



**State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
P.O. Box 1736
Romney, WV 26757**

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

December 16, 2005

Dear _____

Attached is a copy of the findings of fact and conclusions of law on your hearing held December 5, 2005. Your hearing request was based on the Department of Health and Human Resources' action to discontinue services under the Title XIX MR/DD Waiver Services 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 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 related condition. A related condition would be any condition, other than mental illness, found to be closely related to mental retardation if this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons. 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 the Mentally Retarded (ICF/MR facility). (Chapter 500 of Title XIX MR/DD Home and Community Based Waiver Program Revised Operations Manual, 11-1-04).

The information, which was submitted at the hearing, revealed that you no longer meet the medical criteria to be eligible for the Title XIX MR/DD Waiver Services Program.

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

Sincerely,

Sharon K. Yoho
State Hearing Officer
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review
Stephen Brady, BHMF
Linda Workman, BMS

_____,
Claimant,

v.

Action Number: 05-BOR-6307

**West Virginia Department of
Health and Human Resources,**

Respondent.

DECISION OF STATE HEARING OFFICER

I. INTRODUCTION:

This is a report of the State Hearing Officer resulting from a fair hearing concluded on December 5, 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 convened on December 5, 2005 on a timely appeal, filed June 27, 2005.

It should be noted here that the claimant's benefits have been continued pending a hearing decision.

II. PROGRAM PURPOSE:

The program entitled MR/DD Home and Community-Based Waiver is set up cooperatively between the Federal and State governments and administered by the West Virginia Department of Health & 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-In-Law

Stephen Brady, Acting Program Coordinator, BHHF (participating by speakerphone)
Linda Workman, Psychologist Consultant, BMS (participating by speakerphone)

Presiding at the Hearing was Sharon K. Yoho, State Hearing Officer and a member of the State Board of Review.

IV. QUESTIONS TO BE DECIDED:

The question to be decided is whether the claimant meets the medical requirements of the Title XIX MR/DD Waiver Services Program.

V. APPLICABLE POLICY:

Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual,
Chapter 500 (revised November 1, 2004)
The Code of Federal Regulations – 42 CFR 435.1009 and 42 CFR 483.440

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 MR/DD Waiver Services Manual Chapter 500
- D-2 Annual Medical Evaluation dated January 24, 2005
- D-3 Psychological Evaluation dated March 9, 2004
- D-4 Social History dated May 18, 2004
- D-5 Individual Program Plan dated September 14, 2004
- D-6 Termination notice dated May 27, 2005

VII. FINDINGS OF FACT:

- 1) The claimant is currently an active client under the Title XIX MR/DD Waiver Services Program. Her eligibility was undergoing an annual evaluation in the month of February 2005. The Bureau of Behavioral Health reviewed the re-evaluation packet in February and determined that the Annual Medical (DD2-A) was incomplete. The Diagnostic section was not completed. The Department's Psychologist requested that the DD2-A be resubmitted with a diagnosis listed and that a current Social History be submitted.
- 2) The Annual Medical (DD2-A) was resubmitted on April 1, 2005 along with a current Social History.
- 3) The Annual Medical listed a qualifying diagnosis of Mental Retardation. This diagnosis was entered on the form on March 30, 2005 with an initial presumed to be that of a medical doctor.

- 4) The Annual Medical noted the claimant's attention span to be normal. Under problems requiring special care, the evaluating Physician did not indicate any areas needing special care. The form was marked with Ambulatory, Continent, Feeds Self and Self-Care for Personal Hygiene. Under Mental and Behavioral Difficulties, the claimant was noted to be Alert.
- 5) The Psychological Evaluation reported Ms. _____ to be fully mobile. It reports her to be independent in personal hygiene and dressing. The evaluation noted that she requires some assistance with shopping, transportation and management of finances. It found her language skills to be well developed.
- 6) The Psychological Evaluation reported _____ to enjoy singing Karaoke, bowling, swimming, fishing and playing basketball. She appeared for her Psychological well groomed and dressed in her _____ work uniform.
- 7) The claimant works five days a week at _____ where she does the limited task of frying French fries. Her previous employment history includes working at _____ restaurant _____ and _____ would like to enter the Certified Nursing Assistant training program however; she lacks the reading ability she feels is necessary. She can read small words and do simple math. Ms. _____ has attempted to pass a driving test with no success. She was married in the summer of 2004.
- 8) The claimant has a Full Scale IQ of 65. Adaptive Behavior Scale scores which would relate to functioning abilities in the identified major life areas were recorded as:

Independent Functioning	Std. Score 11	63% Average
Physical Development	Std. Score 13	84% Above Average
Economic Activity	Std. Score 12	75% Average
Language Development	Std. Score 13	84% Above Average
Numbers and Time	Std. Score 9	37% Average
Domestic Activity	Std. Score 12	75% Average
Self-Direction	Std. Score 12	75% Average

The claimant's Pre/Vocational Activity Std. Score was 6 9% Below Average

- 9) The claimant's mother-in-law voiced concerns regarding Ms. _____'s need for transportation to her job at _____. The Waiver Services is helping with this right now. She also voiced concerns regarding the claimant's need for assistance in dealing with money, with cooking and with choosing her clothing.
- 10) Ms. _____ has made progress due to the services, which have been offered to her through the MR/DD program.

- 11) Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500, November 2005 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 and 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 support.

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 the 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

- * 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

- * Tuberous Sclerosis

Additionally, mental retardation and/or related condition 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).

- 12) 42 CFR 435.1009 states, in part:

"Active Treatment in intermediate care facilities for the mentally retarded means treatment that meets the requirements specified in the standard concerning active treatment for intermediate care facilities for persons with mental retardation under 483.440(a) of this subchapter.....

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....

Persons with related conditions mean individuals who have a severe, chronic disability that meets all of the following conditions:

(a) It is attributable to--

(1) Cerebral palsy or epilepsy; or

(2) Any other condition, other than mental illness, found to be closely related to mental retardation because this condition results in impairment of general intellectual functioning of adaptive behavior similar to that of mentally retarded persons, and requires treatment or services similar to those required for these persons.

(b) It is manifested before the person reaches age 22.

(c) It is likely to continue indefinitely.

(d) It results in substantial functional limitations in three or more of the following areas of major life activity:

(1) Self-care

(2) Understanding and use of language

(3) Learning

(4) Mobility

(5) Self-direction

(6) Capacity for independent living

13) 42 CFR 483.440(a) states, in part:

"(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.

VIII. CONCLUSIONS OF LAW:

- 1) Regulations require that a diagnosis of MR or related condition exists which must be severe and chronic and have been manifested prior to age 22 and is likely to continue. The claimant meets this criterion as she has a diagnosis of Mental Retardation, which manifested prior to age 22 and is likely to continue.
- 2) Regulations require that substantial limitations in functioning must exist in three (3) or more of the major life areas. Testimony and evidence supports that the claimant has substantial limitations in the major life area of Capacity for Independent Living and in Learning. The claimant's Adaptive Behavior scores that were at or below the seventy fifth (75)-percentile range were in the areas of Independent Functioning, Economic Activity, Numbers and Time, Domestic Activity and Self-Direction. Evidence provided on the DD2A and Social Summary do not coincide with these low scores. Evidence clearly shows the claimant does not have substantial deficits in the area of Self-care and Self-direction however; substantial deficits are indicated in the area of learning (functional academics) and Capacity for Independent Living. Substantial deficits in two (2) of the major life areas would not lead to an eligible determination.
- 3) Regulations require that evaluations of the applicant must demonstrate a need for the same level of care and services that is provided in an ICF/MR facility. Evidence does not support the belief that this claimant needs such level of services that are provided in an Institutional setting.

IX. DECISION:

It is the decision of the State Hearing Officer to uphold the action of the Department to discontinue services under the Title XIX MRDD Waiver Services Program.

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this 16th Day of December, 2005.

**Sharon K. Yoho
State Hearing Officer**