



State of West Virginia  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
Office of Inspector General  
Board of Review  
4190 West Washington Street  
Charleston, West Virginia 25313

Joe Manchin III  
Governor

March 1, 2005

Ms. \_\_\_\_\_

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

Case Name: \_\_\_\_\_

Dear Ms. \_\_\_\_\_;

Attached is a copy of the findings of fact and conclusions of law on the hearing held August 11, 2004. Your hearing request was based on the Department of Health and Human Resources' action, to deny \_\_\_\_\_'s application for the MR/DD Waiver Services 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 Medicaid Home and Community Based MR/DD Waiver Program, are determined based on current regulations. One of these regulations states in part:

"The evaluations must demonstrate that an individual has a diagnosis of mental retardation and/or a related condition which constitute a severe chronic disability which is:

1. Attributable to a mental or physical disability or a combination of both;
2. Manifested before a person reaches twenty-two (22) years of age;
3. Likely to continue indefinitely; and
4. Substantially limits functioning in three or more of the following areas of major life activities:
  - a. Self-Care
  - b. Learning (functional academics)
  - c. Mobility
  - d. Capacity for Independent Living (home living, social skills, health, and safety, community use, leisure)

- e. Receptive and/or Expressive Language
- f. Self-Direction
- g. Economic Self-Sufficiency (Employment)  
(WVDHHR Title XIX MR/DD Home and Community Based Waiver Program Operations Manual, Chapter 1 Section I. C).

The information submitted at the hearing revealed: \_\_\_\_\_ does not meet the medical criteria for the MR/DD Waiver Program.

It is the decision of the State Hearing Officer, to UPHOLD the action of the Department to deny the MR/DD Waiver packet.

Sincerely,

Ray B. Woods, Jr., M.L.S.  
State Hearing Officer  
Member, State Board of Review

cc: Erika H. Young, State Board of Review  
Tiffany Fooce, Bureau for Behavioral Health and Health Facilities  
Susan Treen, Bureau for Behavioral Health and Health Facilities

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

**NAME:** \_\_\_\_\_ on behalf \_\_\_\_\_

**ADDRESS:** \_\_\_\_\_

**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 March 1, 2005, 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. The fair hearing was scheduled for August 11, 2004 on a timely appeal filed April 28, 2004.

It should be noted here that, \_\_\_\_\_ is not receiving any benefits under the MR/DD Medicaid Waiver Program. The interested parties did not have a pre-hearing conference.

All persons giving testimony were placed under oath.

**II. PROGRAM PURPOSE**

The program entitled the Home and Community Based MR/DD Waiver Program, is set up cooperatively between the Federal and State Government and administered by the West Virginia Department of Health and Human Resources.

Under Section 2176 of the Omnibus Budget Reconciliation Act of 1981, states were allowed to request waiver from the Health Care Financing Administration (HCFA) so that they could use Medicaid (Title XIX) funds for home and community based services. The program's target population is individuals with Mental Retardation or related conditions (ICF/MR), who would otherwise be placed in an intermediate care facility (if not for the waiver services).

**III. PARTICIPANTS**

\* \_\_\_\_\_, Mother

\* \_\_\_\_\_, Daughter

\* \_\_\_\_\_, Grand Mother

\* \_\_\_\_\_ Service Coordinator – Autism Services

\* Richard Workman, Psychologist - Bureau of Medical Services

\* Susan Treen, Program Operations Coordinator - Bureau for Behavioral Health and Health Facilities

\* Debbie Roberts, Repayments Investigator – Office of Inspector General

\* Presiding at the hearing was, Ray B. Woods, Jr., M.L.S., State Hearing Officer and, a Member of the State Board of Review.

\* All Parties Participated by Conference Call

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

Does \_\_\_\_\_ meet the medical eligibility for the Medicaid Home and Community Based MR/DD Waiver Program?

#### V. APPLICABLE POLICY

The Code of Federal Regulations § 435.1009 *Institution for the mentally retarded or persons* and; WVDHHR Title XIX MR/DD Home and Community Based Waiver Program Operations Manual, Chapter 1 Section I. C. *LEVEL OF CARE CRITERIA FOR MEDICAL ELIGIBILITY*.

#### VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

##### DEPARTMENTS EXHIBITS

- D-1 Denial Letter from Bureau of Medical Services, dated 04/29/04
- D-2 MRDD Waiver Full Application Cover Sheet, dated 04/06/04
- D-3 Client Needs Summary For ICF/MR Waiver, dated 04/06/04
- D-4 Letter from Autism Services Center dated 04/16/04 to Waiver Program Manager
- D-5 WV MR/DD Waiver Program Application Form (DD-14), dated 02/27/04
- D-6 MR/DD Waiver Program Participant Monitoring Status Report, dated 02/27/04
- D-7 Annual Medical Evaluation (DD-2A), dated 01/09/04
- D-8 Psychological Evaluation (DD-3), dated 02/04/04
- D-9 Social History (DD-4), dated 02/20/04
- D-10 Annual Individual Program Plan (DD-5), dated 02/27/04
- D-11 MR/DD Waiver Program Services Cost Estimate Worksheet (DD-6), dated 02/27/04
- D-12 Informed Consent (DD-7) dated 02/27/04
- D-13 Informed Consent (DD-7a) dated 02/27/04
- D-14 Eligibility Committee Report - Lincoln County, dated 05/01/03
- D-15 Individualized Education Plan (IEP) dated 05/01/03
- D-16 Speech and Language Evaluation Observation Report dated 12/04/03
- D-17 Letter from \_\_\_\_\_, D. O. – Harts Health Center dated 01/29/04
- D-18 Code of Federal Regulations § 435.1009 – *Definitions relating to institutional status*
- D-19 Scheduling Notice (IG-BR-29) dated 07/21/04
- D-20 Request for Hearing dated 05/06/04
- D-20 GroupWise Message from [REDACTED] to State Hearing Officer, dated 07/21/04  
re: Rescheduling

#### VII. FINDINGS OF FACT

- Ms. Susan Treen provided the following testimony:

- The application process begins when the applicant completes the DD-14. The individual or guardian makes a choice of MR/DD Providers.
- The application is completed and submitted to the MR/DD Office. The Agency chosen by the individual/family, is notified to begin the packet.
- The packet includes three (3) primary evaluations used to determine medical eligibility for the MR/DD Waiver Program. They include the:
  - The first evaluation is the Medical Evaluation (DD-2A);
  - The second evaluation is the Psychological Evaluation (DD-3) and;
  - The third evaluation is the Social History (DD-4).
- Once a decision is made, it is mailed to the applicant.
- Ms. Treen then reviewed the Level of Care Criteria for Medical Eligibility.
- Mr. Richard Workman provided the following testimony:
  - The DD-2A was completed on January 9, 2004, provides the following information:
    - \_\_\_\_\_ is described as Duane Syndrome (Eyes); Coanal Atresian (Nose) Corrected at birth; Weak Muscle Tone (Extremities); Teathered Spinal Cord, Scoliosis (Spine); Short Stature (Endocrine); Stuttering ( Speech); Instability (Gait) and; Weak Muscle Tone.
    - Under Problems Requiring Special Care, the categories were marked as follows:
      - Mobility – Needs Assistance with Balance; Continnence - Continent; Feeding - Feeds Self; Personal Hygiene - Needs Assistance and; Mental and Behavioral Difficulties – Alert and Needs Close Supervision.
    - Speech Therapy and Physical Therapy are recommended by the Physician.
    - Under Diagnostic Section:
      - Mental - None; Physical – Klippel Feil Syndrome (Teathered Cord, Spina Bifida & Scoliosis and; Prognosis – (Blank)
      - The Physician certified that \_\_\_\_\_ “Requires the Level of Care and Services Provided in an Intermediate Care Facility for Individuals with Mental Retardation and/or Related Conditions.”
- Psychological Evaluation was conducted on February 4, 2004. It provides the following information:

- \_\_\_\_\_ receives special education for orthopedically impaired students.
- \_\_\_\_\_ obtained a Verbal Score of 91, on the Wechsler Intelligence Scale for Children - Third Edition, Verbal Scales. Performance = 73 and Full Scale = 81. This indicates \_\_\_\_\_ has average Intellectual Scores. Mr. Workman stated, "Stuttering is not eligible diagnosis. It does not meet the criteria under Language Skills."
- Psychomotor Skills - \_\_\_\_\_ is ambulatory with physical assistance.
- Self-Help Skills – \_\_\_\_\_ requires assistance with all activities of daily living.
- Language – \_\_\_\_\_ is able to speak and form complete sentences.
- Others – \_\_\_\_\_ enjoys playing with Barbie dolls, writing, playing in water and being with peers. She also enjoys playing on the computer.
- The Adaptive Behavior Evaluation indicates \_\_\_\_\_'s scores were in the average range. The Instrument used was the AAMR Adaptive Behavior Scale - School: (ABS-S:II) (Non-metal Retardation Norms). The Program is looking for scores of substantial delays. The Program is looking for individuals with scores below 1. The scores were as follows:

<u>Part One Domain Scores</u>	<u>Standard Score</u>	<u>Age Equiv.</u>	<u>Rating</u>
Independent Functioning	1	<3-0	Very Poor
Physical Development	7	<3-0	Below Average
Economic Activity	3	<3-0	Very Poor
Language Development	5	4-3	Poor
Numbers and Time	8	6-3	Average
Pre/Vocational Activity	7	5-3	Below Average
Self-Direction	8	3-0	Average
Responsibility	9	5-3	Average
Socialization	7	5-3	Below Average

- The Psychologist makes the following Diagnoses:

Axis I:	309.24 307.0	Adjustment Disorder with Anxiety Stuttering
Axis II:	V62.89	Borderline Intellectual Functioning

Axis III: By History:  
 Klippel-Feil Syndrome  
 Split Cervical Spinal Cord  
 Spina Bifida  
 Duane's Syndrome

Axis IV: None contributory

Axis V: GAF = 50 (current)

- Under PLACEMENT RECOMMENDATIONS, the Psychologist states:  
 \_\_\_\_\_ meets the criteria for an ICF/MR level of care based on the related conditions of Klippel-Feil Syndrome, Split Cervical Spinal Cord and Spina Bifida. Her intellectual functioning is in the borderline range. She has significant deficits in adaptive functioning. Continued community placement represents the least restrictive environment. Her participation in the Title XIX MR/DD waiver program is recommended.
- The Individual Program Plan provides the following information:
  - Medical/Health Strengths for \_\_\_\_\_ include Good Health and Ambulatory.
  - Social Strengths – Has friends but tends to be shy; likes to play video games; likes to watch movies and; can dress with assistance.
  - There are no training needs listed in the document. There also are no goals listed under the Individual Habilitation Plan (IHP). Under the Section of Activities and Methods, it refers to the Individualized Education Plan (IEP).
- The Eligibility Committee Report considered the following multi-disciplinary reports in making their recommendations: Intelligence; Achievement; Information from the Parent; Adaptive Skills Developmental Skills and; Motor Skills. According to the Committee, \_\_\_\_\_ met the criteria for Orthopedically Impaired Services. There was no recommendation for Mentally Impaired Services.
- The \_\_\_\_\_ County Individualized Education Plan (IEP) lists the following Annual Goal: Student will improve her gross motor skills to an age appropriate level in order to become more independent at school. The focus on Motor Skills is reflected in 5 of the 10 pages on the I E P. Mr. Workman states that the goal of motor skills would not be eligible for active treatment.
- The I E P is positive by providing \_\_\_\_\_ with assistance with Transition from one surrounding to another; Assistance in restroom; Assistance in cafeteria and; Assistance on the playground. According to Mr. Workman individuals are not placed in institutional level of care when requiring assistance and, not active treatment.
- Under the heading of Consideration of Factors for IEP Development it states in part: The student (\_\_\_\_\_) does not have communication needs and; the student (\_\_\_\_\_) will

participate under standard conditions for State/District Achievement Tests. According to Mr. Workman, most individuals in an ICF/MR setting would not participate in standard conditions.

- A factor indicated under Placement states that \_\_\_\_\_ participates in a Regular Education Environment 99% of the time and 1% of the time in a Special Education Environment.
- Based upon the information received, it was determined that \_\_\_\_\_ did not meet the severe chronic part of the program or, did not require an institutional level of care. In addition, she does not require the active treatment typically provided in an institutional level of care. \_\_\_\_\_ requires assistance but does not require active treatment.
- Ms. \_\_\_\_\_ states that \_\_\_\_\_ is in Regular Education classroom but, she does not participate at playtime and physical education. \_\_\_\_\_ is unable to carry her tray in the lunchroom. She is also unable to take a bath on her own.
- Ms. \_\_\_\_\_ believes \_\_\_\_\_ would benefit from the program because she and her husband must work. \_\_\_\_\_'s grandmother must assist with watching her. Not everyone can watch \_\_\_\_\_.
- \_\_\_\_\_ has also been denied for the Children's with Disabilities Community Services Program (CDCSP). According to Ms. \_\_\_\_\_, \_\_\_\_\_ is being evaluated at the \_\_\_\_\_ Children's Hospital for growth hormones. The family insurance does not cover the expenses, which is \$4,000.00 a year.
- According to Ms. \_\_\_\_\_ she understands through her association with \_\_\_\_\_, the reason for the denial of services. \_\_\_\_\_ could benefit from adequately trained staff to work with her disability. The training at Autism Services is very general but, geared to the person's disability. The added one on one support would benefit \_\_\_\_\_.
- It should be noted that, Ms. \_\_\_\_\_ called the State Hearing Officer on the eve of the hearing and requested to participate by conference call. On the morning of the hearing, the State Hearing Officer received a call from Mrs. Debbie Roberts, Repayments Investigator in the \_\_\_\_\_ District DHHR Office. Ms. \_\_\_\_\_ appeared at the Office for the scheduled hearing. Rather than reschedule the hearing, the proceedings were conducted by conference call, with the assistance of Mrs. Debbie Roberts.

## VIII. CONCLUSIONS OF LAW

– WVDHHR Title XIX MR/DD Home and Community Based Waiver Program Operations Manual, Chapter 1 Section I. C states:

### I. LEVEL OF CARE CRITERIA FOR MEDICAL ELIGIBILITY

- A. 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 (ICF/MR Facility).



### Definition

An Intermediate Care Facility provides services in an institutional setting for persons with mental retardation or related conditions. The primary purpose of the institution is to provide health and rehabilitative services. The institution provides services to individuals who are in need of and who are receiving active treatment.

- B. The following list includes some examples of related conditions. This list does not represent all related conditions.
1. Autism or Pervasive Developmental Disability, NOS
  2. Spina Bifida
  3. Cerebral Palsy
  4. Tuberos Sclerosis
  5. Traumatic Brain Injury and/or Spinal Cord Injuries (occurring during the developmental period)
- C. The evaluations must demonstrate that an individual has a diagnosis of mental retardation and/or a related condition which constitute a severe chronic disability which is:
1. Attributable to a mental or physical disability or a combination of both;
  2. Manifested before a person reaches twenty-two (22) years of age;
  3. Likely to continue indefinitely; and
  4. Substantially limits functioning in three or more of the following areas of major life activities:
    - a. Self-Care
    - b. Learning (functional academics)
    - c. Mobility
    - d. Capacity for Independent Living (home living, social skills, health, and safety, community use, leisure)
    - e. Receptive and/or Expressive Language
    - f. Self-Direction
    - g. Economic Self-Sufficiency (Employment)
- D. Level of care determinations are made by the Office of Behavioral Health Services (OBHS) and the Bureau for Medical Services (BMS) based on the medical, psychological and social evaluations (DD-2A, DD-3, and DD-4).
- E. Evaluations must demonstrate the need for an ICF/MR level of care and services. This is demonstrated by the individual's need for intensive instruction, services, safety, assistance and supervision to learn new skills and increase independence in activities of daily living. The level of care and services needed must be the same level which is provided in an ICF/MR facility.

The Code of Federal Regulations § 435.1009 defines an Institution for mentally retarded persons as:

*“Institution for the mentally retarded or persons with related conditions means an institution (or distinct part of an institution) that -*

- Is primarily for the diagnosis of the mentally retarded or persons with related conditions; and
- Provides, in a protected residential setting, ongoing evaluation, planning, 24-hour supervision, coordination, and integration of health or rehabilitation services to help each individual function at his greatest ability.”

## XI. **DECISION**

According to Chapter 1, Section 1, LEVEL OF CARE CRITERIA FOR MEDICAL ELIGIBILITY, the policy states,

- A. 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 (ICF/MR Facility).

### Definition

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- B The following list includes some examples of related conditions. This list does not represent all related conditions.
1. Autism or Pervasive Developmental Disability, NOS
  2. Spina Bifida
  3. Cerebral Palsy
  4. Tuberous Sclerosis
  5. Traumatic Brain Injury and/or Spinal Cord Injuries (occurring during the developmental period)
- C. The evaluations must demonstrate that an individual has a diagnosis of mental retardation and/or a related condition which constitute a severe chronic disability which is:
1. Attributable to a mental or physical disability or a combination of both;
  2. Manifested before a person reaches twenty-two (22) years of age;
  3. Likely to continue indefinitely; and
  4. Substantially limits functioning in three or more of the following areas of major life activities:
    - a. Self-Care
    - b. Learning (functional academics)
    - c. Mobility

- d. Capacity for Independent Living (home living, social skills, health, and safety, community use, leisure)
- e. Receptive and/or Expressive Language
- f. Self-Direction
- g. Economic Self-Sufficiency (Employment)

D. Level of care determinations are made by the Office of Behavioral Health Services (OBHS) and the Bureau for Medical Services (BMS) based on the medical, psychological and social evaluations (DD-2A, DD-3, and DD-4).

E. Evaluations must demonstrate the need for an ICF/MR level of care and services. This is demonstrated by the individual's need for intensive instruction, services, safety, assistance and supervision to learn new skills and increase independence in activities of daily living. The level of care and services needed must be the same level which is provided in an ICF/MR facility;

The Code of Federal Regulations § 435.1009 define an Institution for mentally retarded persons as:

*“Institution for the mentally retarded or persons with related conditions means an institution (or distinct part of an institution) that -*

- Is primarily for the diagnosis of the mentally retarded or persons with related conditions; and
- Provides, in a protected residential setting, ongoing evaluation, planning, 24-hour supervision, coordination, and integration of health or rehabilitation services to help each individual function at his greatest ability.”

In order to determine if \_\_\_\_\_ meets the criteria for the MR/DD Waiver Program, It is necessary to address each aspect of the eligibility criteria listed under Chapter 1, Section 1 of the MR/DD Waiver Manual.

- A. The Annual Medical Evaluation (DD-2A) completed on January 9, 2004, states \_\_\_\_\_ has an eligible related condition. The Physician does certify that \_\_\_\_\_ requires the level of care and services provided in an Intermediate Care Facility, for individuals with Mental Retardation and/or related conditions (ICF/MR Facility).
- B. Related condition met (Spina Bifida)
- C. The evaluations must demonstrate that an individual has a diagnosis of mental retardation and/or a related condition which constitute a severe chronic disability which is (I'll note that the wording is a little different under The Code of Federal Regulations § 435.1009 *Persons with related conditions* means individuals who have a severe, chronic disability that meets all of the following conditions):
  - 1. Attributable to a mental or physical disability or a combination of both. \_\_\_\_\_ has Spina Bifida.

2. Manifested before a person reaches twenty-two (22) years of age. \_\_\_\_\_ was six years of age when he was evaluated.
3. Likely to continue indefinitely; and
4. Substantially limits functioning in three or more of the following areas of major life activities:
  - a. Self-Care - .\_\_\_\_\_ requires assistance with all activities of daily living.
  - b. Learning (functional academics) - \_\_\_\_\_ participates in a Regular Education Environment 99% of the time and 1% of the time in a Special Education Environment.
  - c. Mobility - \_\_\_\_\_ is ambulatory with physical assistance.
  - d. Capacity for Independent Living (home living, social skills, health, and safety, community use, leisure) - \_\_\_\_\_ enjoys playing with Barbie dolls, writing, playing in water and being with peers. She also enjoys playing on the computer. \_\_\_\_\_ has friends but tends to be shy; likes to play video games; likes to watch movies and; can dress with assistance.
  - e. Receptive and/or Expressive Language - \_\_\_\_\_ is able to speak and form complete sentences.
  - f. Self-Direction - There are no training needs or goals listed in the under the Individual Habilitation Plan (IHP). Under the Section of Activities and Methods, it refers to the Individualized Education Plan (IEP).
 

The I H P Eligibility Committee Report considered the following multi-disciplinary reports in making their recommendations: Intelligence; Achievement; Information from the Parent; Adaptive Skills Developmental Skills and; Motor Skills. According to the Committee, \_\_\_\_\_ met the criteria for Orthopedically Impaired Services. There was no recommendation for Mentally Impaired Services.
  - g. Economic Self-Sufficiency (Employment) - Not applicable due to \_\_\_\_\_'s age.

In reviewing \_\_\_\_\_'s eligibility for the MR/DD Waiver Program, Mr. Workman testified,

“He did not dispute the fact that \_\_\_\_\_ needs assistance. \_\_\_\_\_ is not an individual who would require institutional level of care. This program is not for assistance but, for active treatment.”

Based upon The MR/DD Waiver Manual Chapter 1 Section I. C and The Code of Federal Regulations § 435.1009 *Persons with related conditions*, \_\_\_\_\_ has an eligible related condition (Spina Bifida). The supporting documentation consisting of the assessment scores, medical and psychological evaluations do not indicate a severe chronic disability, which substantially limits functioning in three or more of the major life activities.

It is the decision of this State Hearing Officer that, the testimony and supporting documentation indicates \_\_\_\_\_ does not meet the eligibility criteria for the MR/DD Waiver Program.

The Department's action to deny the MR/DD Waiver Application was proper and correct.

#### **X. RIGHT OF APPEAL**

See Attachment.

#### **XI. ATTACHMENTS**

The Claimant's Recourse to Hearing Decision.

Form IG-BR-29.