



**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 22, 2005

for _____

Dear Ms._____:

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 deny eligibility for services under the Title XIX MR/DD Waiver Services Program for your nephew.

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, did not substantiate that your nephew met 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

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 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 July 13, 2005.

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 Aunt

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 February 11, 2005

D-2a Corrected Annual Medical Evaluation dated February 11, 2005

D-3 Psychological Evaluation dated April 14, 2005

D-3a Corrected Annual Medical Evaluation dated April 14, 2005

D-4 Social History dated May 4, 2005

D-5 Individualized Education Program (IEP) dated January 22, 2004

D-5a Individualized Education Program dated January 13, 2005

D-6 [REDACTED] County Schools, Psycho educational Evaluation Report, 12/2/03

D-7 Notice of denial dated June 17, 2005

VII. FINDINGS OF FACT:

- 1) The claimant's aunt, Ms. _____, submitted an application packet to the Bureau of Behavioral Health in May 2005 to determine if her nephew would qualify for services under the Title XIX MR/DD Waiver Services Program. The Bureau of Behavioral Health reviewed the documents submitted and determined that based on the information made available to them that Mr. _____ did not meet the medical criteria for the program.

- 2) The denial notice was sent on June 17, 2005 advising the following: “Your application was denied because: The DD-2A (Annual Medical Evaluation) lacks an eligible diagnosis. Psychometric data reported in the DD-3 does not support the Axis II diagnosis of mild mental retardation and a licensed psychologist did not sign the report. The IEP submitted with the packet is outdated. A current comprehensive measure of intelligence and academic achievement will be required for further review.” The notice also advised that the claimant had a right to a second medical exam at the department’s expense if their decision was based on medical reasons.
- 3) Ms._____ re-submitted the DD-2A on August 8, 2005 with a diagnosis of Mild Mental Retardation noted.
- 4) The Psychological was re-submitted by Ms._____ on July 13, 2005 with a licensed Psychologist signature.
- 5) A current IEP was submitted on July 14, 2005.
- 6) A current comprehensive measure of intelligence was not included in the original packet and was not provided when requested by the Department for further review. The only test results provided to measure intelligence was a Peabody Picture vocabulary test. The standard score on this test was 88, which is in the low average range of intelligence. This score did not support a diagnosis of Mental Retardation. The scoring results of the Peabody Picture vocabulary test are not considered to be a comprehensive measure of intelligence.
- 7) The Physician noted, on the DD-2A, no special care is needed for ambulation, continence or feeding. He noted the claimant needs assistance with personal hygiene. The following areas were noted by the Physician to be normal: Alertness, Coherence, Attention Span, Vision, Hearing, Speech, Sensation, Coordination, Gait, Muscle Tone and Reflexes. He does however note that the “Patient Requires the Level of Care and Services provided in an Intermediate Care Facility for Individuals with mental Retardation (ICF/MR).”
- 8) The Psychological Evaluation reported Mr. _____ to ambulate fully and to be unable to complete self-help activities without verbal prompting and assistance. It reports him to communicate effectively. It reports the claimant to be unable to read, but this information is disputed in the IEP, which states he reads on a 3rd to 4th grade level. The Psychological document listed a diagnosis of Mild Mental Retardation
- 9) Adaptive Behavior Scale scores were provided with the Psychological. Two areas produced scores in the less than the one percentile range. These were in the areas of Independent Functioning and Economic Activity.
- 10) The claimant’s Social History reports the claimant to be able to communicate his basic wants and needs and to understand simple directions. He is reported to be able to use the microwave to prepare simple meals. The Social History reports him to have a good overall safety concept. He helps around the house doing such tasks as vacuuming, taking out trash and cleaning out vehicles. He participates in Basket Ball and Base Ball. The Social History reports that the claimant needs supervision with shopping.

- 11) The January 13, 2005 Individualized Education Program (IEP) notes that Mr. _____ reads in class during his “free time”. He completes spelling tests at 74%, can count by 5s, 10s and 25s at 81%, he tells time at 95% and he can count coins up to \$1.00 and bills up to \$20.00 at 100%.
- 12) The IEP notes that Mr. _____ uses inappropriate language and will pick on others to get a laugh. He shows off various electronics that he brings to school daily such as (CDs, CD player, Cell Phone, 2 Way Radio, DVD players etc.) When isolated and working individually with a teacher Mr. _____ is a hard worker and an appropriate young man. He needs to work on learning to impress others with appropriate and positive behaviors. The IEP reports that Mr. _____ has had success in Vocational Technical training in the past two (2) years.
- 13) Ms. _____ testified that Mr. _____ is very difficult for her to handle. She believes that he needs someone to work with him so he can learn all that he is capable of learning. She reiterates that Mr. _____ is Mentally Retarded and has been since birth. He is her sister’s child and her sister recently passed away leaving Mr. _____ in her care. She is 60-years-old and feels she is not in a position to adequately care for him. She believes the school system would have reason to reflect an inaccurate picture on Mr. _____’s IEP. During the hearing, Ms. _____ asked Mr. _____ to count by 5s and by 10s and he did so successfully. She asked him to look at her watch and tell her what time it was and he was able to say that it was around 10:00, which was true.
- 14) 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)
- Economic Self Sufficiency

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).

15) 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

16) 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 Physician and Psychologist have diagnosed Mr. _____ with Mild Mental

Retardation. This condition was manifested prior to age 22 and is likely to continue however; evidence does not support his MR condition to be severe in nature.

- 2) Regulations require that substantial limitations in functioning must exist in three (3) or more of the major life areas. With the absence of a reliable comprehensive measure of intelligence, the Department had to depend on the information supplied to them. Testimony and evidence did not support that the claimant has substantial limitations in three (3) of the major life areas. Documentation submitted did support that Mr. _____ has substantial limitations in the area of Self Care. There is also indication that Mr. _____ may have substantial limitations in the area of Economic Self-Sufficiency however; he has been making progress in Vocational Technical training.
- 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 as is provided in an Institutional setting.

IX. DECISION:

It is the decision of the State Hearing Officer to uphold the action of the Department to deny 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 22nd Day of December, 2005.

**Sharon K. Yoho
State Hearing Officer**