well as the most current psychological evaluation (D-9), provide a diagnosis of Mild Mental Retardation, this finding is incompatible with the clinical (psychometric) documentation found in the three previous evaluations. Moreover, there has been no new or additional psychometric testing completed to support the diagnosis found in Exhibit D-9. The evidence fails to confirm that the Claimant has a program qualifying diagnosis of Mental Retardation or a related condition.
- 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 9<sup>th</sup> Day of July, 2008**

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**Thomas E. Arnett  
State Hearing Officer**