



**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 30, 2005

Dear Ms.____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held December 8, 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, BHHF
[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 STATE HEARING OFFICER

I. INTRODUCTION:

This is a report of the State Hearing Officer resulting from a fair hearing concluded on December 8, 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 8, 2005 on a timely appeal, filed October 11, 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

_____, Provider

[REDACTED]

Stephen Brady, Acting Program Coordinator, BBHHF (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 Annual Medical Evaluation dated March 1, 2005

D-2 Psychological Evaluation dated May 26, 2005

D-3 Termination notice dated August 12, 2005

Claimant's Exhibits:

C-1 Domain Training documentation

C-2 Training Objectives

C-3 Program Objectives February 2005 thru June 2005

C-4 Program Objectives Charting Form

C-5 Protocol by QMRP dated November 28, 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 March 2005. The Bureau of Behavioral Health reviewed the re-evaluation packet in March

and determined that the Annual Medical (DD2-A) was incomplete. The Physician had not signed the document and the need for ICF/MR level of care was not noted. The Department's Psychologist requested that the DD2-A be resubmitted with a signature.

- 2) The DD2-A was resubmitted on June 23, 2005 with a signature and the need for ICF/MR level of care had been noted.
- 3) The Annual Medical listed a qualifying diagnosis of Mental Retardation.
- 4) The Annual Medical noted the claimant's attention span, speech, coordination and gait to be normal. Under problems requiring special care, the evaluating Physician noted the claimant to be ambulatory and able to feed self. A problem with bladder incontinence was noted and the Physician noted that the claimant needs prompting for personal hygiene care.
- 5) The Psychological Evaluation reported Ms._____'s fine motor skills to be reasonably well developed. The Evaluation reported her to be able to feed, bathe and dress herself. She is reported to be generally independent in toileting, but does have occasional toileting accidents
- 6) The Psychological Evaluation reported the claimant to be able to speak in complete sentences and read at about a 2nd grade level. She can write sentences, but has trouble constructing a paragraph. She was reported to have no articulation defects, but tends to be quiet.
- 7) The Psychological Evaluation reports that Ms._____'s personal freedom tends to be rather limited due to her tendency to sneak off to be with boys. She likes shopping, watching TV, reading and watching ball games.

The Wechsler Adult Intelligence test reported the following scores:

Verbal IQ	66	1%	Mild MR Range
Performance IQ	80	9%	Low Average Range
Full Scale IQ	69	2%	Mild MR Range

(Department looks for IQs below 55 or less than 1%) when determining eligibility.

- 8) The verbal and performance subtests scores suggest that the claimant has significant weakness in skills demanded in academic work. The scores indicate some strength in capacity for vocational tasks that are presented visually.
- 9) Adaptive Behavior was assessed using the ABS I & II. These scores determined the claimant to:

Be able to - Take care of most personal care needs

Understand simple commands

Communicate basic needs and wants

Be unable to - Be employed at a productive wage without systematic long-term supervision or support

Learn new skills without aggressive and consistent training

Apply learned skills without aggressive and consistent training

Demonstrate appropriate behavior without direct supervision

Make decisions requiring informed consent without extreme difficulty

- 10) The Developmental Findings/Conclusions section of the Psychological notes that Ms._____’s developed visual motor skills allow her to be more trainable for self-care, domestic and potentially occupational skills. It reports the claimant to be in the mild range of mental retardation with well-developed self-care skills, but still having misbehaviors reflecting immaturity in personality development.
- 11) The evaluating Psychologist recommends vocational skills training and the continuation of her current volunteer work at a hospital. Also recommended is individual therapy to address her emotional issues and social behaviors.
- 12) Placement recommendations are included on the Psychological. The Psychologist states that, “Although _____ has the behavioral capacity to exhibit some good physical self-care skills; she has severe deficits in her ability to make social judgments required for successful independent living. She still requires an ICF/MR level of care.”
- 13) The Adaptive Behavior Scale scores which the Department looks for to determine eligibility are scores of twelve (12) or below. Ms._____ scored at twelve (12) or below in the following areas which relate to Major Life Areas:

Economic Activity 12

Numbers and Time 11

Self Direction 11

Some scores reported in the areas relating to behavior were much lower.

- 14) The claimant’s witnesses report through training documentation that Ms._____ eats independently, orders meals in a restaurant, has occasional toileting accidents, completes bathing unaided, brushes teeth independently, completely dresses self, makes telephone calls and walks unaided. Regarding Language Development, documentation shows the claimant to be able to write short notes and memos, express emotions, speak in simple sentences, read simple stories or comics, and talk sensibly. Ms._____ is reported to be able to do simple addition and subtraction. She is reported to do simple housekeeping with prompting and can use the microwave. Documentation shows that Ms._____ initiates most of her own activities and does not need constant

encouragement to complete tasks. She is reported to be very dependable in taking care of her personal belongings.

- 15) Concerns raised by the claimant's witnesses were predominantly regarding Ms._____'s need for supervision due to behavioral issues. There were also concerns regarding the need for prompting to get tasks completed. Persons, who are working with the claimant, are concerned that she could not live independently.
- 16) 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).

17) 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

18) 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 does have a diagnosis of Mental Retardation, which manifested prior to age 22 and is likely to continue. Her diagnosis is Mild Mental Retardation.
- 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 (Capacity for Independent Living). The claimant has behavioral issues that warrant the need for supervision however; she has successfully learned most skills that relate to the other five (5) major life areas. Ms._____'s Adaptive Behavior score for (self-direction) was eleven (11) which indicates that she may have substantial limitations in the area of self-direction however; testimony and other documentation does not support this finding. Ms.____ clearly makes choices for what she wants to do in her free time. It is however; understood that she does not always make good choices. Substantial deficits in two (2) of the major life areas would still 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 the 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 30th Day of December, 2005.

**Sharon K. Yoho
State Hearing Officer**