



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

April 3, 2009

----- & -----for

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held March 11, 2009. 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 Medicaid Regulations, Chapter 513 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07).

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 proposal of the Department 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**

Claimant,

vs.

Action Number: 08-BOR-2649

**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 April 3, 2009 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 convened on March 11, 2009 on a timely appeal filed December 19, 2008.

It should be noted that benefits have continued pending the 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(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

-----, Claimant's mother/representative

-----, Claimant's father/representative

██████████ Therapeutic Consultant, ██████████

██████████ Service Coordinator, ██████████

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

Richard L. 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 or not the Department was correct in its proposal to terminate the Claimant's benefits and services through the MR/DD Waiver Program.

V. APPLICABLE POLICY

West Virginia Medicaid Regulations, Chapter 513, Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Department's Exhibits:

- D -1 West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07
- D-2 Notice of Denial/Termination - dated 11/3/08
- D-3 Final Order – In the Circuit Court of ██████████ County, West Virginia (05-AA-65) entered October 12, 2006
- D-4 DD-2-A-ICF/MR Level of Care Evaluation - dated 5/28/08
- D-5 Updated Annual Psychological Evaluation – dated 12/4/08
- D-6 Psychological Evaluations (██████████ County Schools) – dated 1/24/08, 2/4/08
- D-7 Positive Behavior Support Plan – dated 5/20/08
- D-8 Individualized Education Program (IEP) - dated 5/21/08
- D-9 UPMC, Western Psychiatric Institute and Clinic, Autism Diagnostic Assessment – dated 2/20/09
- D-10 Correspondence from ██████████ Coordinator of Special Education, ██████████

D-11 County Schools – dated 2/19/08
Correspondence from [REDACTED] Coordinator of Special Education, [REDACTED]
County Schools – dated 3/10/09

VII. FINDINGS OF FACT:

- 1) The Claimant was notified via a Notice of Denial/Termination dated November 3, 2008 (D-2) that Waiver services were terminated. 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 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.

It should be noted that Self-Care was identified as a substantially deficient major life area.

- 2) As a matter of record, the Department stipulated that in addition to Self-Care, supplementary information reviewed for eligibility confirms that the Claimant is also demonstrating a substantial adaptive deficit in his Capacity for Independent Living. The Department, however, remains unwilling to acknowledge that a third (3rd) substantial adaptive deficit is identified in the information reviewed for eligibility, and therefore, the Claimant does not meet the medical eligibility criteria (substantial adaptive deficits in three or more of the major life areas) required for participation in the MR/DD Waiver Program.

The Claimant's diagnosis (Asperger's Disorder) was noted to be problematic by the Department, however, because this area was not addressed in the Notice of Denial/Termination, this decision will focus solely on the Claimant's eligibility based on the functionality policy criteria.

- 3) The Claimant, by and through his representatives, contends that medical eligibility should have been re-certified as he is also demonstrating a substantial adaptive deficit in the major life areas of Self-Direction and Learning.
- 4) The Department's psychologist purported that Self-Direction skills are an individual's ability to recognize they have a choice – examples noted were the choice to participate in activities or manipulate their environment. In addition, the Department's psychologist noted that the Claimant's diagnosis of Obsessive Compulsive Disorder adversely affects the Claimant's

Self-Direction skills.

The Adaptive Behavioral Scale: School: 2nd Edition Non MR Norms (ABS-S:2) reveals on page 4 of Exhibit D-5 (Updated Annual Psychological Evaluation) that the Claimant received a Standard Score of 3 and a percentile rank of 1 in Self Direction. Page 6 of Exhibit D-5 further indicates – “-----’s ABS Self-Direction score falls in the bottom one percentile.” While this score clearly demonstrates that Self-Direction skills are limited, pursuant to Medicaid policy guidelines, a score of less than 1 percentile for Non-MR Norms (a Standard Score of 2 or less) is indicative of a substantial adaptive deficit. Page 3 of Exhibit D-5 notes the Claimant likes to watch videos on TV and that he loves to play with Legos.

Exhibit D-7 (Positive Behavior Support Plan) provides a documented record of Self-Direction skills wherein the Claimant demonstrates choice. It is recorded on page 2 – “Conversation about chores or responsibilities to help his parents is met with screaming or crying out responses like ‘I’m not listening to this’ again reminiscent of a young child with ‘brat-like’ behaviors.”

The third paragraph (page 2) goes on to state – “----- does have a somewhat limited diet, preferring carbohydrates, especially cheese.” The last sentence, same paragraph, states – “--- -- likes to swim at the [REDACTED] Community Center and should be encouraged to do more as expenses will allow.”

Page 3 of Exhibit D-7 (#2) notes that – “----- has spent time in lunchtime detention due to his condescending attitude towards teachers and school personnel.” This statement indicates the Claimant is being punished for a behavior that is believed to be correctable. If the Claimant was incapable or believed to be incapable of Self-Direction by the developers of the Positive Behavior Support Plan, disciplinary action would clearly be inappropriate. This section goes on to state – “If ----- does not get his way, he has a learned behavior that if he screams and yells, he may get it.” It is also noted that – “----- can be very manipulative when it comes to his parents.” “He is the expert of trying to place authority figures on a ‘guilt trip’ (his words).”

While the Claimant’s self-directed decisions may not always be the desired choice, the evidence fails to confirm the Claimant is demonstrating a substantial adaptive deficit in Self-Direction.

- 5) The Department noted the Claimant’s Composite IQ of 90 (page 1 of Exhibit D-5) is inconsistent with cognitive delays. While the evaluating psychologist indicates on page 6

that the Claimant's IQ is not reflective of the true severity of his learning deficit, this statement is related specifically to his Capacity for Independent Living – to which the Department acknowledged is substantially limited.

The Claimant's IEP, Exhibit D-8, page 3 indicates the Claimant will graduate high school with a standard diploma. Page 4 of the Exhibit D-8 indicates the Claimant received a "B" in English and that he passed Applied Math I & II with a "B" and that he is taking Applied Geometry class his junior year.

In Exhibit D-11, [REDACTED] Special Education and Autism Coordinator states – "----- is able to complete academic work on grade level. Unfortunately, his ability to solve problems independently, make appropriate choices, and complete a task is severely limited."

Based on the evidence, the Claimant is not demonstrating a substantial adaptive deficit in Learning (Functional academics).

- 6) West Virginia Medicaid Regulations, Chapter 513, – 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.
- 2) The Claimant's diagnosis of Asperger's Disorder and Obsessive Compulsive Disorder were noted to be problematic during the eligibility re-certification process, however, these issues were neither addressed in the Notice of Denial/Termination nor at the hearing as the reason for denial.
- 3) The area of policy specifically cited as the reason for denial/termination is related to the Claimant's functional ability (substantial adaptive deficit in three or more of the major life areas). While the Department conceded that the Claimant demonstrates a substantial adaptive deficit in Self-Care and in his Capacity for Independent Living, the standardized measures of adaptive behavior scores, as well as the clinical documentation found in the evaluations, fail to confirm a substantial adaptive deficit in Learning or Self-Direction.
- 4) Based on the evidence presented at the hearing, the Department was correct in denying re-

certification for continued participation in 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 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 3rd Day of April, 2009

**Thomas E. Arnett
State Hearing Officer**