



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

Joe Manchin III  
Governor

Martha Yeager Walker  
Secretary

September 22, 2005

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

Dear Mr. \_\_\_\_\_:

Attached is a copy of the findings of fact and conclusions of law on your hearing held August 12, 2005. Your hearing request was based on the Department of Health and Human Resources' proposal to terminate services under the Title XIX MR/DD Waiver Program.

In arriving at a decision, the State Hearings 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 Waiver Services Program is based on current policy and regulations. Some of these regulations state as follows:

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 of daily living and; A need for the same level of care and services that is provided in an ICF/MR institutional setting. (West Virginia Provider Manual CHAPTER 500-COVERED SERVICES, LIMITATIONS, AND EXCLUSIONS, Volume 13 - MR/DD Waiver Services - Section 503.1 – Application, October 1, 2003)

The information submitted at your hearing revealed: You do not meet the continued medical eligibility criteria.

It is the decision of the State Hearings Officer to uphold the proposal of the Department to terminate services under the Title XIX MR/DD Waiver Program.

Sincerely,

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

cc: Erika H. Young, Chairman, Board of Review  
Stephen Brady, Acting Program Coordinator – OBH& [REDACTED]  
[REDACTED]

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

\_\_\_\_,

**Claimant,**

v. **Action Number:** \_\_\_\_\_

**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 22, 2005 for Mr. \_\_\_\_\_. 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 scheduled on August 12, 2005 on a timely appeal filed April 28, 2005.

It should be noted here that the Claimant was receiving MR/DD Waiver Services at the time of the hearing. A pre-hearing conference was not held between the parties.

**II. PROGRAM PURPOSE:**

The Program entitled MR/DD Waiver Services is set up cooperatively between the Federal and State governments and administered by the West Virginia Department of Health & Human Resources.

The 1965 Amendments to the Social Security Act established, under Title XIX, a Federal-State medical assistance program commonly known as Medicaid. The Department of Health and Human Resources administers the Medicaid Program in West Virginia in accordance with Federal Regulations. The Bureau for Medical Services is responsible for development of regulations to implement Federal and State requirements for the program. The Department of Health and Human Resources processes claims for reimbursements to providers participating in the program.

**III. PARTICIPANTS:**

\_\_\_\_\_, Claimant

\_\_\_\_\_  
\_\_\_\_\_  
Richard Workman, Licensed Psychologist – Bureau of Medical Services (B.M.S.)  
Stephen Brady, Acting Program Operations Coordinator – Office of Behavior Health and Health Facilities (O B H & H F)

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

**IV. QUESTIONS TO BE DECIDED:**

The question(s) to be decided is: Does \_\_\_\_\_ meet the continued medical eligibility criteria for the Title XIX MR/DD Waiver Services Program?

**V. APPLICABLE POLICY:**

West Virginia Provider Manual CHAPTER 500 - COVERED SERVICES, LIMITATIONS, AND EXCLUSIONS, Volume 13 - MR/DD Waiver Services - Section 503.1 – Application, October 1, 2003; CFR § 435.1009 Definitions related to institutional status – *Institution for the mentally retarded or related conditions* (b) and; CFR § 483.440 Condition of participation: Active treatment services (a) (2) and (b) (1)

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

**Department's Exhibits:**

- D-1 Denial Letter dated 04/13/05
- D-2 West Virginia Provider Manual CHAPTER 500-COVERED SERVICES, LIMITATIONS, AND EXCLUSIONS, Volume 13 - MR/DD Waiver Services - Section 503.1 – Application, October 1, 2003
- D-3 Memorandum from OBH&H to \_\_\_\_\_ for current DD-4, dated 02/09/05
- D-4 Annual Medical Evaluation (DD-2A) dated 11/23/04
- D-5 Psychological Evaluation Update dated 04/07/04
- D-6 Social History dated 07/20/04
- D-7 CFR § 435.1009 Definitions related to institutional status – *Institution for the mentally retarded or related conditions*
- D-8 CFR § 483.440 Condition of participation: Active treatment services
- D-9 Scheduling Notice dated 06/08/05
- D-10 Request for Hearing dated 04/26/05 with attached 04/13/05 Denial Letter

**Claimants' Exhibits:**

None

## VII. FINDINGS OF FACT:

1) **West Virginia Provider Manual CHAPTER 500-COVERED SERVICES, LIMITATIONS, AND EXCLUSIONS, Volume 13 - MR/DD Waiver Services - Section 503.1 – Application, October 1, 2003** states in part:

### Medical Eligibility Criteria

BMS and OBHS determine 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 24 hour supervision, training, and supports.

OBHS and BMS determine the level of care based on the Annual Medical Evaluation (DD-2A), Psychological Evaluation (DD-3), and Social History (DD-4) Evaluation, and other documents as requested.

The evaluations must demonstrate that an applicant has a diagnosis of mental retardation which must be severe and chronic, 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.

### Medical Eligibility Criteria: Diagnosis

#### **Diagnosis**

- Must have a diagnosis of mental retardation, which must be severe and 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 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.

- \* Autism
- \* Traumatic brain injury
- \* Cerebral Palsy
- \* Spina Bifida
- \* Tuberos 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 of daily living
- A need for the same level of care and services that is provided in an ICF/MR institutional setting.

The applicant, his/her family, and/or legal representative must 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 (Informed Consent, DD-7).

**2) CFR § 435.1009 Definitions related to institutional status – *Institution for the mentally retarded or related conditions* states:**

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

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

**3) CFR § 483.440 Condition of participation: Active treatment services** states:

(a) *Standard: Active treatment.* (1) Each client must receive a continuous active treatment program, which includes aggressive, consistent implementation of a program of specialized and generic training, treatment, health services and related services described in this subpart, that is directed toward--

- (i) The acquisition of the behaviors necessary for the client to function with as much self determination and independence as possible; and
  - (ii) The prevention or deceleration of regression or loss of current optimal functional status.
- (2) Active treatment does not include services to maintain generally independent clients who are able to function with little supervision or in the absence of a continuous active treatment program.

(b) *Standard: Admissions, transfers, and discharge.* (1) Clients who are admitted by the facility must be in need of and receiving active treatment services.

**4)** The Claimant in this case is Mr. \_\_\_\_\_, a twenty-nine (29) year old Caucasian male applying for continued certification under the Title XIX MR/DD Waiver Program. The Bureau of Medical Services believes the submitted documentation does not support substantial adaptive deficits in three or more of the seven life areas identified for continued MR/DD Waiver eligibility (Exhibit D-1).

**5)** Mr. Stephen Brady, Acting Program Operations Coordinator for the Office of Behavior Health and Health Facilities, reviewed the policy as stated under the West Virginia Provider

Manual CHAPTER 500 - COVERED SERVICES, LIMITATIONS, AND EXCLUSIONS, Volume 13 - MR/DD Waiver Services - Section 503.1 – Application, October 1, 2003 (Exhibit D-2).

6) Mr. [REDACTED] Qualified Mental Retardation Professional (QMRP) - [REDACTED] requested Mr. [REDACTED] clarify “24-hour Level of Care.” According to Mr. [REDACTED] it would require twenty-four (24) hour supervision in the same facility that could also include natural supports. The natural support does not have to be paid staff but rather, a neighbor, roommate, friend, etc.

7) Mr. [REDACTED] Service Coordinator - [REDACTED] provided testimony that, Mr. \_\_\_\_ lives in a facility where there is an on-site Residential Manager and neighbors who are part of an established natural support system. There is always a designated Manager at all times.

8) Mr. Richard Workman, Psychologist with the Bureau of Medical Services, explained that the Title XIX MR/DD Waiver Program is for an Institutional Level of Care. Mr. \_\_\_\_ would need to have the level of care equivalent to someone in an institutional setting. When someone has met the skills in the major life areas and no longer require active treatment to develop those skills, they are no longer eligible.

9) Mr. Workman began consulting with Medicaid in 1983 by reviewing eligibility and conducting on-site reviews at Intermediate Care Facilities (ICF) around the State of West Virginia. In 1985, The Bureau of Medical Services applied and was approved for the Waiver Program. One of the stipulations was that people must still meet that institutional level of care provided in a community setting. If a person does not have substantial deficits equivalent to a person who needs to be in an institution, they must be annually re-certified.

10) There were two Denial Letters dated February 9, 2005 (Exhibit D-3) and April 13, 2005 (Exhibit D-1), respectively. The first denial letter stated,

The DD-2A submitted for the above named individual (\_\_\_\_) could not be re-certified as one or more of the following was insufficient or missing:

- Other: Please submit with current DD-4
- Please re-submit with most recent copy of psychological evaluation
- Please submit a corrected DD-2A for further review. Re-certification will be delayed until receipt of the requested information. Please attach a copy of this memorandum as a cover sheet for the DD-2A. Physician is required to initial and date any changes made to pages 2 - 4 of DD-2A.

The second denial letter stated, “Documentation submitted for re-certification review does not support substantial adaptive deficits in three or more of the seven life areas identified for continued MR/DD Waiver eligibility.”

11) Mr. Workman referred to CFR § 435.1009 Definitions related to institutional status – *Institution for the mentally retarded or related conditions* (b) (Exhibit D-7) which states, “Provides, in a protected residential setting, ongoing evaluation, planning, 24-hour supervision, coordination, and integration of health or rehabilitative services to help each individual

function at his greatest ability.” According to Mr. Workman, the Waiver Program is looking for persons requiring this level of supervision.

**12)** Mr. Workman also referred to CFR § 483.440 *Condition of participation: Active treatment services* (a) (2) and (b) (1) which states, “(2) Active treatment does not include services to maintain generally independent clients who are able to function with little supervision or in the absence of a continuous active treatment program and; (b) *Standard: Admissions, transfers, and discharge.* (1) Clients who are admitted by the facility must be in need of and receiving active treatment services. According to Mr. Workman, the Program is for people who have a severe and chronic disability and, not for people with mild delays who can function with minimal supports and guidance. Mr. Workman proceeded to review the documentation that led to their decision

**13)** The Annual Medical Evaluation (DD-2A) dated November 23, 2004 (Exhibit D-4), was completed by the Physician. He did not indicate any area of difficulty under the *Neurological Heading*. The areas included: Alertness; Coherence; Attention Span; Vision; Hearing; Speech; Sensation; Coordination; Gait; Muscle Tone and; Reflexes. According to Mr. Workman, someone in an ICF facility would have some level of difficulty in these areas.

The Physician only listed Independence with Personal Hygiene, under the five (5) areas listed as *Problems Requiring Special Care*. The areas included Mobility; Continence Status; Feeding; Personal Hygiene and; Mental and Behavioral Difficulties.

The Diagnostic Section did not have any eligible mental retardation diagnosis. Under Mental Diagnoses, The Physician listed Seizure Disorder and Anxiety Disorder. The Physical Diagnosis was listed as Warts on Right Hand. The Prognosis was Good.

The Physician did certify Mr. \_\_\_\_ required the level of services provided in an Intermediate Care Facility for Individuals with Mental Retardation and/or Related Conditions.

According to Mr. Workman, the DD-2A did not arrive with an eligible diagnosis or, with information that would prove Mr. \_\_\_\_ was eligible for the MR/DD Waiver Program.

**14)** The Psychological Evaluation Update, dated April 7, 2004 (Exhibit D-5), was completed by \_\_\_\_\_ M. A., Licensed Psychologist. The following statements are a partial list of observations provided by Ms. \_\_\_\_\_

- \_\_\_\_\_ continues to have deficits in physical development, independent functioning and socialization. According to Mr. Workman, the Physician stated in the DD-2A that Mr. \_\_\_\_ was Ambulatory and, Independent in Self-Care. This not considered active treatment according to the Code of Federal Regulations.

- \_\_\_\_\_ continues to require assistance in self-care, self direction, physical development and any and all medical appointments. He would not know what to do in the event of an emergency and he also presents with poor judgment and inappropriate social skills. According to Mr. Workman, this is inconsistent with the Physicians statements on the DD-2A stating Mr. \_\_\_\_ was Independent with Personal Hygiene. The Self-Direction Score on the ABS Scores are inconsistent with Mr. \_\_\_\_’s interests. Mr. \_\_\_\_ likes to play basketball, bowl and, ride the bus.



- \_\_\_\_\_ is capable of getting himself to appointments on time, however he does not successfully know how to tell time on a manual clock and he relies on a digital watch on his arm. According to Mr. Workman, it is difficult for individuals under an ICF level of care to tell time at all. Mr. \_\_\_\_\_ understanding of a digital watch is a fairly high level skill for individuals in an institution.
- \_\_\_\_\_ has a diagnosis of generalized anxiety disorder as well as mental disorder secondary to his Cerebral Palsy. According to Mr. Workman, the Physician did not provide a diagnosis of Cerebral Palsy on the DD-2A. The diagnosis of Cerebral Palsy was seen in other parts of the record but, has not been documented in the Physical section.
- \_\_\_\_\_ does have a seizure disorder and he has been seizure free for several years. According to Mr. Workman, the MR/DD Waiver Program does not consider the Seizure Disorder for services. The Cerebral Palsy would not be considered since it is not severe in degree. Mr. Workman testified that Moderate Mental Retardation and below are considered an eligible area. Individuals with Mild Delays are not appropriate for the Program. Adaptive Behavior Scores would be considered for individuals with such delays.
- A Wechsler Abbreviated Scale of Intelligence (WASI) was administered to Mr. \_\_\_\_\_. Mr. \_\_\_\_\_ obtained the following IQ Scores: Vocabulary – 20; Similarities – 20; Block Design – 24 and; Matrices Reasoning – 20. Mr. \_\_\_\_\_ obtained a Verbal IQ of 57; A Performance IQ of 57 and; Full Scale IQ of 53. According to Mr. Workman, these scores are in the range that would be considered eligible but, would require corresponding adaptive behavior consistent. The discrepancy occurs with Mr. \_\_\_\_\_'s functioning.
- Mr. \_\_\_\_\_ was rated on the Adaptive Behavior Scale-Residential and Community Second Edition (ABS-RC: 2). Mr. [REDACTED] was responsible for rating the report in the following manner:

| <u>Subtest</u>          | <u>Standard Score</u> |
|-------------------------|-----------------------|
| Independent Functioning | 13                    |
| Physical Development    | 16                    |
| Economic Activity       | 13                    |
| Language Development    | 14                    |
| Numbers and Time        | 14                    |
| Domestic Activity       | 15                    |
| Pre/Vocational Activity | 6                     |
| Self-Direction          | 10                    |
| Responsibility          | 9                     |

Socialization 10

Mr. Workman considers Subtest scores of 12 and below as eligible for the Program.

| <u>Part One Factors</u>          | <u>Quotient Scores</u> |
|----------------------------------|------------------------|
| Personal Self-Sufficiency        | 118                    |
| Community Self-Sufficiency       | 116                    |
| Personal – Social Responsibility | 95                     |

Mr. Workman believes eligible scores, when compared to individuals with mental retardation, would fall around 100 and below.

15) Mr. Workman considered the Social History (DD-3) dated July 20, 2004 to be very positive (Exhibit D-6). He referred to comments in the following sections:

**Social:** \_\_\_\_ is living in [REDACTED] by himself and seems to be adapting to this lifestyle very well. \_\_\_\_ has continued to thrive in this environment and is really enjoying his independence.

**Emotional:** \_\_\_\_ has been living in his own residence at [REDACTED] for over a year now and has adjusted well. \_\_\_\_ will try to boss anyone around that does not stand up to him. Mr. Workman believes this shows self-direction and independence.

**Education/Training:** \_\_\_\_ graduated from [REDACTED] School in June of 1997. \_\_\_\_ has had several employment opportunities since his graduation but has refused to be employed for any period of time. He currently helps with habitat for humanity. \_\_\_\_ had been mowing lawns for extra money but does not remember to do it on a regular basis, only when he needs money. According to Mr. Workman, the Program is not necessarily for refusal, it's the ability to do it. Mr. \_\_\_\_ has had the ability to be employed. Again, the Program is looking for severe and chronic delays.

**Functional Status:** \_\_\_\_ is independent in most areas of his life with continual support and training from ARC staff within a supported living environment. \_\_\_\_ has been employed in the past with several fast food type jobs for short periods of time. He currently requires training in his basic life skills on an ongoing basis. He requires ICF/MR level of care at this time.

**Recreational/Leisure Activities:** \_\_\_\_ has good recreational and leisure skills. He receives a lot of exercise through playing basketball, going to the YMCA and riding his bike. He also has a daily schedule to go out into the community. This schedule has him going to the YMCA, the library, bowling, shopping, etc.

16) Mr. Workman determined that Mr. \_\_\_\_ was not eligible for the Title XIX MR/DD Waiver Program for the following reasons:

- **Self-Care** – No substantial delays

- **Independent Living** – Mr. \_\_\_\_ does not require the intensive level of supervision and support. Although Mr. \_\_\_\_ has available supports, he would not require that level of institutional level of care.
- **Mobility** – Mr. \_\_\_\_ does not meet the program requirements since he is ambulatory.
- **Self-Direction** – Mr. \_\_\_\_ participates in various recreational and leisurely activities.
- **Learning** – It was not measured and it could not be determined if [REDACTED] can read. It was not important in the determination since he did not meet it in Language.

Based upon the documentation, Mr. Workman determined that Mr. \_\_\_\_ did not have substantial delays and require an institutional level of care in the areas of Self-Care; Independent Living; Mobility; Self-Direction and; Language.

17) Ms. [REDACTED] Care Taker – [REDACTED] disagreed with the fact that Mr. \_\_\_\_ is independent with his hygiene and cooking. Mr. \_\_\_\_ must be prompted to take a shower. Ms. [REDACTED]'s concerns were based on her employment with several ICF/MR facilities. According to Mr. Workman, the Physician indicated Mr. \_\_\_\_ was independent on the DD-2A and, the Adaptive Behavior Scores are outside the range of the program.

18) Mr. \_\_\_\_ disagreed with the DD-2A completed by the Physician because, a diagnosis of Cerebral Palsy was not listed. The Physician only met with Mr. \_\_\_\_ on one occasion. Mr. Workman reminded Mr. \_\_\_\_ that the DD-2A was submitted by [REDACTED] and presumed to be correct.

19) Mr. \_\_\_\_ has worked with Mr. \_\_\_\_ for two (2) years. It is estimated that forty-five (45) staff have worked with Mr. \_\_\_\_ during that period. Mr. \_\_\_\_ lived in an ICF/MR facility for several years before being discharged into the community. Mr. [REDACTED] characterizes Mr. \_\_\_\_'s actions as unstable.

## VIII. CONCLUSIONS OF LAW:

- 1) The DD-2A dated November 23, 2004 does not list an eligible diagnosis;
- 2) The Physician certified that Mr. \_\_\_\_ requires the level of care provided in an ICF/MR facility and;
- 3) The documentation indicates Mr. \_\_\_\_ does not have substantially limited functioning in three or more of the major life areas.

## IX. DECISION:

It is the decision of this State Hearing Officer to UPHOLD the Proposal of the Department to terminate services under the Title XIX 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 22nd Day of September, 2005.**

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**Ray B. Woods, Jr., M.L.S.**  
**State Hearing Officer**