



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

June 6, 2008

_____ for

Dear Mr. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held May 22, 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
Steve Brady, MR/DD Waiver Program
Mary McQuain, Esq., Assistant AG's Office
[REDACTED]

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

Claimant,

vs.

Action Number: 07-BOR-2475

**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 June 6, 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 originally scheduled to convene on February 4, 2008 but was continued at the request of the Claimant and convened on May 22, 2008 on a timely appeal filed August 17, 2007.

Benefits and services were continued pending the results of the hearing.

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:

[REDACTED]

, Claimant's mother / guardian

[REDACTED]

Mary McQuain, Esq., Assistant AG's Office, Counsel for the Department
Steve Brady, Program Coordinator, MR/DD Waiver Program
Linda 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 500-8.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500-8
- D-2 DD-2a, ICF/MR Level of Care Evaluation
- D-3 DD-3, Psychological Evaluation - Update
- D-4 Notice of Denial/Termination dated 8/6/07
- D-5 DD-3, Psychological Evaluation – Triennial dated 5/16/07
- D-6 Notice of Denial/Termination dated 8/29/07
- D-7 Individualized Education Program (IEP) dated 2/22/07
- D-8 Notice of Denial/Termination dated 9/17/07
- D-9 DD-3, Psychological Evaluation dated 10/16/07

Claimant's Exhibits:

- C-1 Individualized Education Program dated 3/12/08

- * Closing written arguments from both parties were received timely and considered in this decision.

VII. FINDINGS OF FACT:

- 1) The Claimant was undergoing an annual reevaluation of medical eligibility for certification of eligibility to participate in the Medicaid MR/DD Waiver program. Exhibits D-2 (ICF/MR Level of Care Evaluation, Annual Renewal, 6/25/07) and D-3, (Psychological Evaluation – Update, 5/17/06) were submitted for review.
- 2) On or about August 6, 2007, the Claimant was notified via a Notice of Denial/Termination that Waiver services have been terminated. This notice goes on to say, in pertinent part:

Your application was terminated because:
The DD-3 (Psychological Evaluation) submitted for re-certification review is outdated.

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 documentation failed to demonstrate substantial limitations in the following major life areas: Learning, Self-Direction, Receptive or Expressive Language, Mobility and Capacity for Independent Living.

The notice indicates that a substantial adaptive deficit was identified in Self-Care.

- 3) In response to the Department's Notice of Denial/Termination, the Claimant submitted Exhibit D-5, Psychological Evaluation – Triennial dated 5/16/07. The Department reviewed Exhibit D-5 and subsequently issued a second Notice of Denial/Termination on 8/19/07 (Exhibit D-6). This notice states, in pertinent part:

Your application was terminated because:
Additional documentation is requested. Please submit Mr. _____'s most current IEP.

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.

This notice goes on to indicate that Self-Care has again been identified as a substantially deficient major life area.

- 4) The Claimant provided a copy of his most recent IEP (Exhibit D-7 dated 2/22/07) for review and a third Notice of Denial/Termination (D-8) was issued by the Department. Exhibit D-8, Notice of Decision dated 9/17/07, is consistent with the two previous notice letters and again indicates the Claimant's Waiver services have been terminated as the Claimant demonstrates substantial adaptive deficits in Self-Care only.
- 5) The Claimant's representatives contend that the Claimant continues to be medically eligible as he demonstrates substantial adaptive deficits in the following major life areas: Capacity for Independent Living, Receptive and Expressive Language, Self-direction and Learning. It should be noted that Exhibit C-1 was submitted, without objection from the Department, at the hearing.
- 6) The Claimant presents an eligible diagnosis (Autism), manifested prior to the age of 22, and his condition is likely to continue indefinitely. The issue to be addressed in this decision is whether the evidence demonstrates the level of severity (substantial adaptive deficits in three or more of the six major life areas), required to show the need for active treatment and an ICF/MR level of care.
- 7) The evidence demonstrates the following in the contested areas: (It should be noted that Non-MR Norms were appropriately used as the Claimant is not diagnosed with Mental Retardation. Pursuant to MR/DD Waiver policy, an eligible Non-MR ABS Score is less than 1 percentile.)

Receptive and Expressive Language-

Exhibit D-3 (page 3) reveals that the Claimant has made significant progress in the area of language. He is able to speak in complete sentences though he doesn't always do so. Articulation is still mildly impaired but improving and he is able to express basic wants and needs verbally. He is able to print some words though he does not like to write and he is reportedly reading at approximately grade level. Language development, according to the ABS score (see page 5) is in the 2nd percentile.

Clinical documentation found in Exhibit D-5 includes the same narrative information; however, the Claimant's ABS score in this more current evaluation was recorded at the 5th percentile.

Exhibit D-9 refers to verbal and non-verbal testing completed on the Claimant. The Claimant scored a 95 - Total Verbal Battery on a test with a mean (average) of 100. A substantial adaptive deficit (3 standard deviations below the mean) would be a score of 55 and below. Although several other scores are noted, none of which qualify as significantly deficient. Page 6 further indicates that the Claimant is able to understand simple commands and able to communicate basic needs and wants.

Testimony provided at the hearing reveals that the Claimant no longer qualifies for speech

therapy in the public school setting as confirmed by the IEP's identified as Exhibit D-7 & C-1.

Based on the evidence, the Claimant is not demonstrating a substantial adaptive deficit in Receptive and Expressive Language.

Self-direction – Exhibits D-3 & D-5 indicate that the Claimant's recreational interests are normal for his age. He enjoys playing in sand and water, shopping, computers, watching cartoons, digging in the yard, and playing with toys. He has improved with regard to interaction with other children but he does not understand how to play with them correctly. He appears to enjoy attention, at least for brief periods of time. Testimony received at the hearing included information regarding the Claimant's vocal dislike toward taking out the trash "because it stinks" and Exhibit D-3 includes an ABS Self-Direction score in the 2nd percentile while Exhibit D-6 provides an ABS percentile rank of 9 – neither of which qualifies under the ABS requirement of less than 1 percentile.

The evidence indicates that the Claimant knows his likes and dislikes and demonstrates the ability to self-initiate activities. Based on the evidence, the Claimant is not demonstrating a substantial adaptive deficit in Self-direction.

Learning - Previous psychological testing documented in Exhibit D-3 reveals an IQ score of 77 while Exhibit D-5 reveals a Full Scale IQ of 93. Exhibit D-5 notes that a Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) was administered on 1/31/07 and the evaluating psychologist indicates that the Claimant's performance on the WISC-IV suggests variability in his skills, as they ranged from borderline to above average. The evaluating psychologist concludes by stating – "The majority of [REDACTED] cognitive abilities do fall within the Average range."

Page 5 of Exhibit D-9 includes the results of a Wide Range Achievement Test-Fourth Edition (WRAT4). The evaluating psychologist notes in the Interpretation/Summary of Test Results that the Claimant's test results indicate that his intelligence is in the average range of ability and his achievement scores are broadly consistent with this ability. His score in math indicates the possibility of a Learning Disability. Page 6 further indicates the Claimant is able to learn new skills without aggressive and consistent training.

Based on the evidence, the Claimant is not demonstrating a substantial adaptive deficit in learning.

Capacity for Independent Living – An individual's Capacity for Independent Living is comprised of several components – (home living, social skills, employment, health and safety, community and leisure activities). The Claimant's substantial adaptive deficit in Self-Care would lend support toward a finding that the Claimant would have a great deal of difficulty living independently, however, in the absence of information to support a finding of at least one additional substantial adaptive deficit in the remaining major life areas,

reviewing this area for the purpose of determining a substantial adaptive deficit is moot.

- 8) 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 less than 1 percentile when derived from non MR normative populations.
- 2) The Claimant presents program qualifying diagnoses of Autism; however, the clinical evidence fails to demonstrate that he demonstrates substantial adaptive deficits in three (3) or more of the six (6) major life areas. While the Department conceded that the Claimant

demonstrates a substantial adaptive deficit in Self-care, and an argument could be made that he demonstrates a substantial adaptive deficit in his Capacity of Independent living, the standardized measures of adaptive behavior, as well as the clinical and narrative documentation, fail to confirm substantial adaptive deficits in Receptive or expressive language, Learning, or Self-direction (Mobility was not contested). Whereas the evidence clearly demonstrates that the Claimant is not demonstrating substantial adaptive deficits in three (3) or more of the major life areas, medical eligibility for participation in the MR/DD Waiver Program cannot be established.

- 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 6th Day of June, 2008

**Thomas E. Arnett
State Hearing Officer**