



**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

June 1, 2006

Case Name: _____

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on the hearing held December 12, 2005. The hearing request was based on the Department of Health and Human Resources' denial of MR/DD Waiver Services for _____.

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 Title XIX 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. (PROGRAM ELIGIBILITY CRITERIA FOR THE MR/DD WAIVER PROGRAM Section 503 Medical Eligibility Criteria).

The information submitted at the hearing revealed: _____ does not meet the medical eligibility criteria for the MR/DD Waiver Program.

It is the decision of the State Hearings Officer to uphold the action of the Department to deny services under the MR/DD Waiver Program.

Sincerely,

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

cc: State Board of Review
Alva Page III, Assistant Attorney General
Susan Hall, M.A., Program Manager
_____, Grand Mother

____,

Claimant,

v.

Action Number: 05-BOR-6691

**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 June 1, 2006 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 scheduled on December 7, 2005 on a timely appeal filed October 5, 2005. The hearing was rescheduled due to a corrected hearing date, and finally convened on December 12, 2005.

It should be noted here that the Claimant was not receiving any benefits under the MR/DD Waiver Services Program. A pre-hearing conference was held between the parties prior to the scheduled hearing.

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 *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.

III. PARTICIPANTS:

____, Staff Attorney – _____
____, Grand Mother

[REDACTED] M.A. Supervised Psychologist*

Alva Page III, Assistant Attorney General – Bureau for Medical Services

Susan Hall, M.A., Program Manager - Title XIX MR/DD Home & Community Based Waiver Services, Bureau for Behavior Health and Health Facilities

Linda O. Workman, M.A., Psychologist – Bureau for Medical Services

* Provided testimony by conference call

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 medical eligibility criteria for the MR/DD Waiver Services Program?

V. APPLICABLE POLICY:

PROGRAM ELIGIBILITY CRITERIA FOR THE MR/DD WAIVER PROGRAM
Section 503 Medical Eligibility Criteria.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 Annual Medical Evaluation (DD-2A) dated 06/27/05
- D-2 Comprehensive Psychological Evaluation dated 05/02/05 – [REDACTED] M.A., Supervised Psychologist
- D-3 WV DHHR Social History Update dated 08/03/04 – [REDACTED]
- D-4 Partial Individualized Education Program – [REDACTED] Schools dated 05/04/05
- D-5 WV DHHR Individual Program Plan dated 06/07/05
- D-6 Notice of Denial dated 08/03/05
- D-7 Letter from ____'s TBI and Classroom Teacher, Special Education dated 10/20/05
- D-8 Psychological Evaluation dated 01/27/04 – [REDACTED] Schools
- D-9 Educational Evaluation Report dated 01/20/04 – [REDACTED] Schools
- D-10 Individualized Education Program – [REDACTED] Schools dated 05/04/05
- D-11 Neuropsychological Evaluation dated 05/19/05 – [REDACTED] Ph.D., P.S.C.
- D-12 Notice of Denial dated 11/30/05
- D-13 Annual Medical Evaluation (DD-2A) dated 06/27/05
- D-14 WV DHHR Social History Update dated 06/07/05
- D-15 Department's Closing Argument

Claimants' Exhibits:

- C-1 Duplicates of Department's Exhibits and related hearing documents
- C-2 Claimant's Closing Argument

VII. FINDINGS OF FACT:

1) Ms. [REDACTED] of [REDACTED] submitted an application packet on behalf of [REDACTED] to the Bureau of Behavioral Health and Health Facilities in July 2005 (C-1). The purpose of the application was to determine if [REDACTED] would qualify for services under the Title XIX MR/DD Waiver Services Program. [REDACTED] is the older of two children and was born on July 10, 1997. On April 27, 2003, [REDACTED] was struck by a car and suffered extensive injuries. He required a prolonged hospital stay and rehabilitation. Mrs. [REDACTED] was awarded custody of the children after they were placed in the custody of the DHHR. The Bureau for Medical Services reviewed the application and determined that, based on the information made available to them; [REDACTED] did not meet the medical criteria for the program.

2) Mr. Alva Page III stipulated for the record that the eligibility criteria are found in the 2001 MR/DD Waiver Hearing Manual; and the Department would not contest [REDACTED]'s diagnosis of Traumatic Brain Injury (TBI) as an eligible related developmental condition. Ms. [REDACTED] did not object.

3) Ms. [REDACTED] stipulated for the record that an additional Social History Update was amended due to a technical error. It was an oversight that was not included in the original package. Mr. Page did not object.

4) Mrs. Linda O. Workman has been a Licensed Psychologist since 1981, and is also a Licensed School Psychologist. She has performed thousands of evaluations on school age children, participated in IEP meetings and workshops for teachers. Her office did all of the psychological evaluations for [REDACTED] Schools for seventeen years. She has also worked in five or six other counties.

Mrs. Workman's Office, Psychological Consultation and Assessment, has been contracted by the Bureau for Medical Services which oversees the Title XIX MR/DD Waiver Services Program through the Office of Behavioral Health and Health Facilities, for approximately twenty years. One of her duties is to certify/determine eligibility for ICF/MR Group Homes. All of the group homes within the State of West Virginia are visited and recertified for their participation.

The MR/DD Waiver Program is an optional program in which the State may choose not to participate. The Federal Government allows States to serve people who would ordinarily be found in institutional settings within the community. The Federal Government establishes eligibility guidelines for use by the individual States. States may make the guidelines more restrictive if they choose but not less stringent. The Department refers to the Code of Federal Regulations to determine eligibility. In West Virginia, the Department has determined that in order to qualify, you need a level of mental retardation that would result in a need for institutional level of care.

There is a wide range of abilities associated with mental retardation. There are individuals diagnosed with mild mental retardation and some with severe and profound. The differences between the two individuals are very profound. Individuals with mild mental retardation often have driver's licenses, work, and raise families. Those individuals with profound mental retardation are not able to attain such things. They require twenty-four hour supervision and training.

A diagnosis of mental retardation does not necessarily guarantee eligibility for this program, only to the point that MR requires an ICF/MR level of care. This is defined as an IQ of 55 which is three standard deviations below the mean which is 100. An average IQ is 100. A standard deviation is fifteen on a measure of intelligence such as the Wechsler Scale. The Department has determined based on documents provided and error of measurements that is the level of disability to be considered. Eligible scores would fall in the range of 55 and below.

In the area of substantial adaptive deficits, if a person in West Virginia is diagnosed with mental retardation, they are compared with a sample population across the country that also has mental retardation. The Department is looking to see if the individual's functional abilities are similar to other people identified with mental retardation requiring this level of care.

When looking at non mental retardation norms, the Department is looking at scores below the first percentile. That is out of the mild range. In reviewing the ABS in this case, the Department is looking for less than one percent in the percentile column, and scores of one and two in the standard scores columns. (This is a general summation of Mrs. Workman's professional background and knowledge of the Bureau for Medical Services MR/DD Waiver guidelines). Mrs. Workman then proceeded to address the documents used to determine their final decision.

- The Comprehensive Psychological Evaluation conducted by Mr. [REDACTED] The Adaptive Behavior Scale-School Second Edition (ABS-S: 2) indicates a less than 1%tile Rank under Independent Functioning which correlates with **Self-Care** (D-2). According to ____'s age, he requires assistance with most activities with daily living. The full IEP (D-10) reflects a goal of self-care. ____ meets the eligibility criteria for Self-Care.
- ____ was not considered eligible under **Learning**. The Department is looking for standard scores of 55 and below on measures of achievement. According to the Wide Range Achievement Test – Revision 3 (WRAT-3) administered by Mr. [REDACTED] ____ scored 72 in Reading; 79 in Spelling; and 84 in Arithmetic. Additional information provided by [REDACTED] Schools in an Educational Evaluation Report (D-9) dated January 20, 2004 lists ____'s Reading Skills at 92. The Neuropsychological Evaluation conducted by Dr. [REDACTED] on February 4th, March 4th, May 9th and 19th 2005 using the Woodcock-Johnson, Third Edition, Tests of Achievement lists ____'s scores as 64 in Broad Reading; 85 in Broad Math; and 66 in Broad Written Language. The tests administered by [REDACTED] and Dr. [REDACTED] did not support deficits in Learning for program eligibility.
- To receive a deficit in **Mobility** under the program guidelines, an individual would be evaluated on their ability to get from one place to another. The only corresponding score on the ABS-S:2 administered by Mr. [REDACTED] would be Physical Development. The Standard Score of 8 and a %tile Rank of 25 would not be eligible for the program.
- ____ is described throughout the various documents as being able to express his wants and needs; being verbal; and his speech is described as relevant, spontaneous and coherent. The evaluation conducted by Dr. [REDACTED] indicates ____ received a Comprehension Index score of 91. This exceeds the Department's guideline scores of 55 and below. ____ does not meet the criteria for **Language**.

- In determining if the individual meets the criteria for **Capacity for Independent Living**, the Department is looking at what would be age appropriate for a seven year old. One of the components is **Home Living**. This is associated with adults i.e., can you do laundry, fix meals, run the sweeper, etc. This was not addressed in the submitted documentation. **Social Skills** – ____ is described as having difficulty in this area. The ABS-S:2 indicates 1%tile in Socialization. This indicates one component of Independent Living in which ____ demonstrates a delay. **Health and Safety** – No information was submitted. **Community Use** – Is the child involved in community activities? No information was submitted. **Leisure Skills** – ____ enjoys several activities. ____ does not meet the criteria for Capacity for Independent Functioning.

- The last area to be considered is **Self-Direction**. This involves whether persons choose to live an active life style and make choices in their own path. Individuals in ICF/MR Group homes may sit in a chair or on a couch all day and do nothing. Someone would need to take them by the arm and encourage them to participate in an activity. The documentation describes ____ as an individual who enjoys lots of activity. ____ does not meet the criteria for Self-Direction.

5) According to the Department's evaluation of ____'s MR/DD Waiver application, he only met the criteria for Self-Care.

6) Under cross-examination from Ms. ____, Ms. Workman testified that the criteria for interpreting the scores on the ABS evaluations are not in the MR/DD Waiver Manual. Ms. Workman also testified that she has never met ____, and believes that it would be difficult to get a complete picture.

7) The State rested their case and Ms. ____ proceeded to obtain testimony from Mr. _____. He is currently employed with _____ a Licensed Psychologist in _____. Mr. _____ is a Supervised Psychologist to _____ in his fifth year. Mr. _____ has a Bachelors Degree in Counseling Rehabilitation from _____ and a Master of Arts Degree in Child Clinical Psychology from the _____ Graduate College.

Prior to working for Ms. _____ Mr. _____ worked for a mental health agency doing counseling and therapy; and some assessment instruments for family services for approximately five years. Summer internships were done through _____ Schools.

Mr. _____ has been ____'s therapist since October 2004. The therapy includes interactive role playing and focusing on ____'s affect, i.e. day to day behavior issues. ____ is seen basically every other week for approximately fifty minutes.

8) Mr. _____ reviewed his evaluation dated May 2, 2005 and noted his personal observations as it pertains to the MR/DD Waiver Program, in the following manner:

- **Independent Functioning (Self-Care)** – Under Behavior History, ____ requires physical assistance with bathing himself and setting water temperature. He has resisted his grandmother in bathing, brushing teeth and, grooming. He must be prompted to do these things. The school records indicate he is very aggressive in school by being very demanding and manipulative. ____ is difficult to redirect to another activity. He always wants to do the same thing over and over again and his grandmother reports that he has poor sleeping habits.

- **Capacity for Independent Living** – ____ has difficulty relating to his peers. He does not pick up on social cues and behaviors especially if he is upset. His disrupted behavior has been attributed to his traumatic brain injury. ____ will participate in activities that are planned for him. He can do some simple meal preparation and try to use a knife if not watched closely. Economic Self-Sufficiency is difficult to determine for ____'s age.
- **Self-Direction** – ____ scored in the 2%tile Rank. He has a listed impairment because his appropriateness to choose an active lifestyle compared to an average eight year old, depends on his poor impulse control and borderline functioning. ____ does not recognize environmental dangers.
- **Language Development** – ____ scored in the 1%tile under Language. He requires a great deal of repetitive instruction or he will forget it. ____ has difficulty in the fine motor skills by not being able to hold a pencil. It is necessary to keep everything on a very basic level in dealing with ____'s receptive language. ____'s attention span is moderately impaired.
- **Mobility** – ____ is able to get from one place to another using his wheelchair. He has a steady gait but is able to ambulate.

9) Mr. [REDACTED] believes ____ is substantially limited in the areas of Self-Care; Self-Direction; and Capacity for Independent Living. The areas of Learning; Mobility; and Language indicate significant deficits compared to an eight year old.

10) Under cross-examination by Mr. [REDACTED] Mr. [REDACTED] testified that the scores obtained on the ABS-S:2, ____ received a 1%tile Rank on Language and meets the eligibility criteria. This would also be true for ____'s eligibility for Receptive and Expressive Language; Self-Direction; and Capacity for Independent Living. Mr. [REDACTED] was unsure if he had reviewed ____'s entire MR/DD Waiver packet.

11) According to Mr. [REDACTED] testimony, ____ is substantially limited in Self-Direction based upon observations in therapy. ____ has been observed in Leisure activities such as swimming, playing with the dog indoors; and puzzles.

12) Mr. [REDACTED] could not state with certainty that he ever visited an ICF Facility.

13) Mr. [REDACTED] was excused and Ms. ____ proceeded to obtain testimony from Ms. [REDACTED] Ms. [REDACTED] became acquainted with ____ while gathering documentation for the MR/DD Waiver application. She is a Service Coordinator with [REDACTED] charged with the responsibility of becoming familiar with the MR/DD Waiver program. Ms. [REDACTED] began employment with [REDACTED] in May 2004. She graduated in May 2004 with a Bachelors Degree in Social Work from [REDACTED] She also obtained her Social Work License. Ms. Allen received direct care experience with [REDACTED] and completed a one year practicum with Child Protective Services. Ms. [REDACTED] did not provide any additional information regarding ____'s Functionality for the MR/DD Waiver Program.

14) Mrs. ____ is the maternal grandmother of _____. She is ____'s primary caregiver and expressed her observations of ____'s levels of functionality.

Mrs. ____ is involved in the IEP process at school. She spends time with repetition and reinforcement to assist ____ with learning. ____ is described as having a slow gait and wears a leg brace. He only has a 5 degree movement in his ankle. ____ has received various forms of therapy for his walking and coping in a normal environment. He is unable to run and holds on to the walls for assistance.

____ does not have any interaction with others because he inappropriately wants to touch someone's face. He becomes fixated on wanting to touch people. ____ is described as willing to do anything for someone in order to receive their attention.

According to Mrs. ____, ____ does not have any self-direction to do anything. ____ is unable to perform tasks due to his strong fixation. ____'s safety is always a major consideration. If he is not kept closely, he will go outside and does not have any fear.

15) It must be noted that Ms. ____ requested a copy of the tapes to assist with her written Closing Argument. The Closing Arguments from both sides were due to be received by the State Hearing Officer on January 6, 2006. The tapes were forwarded to the Board of Review for dubbing, which in turn experienced technical difficulties. The tapes were finally dubbed and the written Closing Arguments were received from Mr. Page and Ms. ____ on April 21, 2006.

16) PROGRAM ELIGIBILITY CRITERIA FOR THE MR/DD WAIVER PROGRAM
Section 503 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 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).

VIII. CONCLUSIONS OF LAW:

1) PROGRAM ELIGIBILITY CRITERIA FOR THE MR/DD WAIVER PROGRAM Section 503 Medical Eligibility Criteria:

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 - Receptive or expressive language (communication) -
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 - Self-direction
- Capacity for independent living (home living, social skills, employment, health and safety, community use, leisure).

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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) The testimony of Mr. [REDACTED] Jr., M.A. and Mrs. ____ were found to be credible regarding ____'s Health and Safety concerns. This does not provide a majority of deficits under Capacity for Independent Living to meet the eligibility criteria.

3) The Physician and Psychologist's all recommended a need for ICF/MR level of care. The documentation supports ____ having a related developmental condition which constitutes a severe and chronic disability. Yet, it does not support concurrent substantial deficits according to the MR/DD Waiver policy.

4) _____ does not meet the eligibility criteria for services under the Title XIX MR/DD Waiver Services Program.

IX. DECISION:

It is the decision of this State Hearing Officer to uphold the action of the Department in this particular matter.

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this 1st Day of June, 2006.

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