



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
150 Maplewood Avenue
Lewisburg, WV 24901

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

February 2, 2007

Dear Mr. ____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held December 14, 2006. Your hearing request was based on the Department of Health and Human Resources' proposal to terminate services under the Title XIX MR/DD Waiver Services 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 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, November 2005).

The information, which was submitted at the hearing, did not substantiate that you meet the medical criteria to be eligible for the Title XIX MR/DD Waiver Services Program.

It is the decision of the State Hearing Officer to **uphold** the proposal of the Department to terminate services under the Title XIX MR/DD Waiver Services Program.

Sincerely,

Margaret M. Mann
State Hearing Officer
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review
[REDACTED]
Alva Page III, Assistant Attorney General, BMS
[REDACTED]
Stephen Brady, BBHFF

**WEST VIRGINIA DEPARTMENT OF HEALTH & HUMAN RESOURCES
BOARD OF REVIEW**

____,

Claimant,

v.

Action Number: 06-BOR-1981

**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 January 25, 2007 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 14, 2006 on a timely appeal, filed May 9, 2006. It should be noted that the hearing record was left open until January 25, 2007 in order for closing arguments to be submitted.

It should be noted that benefits have been continued pending the hearing decision.

II. PROGRAM PURPOSE:

The program entitled MR/DD Home and Community-Based Wavier 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
[REDACTED]

Claimant's Witnesses:
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Alva Page III, Assistant Attorney General, BMS

Department's Witnesses:

Stephen Brady, Bureau of Behavioral Health & Health Facilities (By telephone)

Linda Workman, Psychologist Consultant, BMS (By telephone)

Presiding at the hearing was Margaret M. Mann, 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 continues to meet 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 (November, 2005)

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 Notification Letter dated May 1, 2006

D-2 Annual Medical Evaluation dated February 2, 2006 & Medication Listing

D-3 Psychological Evaluation dated February 1, 2006

D-4 Chapter 500-8, 500-9, and 500-10 of the Title XIX MR/DD Home and Community Based Waiver Program Revised Operations Manual, November 2005).

Claimant's Exhibits:

C-A) Notice of Denial dated May 1, 2006

C-B) Annual Medical Evaluation (DD-2A) dated February 2, 2006

- C-C) Evaluation from [REDACTED] dated October 25, 2006
- C-D) Letter from [REDACTED] dated November 28, 2006
- C-E) Information regarding retinitis pigmentosa
- C-F) Emergency 24 Hour Support Plan dated April 20, 2005
- C-G) Psychological Evaluation (DD-3) dated February 1, 2006
- C-H) Psychological Evaluation (DD-3) dated February 17, 2005
- C-I) Psychological Evaluation (DD-3) dated February 20, 2004
- C-J) Updated ABS Scores dated October 12, 2006
- C-K) Updated Vineland Scores dated October 2006

VII. FINDINGS OF FACT:

- 1) The Claimant is a recipient of MR/DD Waiver services. The Claimant's birthdate is ____.
- 2) A reevaluation was completed in order to determine if the Claimant would continue to qualify for services under the Title XIX MR/DD Waiver Program. The Bureau of Behavioral Health reviewed the documents submitted and determined that he did not qualify medically for the program.
- 3) The Department sent a notification letter dated May 1, 2006 (Exhibits D-1 & C-A) to the Claimant stating in part, "Your Waiver services have been terminated. Documentation submitted for re-certification review does not support the presence of substantial adaptive deficits in three or more of the six major life areas considered for Waiver eligibility nor the need for an ICF/MR level of care."
- 4) The Annual Medical Evaluation (DD-2A) was signed by the physician on 02/02/2006 and an ICF-MR Level of Care was recommended. It was noted that the Claimant wears glasses and it was difficult to understand him. Under problems requiring special care, it reads: Mobility: Ambulatory; Continence Status: Continent; Feeding: Feeds Self; Personal Hygiene: Independent; Mental and Behavioral Difficulties: Alert, MR. (Exhibits D-2 and C-C)
- 5) The psychological dated 02/06/2006 reads in part that the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III) was administered 02/20/2004. The results were a Verbal IQ Score of 61, Performance IQ Score of 57, and Full Scale IQ Score of 55. Axis II Diagnosis of Moderate Mental Retardation. The report reads in part that the Claimant "will continue to require an ICF-MR level of services." (Exhibits D-3 & C-G) Adaptive Behavior is assessed at the 7 year, 10 month level. Achievement indicates performance at first grade or kindergarten level. He transitioned into a supported living arrangement approximately two years ago. He has done fairly well in that setting. Staffing is scheduled for 50 hours per week, but, typically, he only receives about 25 hours per week. Family continues to provide the equivalent of 24 hour supervision. He continues to do well in supported employment. Visual problem is mostly corrected with corrective lenses.
- 6) One of the tests administered was the Adaptive Behavior Scale – Residential and Community: Second Edition (ABS-RC:2). Mental retardation norms were utilized. Testimony from the Department's consulting psychologist revealed that the scores in

regard to the major life areas did not support continuing eligibility. They are looking for standard scores of twelve or below. Under **Independent Functioning** the standard score was 15 – rating Superior. The Claimant had a standard score of 12 under **Physical Development** – rating Average. Documentation supports the fact that the Claimant is fully mobile. Under **Language** there is a Standard Score of 13 – rating Above Average. Under **Capacity for Independent Living** the Claimant scored a 17 under Domestic Activity – rating Very Superior; Socialization Standard Score was a 15 – rating Superior. Responsibility Standard Score was 14 – rating Above Average. As far as health and safety, this appears to not be a concern as the Claimant is left alone part of the day. **Self-Direction** Standard Score was 18 – rating Very Superior. (Exhibits D-3 & C-G)

- 7) The Inventory for Consumer and Agency Planning (ICAP) score was a 79. This is Level 7 – limited personal care and/or regular supervision. The ICAP narrative reads in part that Standard Scores ranged from less than 5 (lowest possible score) through 74. This is in the area of Personal Living. This includes routine ADL activities related to grooming, hygiene and domestic chores. These skills are rote and over practiced. Otherwise, his next highest score is 36, in the area Community Living. The Broad Independence Standard Score is 11. All percentile rankings (other than Personal Living equal 4) are 1. This indicates that 99% of the population would have obtained higher scores. This assessment is felt to be valid and is the best descriptor of his adaptive behavior skills.His ICAP Service Score of 79 corresponds to Level 7. This indicates the need for limited personal care and/or regular supervision. (Exhibits D-3 & C-G)
- 8) Testimony from the Department's consulting psychologist revealed that the Claimant does have a substantial deficit in the major life area of **Learning**. The Wide Range Achievement Test – Revision 3 (WRAT-3) was administered 02/20/2004. The Claimant obtained Standard Scores of less than 45 (lowest possible score) in all areas. This corresponds to the first grade or kindergarten level. (Exhibits D-3 & C-G)
- 9) There was an additional ABS test completed 10/12/2006. (Exhibit C-L) The Department did not have these test results when the initial decision was made. Scores on this test include Independent Functioning - Standard Score 12 - rating Average; Physical Development – Standard Score 11 – rating Average; Language Development – Standard Score 12 – rating Average; Domestic Activity – Standard Score 13 – rating Above Average; Self-Direction – Standard Score 13 – rating Above Average; Responsibility – Standard Score 12 – rating Average; and Socialization – Standard Score 13 – Above Average. Part Two Domain Scores show scores below the 75% rank under Social Behavior, Conformity, Trustworthiness, Social Engagement and Dist. Interp. Behavior. Factor Scores are Pers. Self-Sufficiency %ile Rank 87, age equiv. 13-0, rating Above Average; Comm. Self-Sufficiency %ile Rank 63, age equiv. 5-9, rating Average; and Personal-Social Respon. %ile Rank 73, age equiv. 7-0, ranking Average.
- 10) Testimony from the [REDACTED] psychologist who evaluated the above report revealed that the narrative on the ABS scores in the February 2006 report (Exhibits D-3 & C-G) notes that the scores on this report are somewhat higher than those obtained previously. This was felt to be some enter/rater reliability factors as well as halo effect. It is felt he had demonstrated improvements but not to the degree currently reflected. The Claimant requires a verbal level of prompting for task performance. The ABS is developed such that credit is given for items even though verbal instruction may be provided. This

accounts for much of the inflation. The [REDACTED] psychologist went on to state that he does not feel the ABS scores in this report are accurate.

- 11) Testimony from the [REDACTED] psychologist revealed that the ICAP scores are 1 in all areas including the Broad Independence Standard Score. The results of the most recent ABS (Exhibit C-J) are more reflective of the Claimant's actual functional levels. His scores are at or below the established cut-offs in most of those areas. The Vineland scores (Exhibit C-K) are based on two norm groups. One being the national group Non-MR1 group where the Claimant obtained a score 0.1 percentile therefore indicating 99.9 % in the group would have higher scores. They also used a supplemental norm group of adults with MR in non-residential facilities and he obtained percentile rankings of 40, 50, and 30. His Adaptive Behavior Composite is also 40 which is also below the acceptable cut-off. The Vineland addresses skills to function on a day to day basis in society. The ABS gives credit even if some verbal prompting/coaching is needed. The Vineland gives credit only if they can typically perform the skill. This helps in determining how much assistance is needed and helps with eligibility. The Claimant's scores indicate he cannot live in the community without significant supports.
- 12) The Claimant does not receive 24/7 staffing. The [REDACTED] psychologist explained the Claimant has been discharged into the community. He must be placed in the least restrictive placement. There is some risk to that. There is always a debate as to how much protection and protective oversight they provide versus how much independence and accompanied risk. The Claimant in the past has wanted independence. He has since changed his mind as he was fired from his last supported employment. As a result, he has had less time structure and got into trouble. Staffing has since been increased. He was suppose to get more staffing in the past but there were not enough bodies. He does need 24-hour staffing. It has not been determined how this will be accomplished.
- 13) The [REDACTED] psychologist discussed the major life areas. In his opinion, the Claimant meets the requirements in the areas of learning, self-direction, and capacity for independent living. **Learning** – The Claimant has a diagnosis of moderate mental retardation, his achievement scores are at the kindergarten or first grade level, he does not generalize, and he does not accept feedback. **Self-Direction** – The Claimant has a tendency to structure time in a passive manner, not able to organize time at a higher level, does not have good planning skills or how to make a plan. **Capacity for Independent Living:** The Claimant is a sociable person but is immature. He misses clues that one is going too far. He has a tendency to misunderstand things. He cannot manage money. They have become more restrictive with his money. He has dietary restrictions but shows no compliance. He has never been successful in a job without a job coach.
- 14) Testimony from the Service Coordinator from [REDACTED] revealed that he has known the Claimant for approximately six months. He started work June 2006. The team's goal is working toward 24-hour staffing. There are issues with retaining staff. He is currently staffed seven days a week ten hours a day. The Claimant's family is close by – minutes away. There is a case manager on call. There is a 24-hour support plan in place. (Exhibit C-F) He feels the Claimant needs more staffing then what is in place.
- 15) Testimony from the Supportive Services Coordinator revealed that the job coach is with the Claimant at all times. They would hope to phase out the job coach as the job progresses. His last employment was at [REDACTED] with the support of a job coach. He had

trouble with co-workers understanding him and could not learn job skills. Ultimately, he was fired. It is his opinion that the Claimant would need a job coach if he got another job.

- 16) The Qualified Mental Retardation Specialist testified that she has known the Claimant for approximately seven months. She administered the second ABS test based on interactions with the Claimant and staff interviews. It was felt the first test did not reflect the Claimant's abilities. The Claimant has limitations in his ability to retain information and follow through with things. He has some behavioral issues. He sometimes has difficult relationships with staff members. **Self-Direction** – He cannot make or keep appointments. **Capacity for Independent Living** - The Claimant cannot manage his finances. He has a payee and cannot write checks or budget. He can make a purchase but could be taken advantage of when getting change back. He cannot plan for nutritious meals. He knows what size clothing he wears but sometimes does not make appropriate choices. He needs 24-hour support and ICF-MR Level of Care.
- 17) 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).

18) 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

19) **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 Mental Retardation or related condition exists which must be severe and chronic and have been manifested prior to age 22 and is likely to continue. Documentation presented at this hearing includes a qualifying diagnosis of Moderate Mental Retardation.
- (2) Regulations also require that along with a qualifying diagnosis, substantial limitations in functioning must exist in three (3) or more of the six (6) major life areas. Substantial limits is defined on standardized measures of adaptive behavior scores three (3) standard deviations below the mean or less than one 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., narrative descriptions, etc.

- (3) The evidence presented at the hearing does not support that the Claimant has substantial limitations in functioning in the major life areas of Self-Care, Mobility, and Language. The psychologist testifying on behalf of the Claimant stated the Claimant did not have substantial limitations in these areas. None of the other evidence supports substantial limitations in these areas.
- (4) Both parties agree that the Claimant does have substantial limitations in functioning in the major life area of Learning.
- (5) The standardized measures of adaptive behavior scores in this case vary from test to test. Some high and some low. However, these scores, as well as the clinical and narrative documentation, fail to confirm substantial adaptive deficits in Self-Direction and Capacity for Independent Living.
- (6) Based on the evidence, continued eligibility for the MR/DD Waiver Program cannot be established.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the proposal of the Department to terminate benefits and services under the Title XIX MRDD Waiver Services Program. The action described in the notification letter dated May 1, 2006 will be taken.

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this 2nd Day of February, 2007.

Margaret M. Mann
State Hearing Officer