



State of West Virginia  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
Office of Inspector General  
State Board of Review  
2699 Park Avenue, Suite 100  
Huntington, West Virginia 25704  
April 18, 2005

Joe Manchin III  
Governor

Martha Yeager Walker  
Secretary

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Dear Ms. \_\_\_\_\_,

Attached is a copy of the findings of fact and conclusions of law on your hearing held February 2 and March 21, 2005. Your hearing request was based on the Department of Health and Human Resources' action to deny medical eligibility for the Title XIX 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 and benefit levels for the MR/DD Waiver Program case are determined based on current regulations. One of these regulations is that the applicant must have both a diagnosis of mental retardation and /or a related condition and require the level of care and services provided in an ICF/MR facility (Title XIX MR/DD Home and Community-Based Waiver Program revised Operations Manual June 1, 2001).

The information which was submitted at the hearing revealed that you continue to meet the medical criteria for the Title XIX MR/DD Waiver Services Program.

It is the decision of the State Hearing Officer to reverse the action of the Department to deny medical eligibility for the Title XIX MR/DD Waiver Program.

Sincerely,

Thomas M. Smith  
State Hearing Officer  
Member, State Board of Review

cc: Board of Review  
Susan Hall, BHHF  
Richard Workman, BMS  
Kelly Ambrose, Dept. Attorney  
\_\_\_\_\_, Claimant's Attorney

NAME: \_\_\_\_\_

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 April 11, 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. This fair hearing was originally convened on February 2, 2005 on a timely appeal filed July 6, 2004.

It should be noted here that any benefits under the Title XIX MR/DD Waiver Program have been continued pending the results of this hearing. It should also be noted that the hearing was originally scheduled for November 19, 2004 but was rescheduled at Department's request. It should also be noted that the hearing was reconvened on March 21, 2005 to allow the claimant's witness (Ms. \_\_\_\_\_) to testify. In addition, it should be noted that the hearing was convened in the \_\_\_\_\_ County DHHR office with Department representatives participating by speaker phone from Charleston, WV.

All persons giving testimony were placed under oath.

### II. PROGRAM PURPOSE

The program entitled Title XIX 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.

The MR/DD Waiver Program serves individuals who are eligible to receive services in an Intermediate Care Facility for Individuals with Mental Retardation and Related Conditions (ICF/MR). The MR/DD Waiver Program provides services in homes and local communities instead of ICFs/MR.

### III. PARTICIPANTS

1. \_\_\_\_\_, Claimant.
2. \_\_\_\_\_, Claimant's mother.
3. \_\_\_\_\_, QMRP
4. \_\_\_\_\_, Psychologist.
5. \_\_\_\_\_, Claimant's Attorney
6. Susan Hall, Program Manager, BHMF.
7. Richard Workman, Psychologist Consultant, BMS.
8. Kelly Ambrose, Dept. Attorney.

Presiding at the hearing was Thomas M. Smith, State Hearing Officer and a member of the State Board of Review.

### V. QUESTION TO BE DECIDED

The question to be decided is whether the claimant (\_\_\_\_\_) meets the medical eligibility requirements for the Title XIX MR/DD Waiver Program.

### V. APPLICABLE POLICY

Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, June 1, 2001.

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### VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

- Exhibit #1 Copy of Eligibility Criteria (7 pages).  
" #2 Copy of notification letters 11-5-04 and 6-17-04.  
" #3 Copy of Demographics/Monitoring report (6 pages).  
" #4 Copy of Psychological Evaluation 9-23-04 (12 pages).  
" #5 Copy of Social History Update 8-13-04 (3 pages).  
" #6 Copy of DSM-IV-TR pages 63 & 65 (3 pages).

- " #7 Copy of Intake Evaluation by [REDACTED] 8-31-04 (5 pages).
- " #8 Copy of letter from [REDACTED] M. D. 10-14-04.
- " #9 Copy of Psychological Evaluation 3-30-04 (11 pages).

Exhibit #C1-1 Copy of Civil Action No. 03-AA-97 4-2-04 (9 pages) (it should be noted that Ms. Ambrose objected to the document and the State Hearing Officer took the objection under advisement to review the document and determined that the document is admissible and marked the document as Exhibit #C1-1).

Exhibit #C1-2 Copy of DSM-IV-TR pages 80-84 (6 pages).

## VII. FINDINGS OF FACT

1. Ms. Hall testified that a packet is submitted by DD-14 and includes a DD-2a (medical evaluation), DD-3 (Psychological Evaluation), and DD-4 (Social History), that the applicant must have a diagnosis of mental retardation (MR) or related condition and must require ICF/MR level of care, that the condition must have manifested prior to age 22, that there must be limits in three (3) or more areas including self-care, learning (functional academics), mobility, capacity for independent living, language, economic self-sufficiency, and self-direction.

2. Mr. Workman testified the claimant does not meet eligibility criteria, that she went to Junior College two (2) semesters, that she exhibits non-compliance and excessive behavior, that the DD-2A shows a diagnosis of autism and obesity, that she does not meet the criteria in mobility, that she is continent, feeds herself, and takes care of personal hygiene and does not meet self-care criteria, that she is alert and most things on the DD-2A are marked as normal, that the Psychological Evaluation 9-23-04 (Exhibit #4) shows severe behavior problems, resistance, and needing prompts, that her mental status is oriented, that she expresses herself and follows instructions and reads and writes well and does not meet the academic criteria, that she has poor social interaction, that she has an average to low IQ, that the ABS scores show less than 3 in language and self-direction but the narrative does not support such findings, that there is a diagnosis of Asperger's and PDD, that she needs behavioral support for refusals, verbal outbursts/threats, obsessive behavior, aggression, that the Psychological Evaluation 3-30-04 (Exhibit #9) shows Vocabulary Score of 85, Language Score of 90, and a Composite Score of 86, that the Social History (Exhibit #5) showed that she had filed bankruptcy in July, 2002, that she has difficulty with money management, that she has a cell phone and two (2) new credit cards, that she attended [REDACTED] Junior College and has worked, that she graduated from [REDACTED] High School in [REDACTED], that she was received training as a 911 operator and at [REDACTED] Pharmacy, that she can read and write, tell time, use a microwave, that she does not meet the criteria in self-care or learning, that she shops at [REDACTED] and shows self-direction, that other areas in the DSM-IV-TR have MR as part of diagnostic criteria, that an individual must meet A, B, C, D, and E to meet criteria for Asperger's in the DSM-IV-TR, that D states that there is no language delays, that E states that there are no delays in cognitive development but the Psychological Evaluation said there was, that it would be difficult for a person with Asperger's to be eligible for the MR/DD Program, that the Intake Evaluation (Exhibit #7) states that she has trouble with aggressive behavior, coping, etc. but gives no concerns about adaptive behavior, that the Waiver Program is not for persons who have outbursts, that Axis I shows a diagnosis of Asperger's Disorder, that Axis II shows Borderline Intellectual Functioning, that a residential treatment program is recommended, that a letter from [REDACTED] [REDACTED], M.D., dated 10-14-04 (Exhibit #8) gives diagnoses of Generalized Anxiety Disorder, Obsessive-Compulsive Disorder, and Pervasive Developmental Disorder, that she does not meet the criteria in mobility, self-care or self-direction.

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3. On Cross-examination, Mr. Workman testified that the claimant's diagnosis can cause problems in other areas of life, that the affects are not limited to one (1) area of life, that the disturbance may cause difficulty in self-sufficiency and occupational areas, that she has been on the program since 5-18-01, that he does not know if her condition has improved, that the Domain Scores in Part I of the Psychological Evaluation 9-23-04 show that she scored 75% or lower in 8 out of 10 areas, that the new manual does not apply different standards, that the old manual did not say 75% or lower qualifies but it was being applied anyway, that the Domain Scores in Part II show 7 out of 8 below 75%, that the Psychological Evaluation completed on 3-30-04 showed 8 out of 10 of the Domain Scores in Part I at 75% or lower and 7 out of 8 of the scores in Part II at 75% or lower, that the Standard Score usually is compared with MR persons, that 10 is an average

score, that #12 is the narrative score, that it is not in the manual or a program instruction, that on the Psychological Evaluation completed on 3-30-04, 8 of the scores were 12 or below in Part I and 7 of the scores were 12 or below in Part II, that on the Psychological Evaluation completed 9-23-04, 8 of the scores in Part I were 12 or below and 7 of the scores in Part II were 12 or below, that he is not aware of any literature in his field or federal instructions or law which supports thresholds, that there are no manual definitions or professional literature which correlate sub-domains to major life areas.

4. Ms. \_\_\_\_\_ testified that she is the QMRP, that she develops programs to assist workers and train staff, that she has worked with the claimant since 2000 but has not been paid to work with her since June, 2004, that before then, she saw her daily and now gets calls from her 1-2 times a week, that in the area of self-care, the claimant cannot wash her hair and get it clean, that she cannot bathe properly, that she brushes her teeth but not adequately, that she has no adequate hygiene skills, that she has a second to third grade learning level, that she failed \_\_\_\_\_ Junior College, that she had a modified scheduled in High School as she was in special education, that she can write but not very good, that she is unable to cook for herself and can't clean, that she is trusting and that anyone could gain entrance to her home, that people take advantage of her, that she filed bankruptcy for her, that the claimant did not know how credit cards worked, that she has attempted to work, that she worked in stock at \_\_\_\_\_ but was fired after 1-2 weeks, that she is concerned that the claimant would stay home and never shower, never brush her teeth, that she does not know how to ride a bus and cannot drive, that she has no money for a taxi, that she would be stuck in the house doing nothing, and that she could be in some danger.

5. On cross-examination, Ms. \_\_\_\_\_ testified that she has known the claimant since mid-2000, that she saw her several times a week last year, that she sleeps a lot when alone, that she does crafts but does not express herself very well, that she completed the application for Junior College, that she was in an autism classroom, that she can hold a broom and mop, that she can brush her teeth but not well, that she does not bathe appropriately, that she has some compliance issues, that she can get on-line and use a computer, that she cannot shop for herself, and that she has not worked in any MR/DD homes but has been in them.

6. Ms. \_\_\_\_\_ testified that she has worked with ICF/MR individuals since 1985, that she is familiar with Asperger's Disorder, that she did two (2) full evaluations of the claimant, that Pervasive Developmental Disorder (PDD) includes a group of disorders including MR, Autism, feeding disorders, that Asperger's is included, that PDD-NOS has characteristics in the Autism Spectrum but not full-blown, that she completed the evaluation 9-23-04 and gave a diagnosis of Asperger's Syndrome and Pervasive Developmental Disability-NOS, that it is 299.80 and is a developmental disability in the Autism Spectrum, that she used school records, teachers, the claimant's mother and interviewed the claimant, that self-care implies basic personal hygiene, doing laundry, cleaning the environment, that the claimant will not do these things without prompting and overseeing, that it includes cleaning the apartment, brushing teeth, not taking a bath and clogging the commode with toilet paper, that self-direction includes organizing your day, caring for finances and shopping, grocery shopping,

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that capacity for independent living includes taking care of finances, getting to work, cleaning the apartment, that the claimant has never been able to sustain employment even with a job coach, that it includes cooking, shopping, and finances, that the Adaptive Behavior Scales (ABS) rates areas in first column and behavior issues in the second, that the raw score is the total numbers, that the percentile rank compares them with others with similar disabilities and not with the general population, that she does not remember what the standard score is, that age equivalent shows skill level, that with Independent Functioning, the claimant scored like a five (5) year old, that the Part I domain measures skill level in life skills, finances, communication, working, that Part II domain measures behavior issues, that she does the narrative notes, that she does the ABS scores first, that in self-direction, the individual can find an activity on his/her own, that the claimant needed support in high school and in junior college, that she was in special education classes, that she still has substantial limitations, that the non-compliance is part of her condition, that it is a feature of PDD, that she supports the conclusion that the claimant has substantial limitations, that there has been no medical improvement, that her

obsession with toilet paper and her health have gotten worse.

7. On cross-examination, Ms. [REDACTED] testified that she has had no complaints filed against her, that she has been in ICF/MR homes, that people there are learning basic skills, that she is familiar with the CFR, that she has not reviewed files for ICF/MR facilities, that she has not read the State Plan for the MR/DD Program, that she was not paid to testify, that no documentation was provided for her testimony, that she did not review anything, that PDD is a catch-all diagnosis, that the difference between PDD and Asperger's gets down to an IQ issue, that PDD-NOS individuals have a below average IQ, that the claimant has an IQ in the lower range, that her diagnosis is probably PDD-NOS due to low average IQ, that there can be language problems with Asperger's individuals, that persons with Asperger's can have quirks, can have high level of intelligence and can get distracted, that persons with Autism would have delays in cognitive development and language, that persons with Asperger's could do well in a job if put in an area of interest, that they have a difficult time fitting in with society, that a lot of individuals in ICF/MR homes have a high school education but not a lot would go to vo-tech or junior college, that the claimant does not understand the necessity of personal hygiene and needs someone to tell her to do them, that the claimant does have a computer, that she does call people, that she can fill out credit card applications, that she worked at [REDACTED] and in fast food, that she is not aware if she had training as a 911 operator, that she was working at [REDACTED] five (5) days a week hanging clothes but behavior and obsession issues caused problems, that she has a problem with aggression, that the ABS language score of less than a three (3) year old surprises her and she would have to look at the questions used but a three (3) year old could not do some of the things the claimant can do, that the claimant has no deficit in mobility, that she did graduate from high school and can read and write, that she can do self-care things but needs prompting, that she can purchase things and engage in activities.

8. On re-direct, Ms. [REDACTED] testified that one of the primary features of Asperger's is social interaction, that it must cause problems in areas of socialization and occupation, that it may cause limitations in other areas, that a person with Asperger's can have impairments in other areas due because of the affect on work, etc., that with Asperger's, the component of willfully choosing not to do something is not there, that with things like brushing teeth, the individual can have the physical skill to do it but not understand the importance of doing it, that the qualitative importance in social interaction may affect other areas, that the failure to hold jobs relates to Asperger's in that the claimant does not have an understanding of the work rules and expectations, that the claimant is substantially limited in economic self-sufficiency, that obsessions are part of the Asperger's disorder, that the individual cannot stop thinking about it, that the DSM-IV-TR refers to restricted and repetitive patterns of behavior and that is what the claimant displays.

9. Both parties requested an opportunity to provide written arguments and a period of two (2) weeks was agreed upon by both parties. Written arguments were received from Mr. [REDACTED] on 4-4-05 and from Ms. Ambrose on 4-6-05 with a

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corrected copy received on 4-7-05. Mr. [REDACTED] notified the State Hearing Officer by e-mail on 4-6-05 that he would be submitting a response to Ms. Ambrose's arguments and his response was received on 4-11-05. On 4-6-05, the State Hearing Officer notified Ms. Ambrose by e-mail that she could also provide a written response but no additional documentation was received from Ms. Ambrose as of April 11, 2005 and the State Hearing Officer proceeded with the hearing decision.

#### **CONCLUSIONS OF LAW**

1. Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, June 1, 2001 Introduction states, in part:

''The Medicaid Home and Community-Based MR/DD Waiver (authorized under Title XIX 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). Th 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 individuals who require 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. West Virginia supports an individual's freedom of choice of providers for MR/DD Waiver Program services.

## ELIGIBILITY

Medical eligibility for this program is determined at the state level by the Bureau for Medical Services (BMS) and the Officer of Behavioral Health Services (OBHS). To be programmatically (medically) eligible, an individual must have **mental retardation or a related condition which requires intensity of training and support and that is received in an ICF/MR setting**. HCFA defines this as a need for ''active treatment''. The medical eligibility determination is based on assessments performed by a physician, a licensed psychologist and a licenses social worker. **All persons who are certified eligible to be in an ICF/MR setting are eligible to participate in the MR/DD Waiver Program.**

2. Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, June 1, 2001, Chapter I states, in part:

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

A. In order to be eligible for the Title XIX MR/DD Home and 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).

#### 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

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4. Tubercous 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 **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 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. Economic Self-Sufficiency (Employment)

D. Level of care determinations are made by the Office of Behavioral Health

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.''

3. Title XIX MR/DD Home & Community-Based Waiver Program Revised Operations Manual, June 1, 2001, Chapter II, Sections I and II state, in part:

''I. APPLICATION PROCESS

A. Where can the application receive an "Application (DD-14) information Packet"?

1. Local Behavioral Health Centers
2. Local/County Department of Health and Human Resources (DHHR) Office
3. State MR/DD Waiver Office

B. The contents of the "Application Information Packet" include

1. An **Application** (DD-14) form;
2. Instructions for completing the application (DD-14);
3. The Statement of Rights (which includes the Notice of Decision form and the Request for Hearing form);
4. Brochure for the MR/DD Waiver Program; and
5. Reference Guide to West Virginia Service Coordination Agencies.

C. What is the difference between an Application and a Statement of Interest?

1. Persons can apply for MR/DD Waiver services or submit a "Statement of Interest" using a single form: the Application (DD-14) form. The State MR/DD Waiver Program combined these into one form to simplify the process. The only difference between an Application and Statement of Interest is when the applicant

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requires MR/DD Waiver Program Services. There are two (2) distinct time frames from which the applicant may choose between on the Application (DD-14).

a. If the applicant requests an **Application** (DD-14) for MR/DD Waiver Program Services, this indicates the individual requires services in 0-90 days.

b. If the applicant requests a **Statement of Interest**" (DD-14) for MR/DD Waiver Program services, this indicates the individual requires services in 91 days or greater.

2. The Application (DD-14) is a one page form which has two (2) duplicate copies. The original "white copy" is for the State MR/DD Waiver office, the "yellow copy" is for the applicant and the "pink copy" is for the selected Service Coordination agency.

D. What is the process for applicants who require MR/DD Waiver Program services in 0-90 days?

**All applicants who require MR/DD Waiver Program services within 0-90 days have a right to a full eligibility determination within 90 days.**

1. The applicant receives an Application (DD-14) Information Packet at one of the following locations:

- a. Local Behavioral Health Centers;
- b. Local/County Department of Health and Human Resources Office; or
- c. State MR/DD Waiver office.

2. The applicant and/or their legal representative are to fully complete the application. **If assistance is needed to complete the application form, the applicant and/or legal representative may receive assistance at no cost from any of the three (3) location sites.**

3. The Application must be fully completed with a Service Coordination Agency selected by the applicant and/or legal representative to ensure processing without delay.

4. The applicant and/or legal representative will submit the completed Application to one of the above-mentioned locations (1a - 1c).

**5. If the Application is submitted to the local/county Department of Health and Human Resources office, there are four (4) responsibilities of that local/county DHHR office:**

a. Entering the date the Application was received on the appropriate space provided at the bottom of the form;

b. Providing the applicant and/or legal representative with the "yellow" copy of the Application for the applicant's records on the day the application is submitted;

c. Sending the original "white" copy to the State MR/DD Waiver office; **and**

d. Sending the "pink" copy to the selected Service Coordination agency within one (1) working day once the application is submitted.

6. If the application is submitted to a local behavioral health center, there are four (4) responsibilities of the local behavioral health center:

a. Entering the date the Application was received on the appropriate space provided at the bottom of the form;

b. Providing the applicant and/or legal representative with the "yellow" copy of the application for the applicant's records on the day the application is submitted;

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c. Sending the "white" original to the State MR/DD Waiver office within one (1) working day once the application is submitted; **and**

d. Sending or maintaining the "pink" copy of the completed Application. If the local behavioral health center was not chosen as the Service Coordination agency, they are responsible for sending the "pink" copy of the application to the selected Service Coordination agency within one (1) working day once the application is submitted.

7. Once the State MR/DD Waiver office receives the Application, they will verify that the selected Service Coordination agency has received a copy of the Application.

8. Once the selected Service Coordination agency has received the completed Application, they will complete the full application packet. The full application packet must be completed and submitted to the State MR/DD Waiver Office within 45 days of receipt of the completed application.

9. Once the State MR/DD Waiver office receives the full application packet from the selected Service Coordination agency, the State MR/DD Waiver office will make a final eligibility determination within 45 days.

10. If an allocation is immediately available, the eligible applicant will be placed on the MR/DD Wavier Program. If an allocation is not available, the applicant will be placed on the "wait list", which is maintained by the State MR/DD Waiver office. The eligible applicant shall not be on a "wait list" longer than 90 days following the final eligibility determination.....

4. The evidence and testimony show that the claimant has an eligible diagnosis. While the Department contended that the claimant's diagnosis of Asperger's Disorder was an exclusionary one, testimony from Ms. \_\_\_\_\_-Griffith showed that the claimant also has a diagnosis of PDD NOS which is not an exclusionary diagnosis for the Title XIX MR/DD Waiver Program and can be considered as a related condition.



5. The evidence and testimony show that the claimant has substantial limitations in the major life areas of self-care, capacity for independent living, self-direction, and economic self-sufficiency.

6. The evidence and testimony show that the claimant has been a recipient of services under the Title XIX MR/DD Waiver Services Program for several years but the Department did not show that her medical condition has improved to the point that she no longer meets the medical eligibility requirements.

7. The Department showed no legal definition or standard for defining substantial limitations in functional abilities either in State or Federal Regulations.

8. The claimant meets the medical eligibility requirements for the Title XIX MR/DD Waiver Services Program.

#### **VIII. DECISION**

Based upon the evidence and testimony presented, I must reverse the action of the Department to determine that the claimant does not meet the medical eligibility criteria for the MR/DD Waiver Services Program.

#### **IX. RIGHT OF APPEAL**

See Attachment.

#### **X. ATTACHMENTS**

The Claimant's Recourse to Hearing Decision.

Form IG-BR-29.