



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

March 27, 2007

Mrs. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dear Mrs. \_\_\_\_\_:

Attached is a copy of the findings of fact and conclusions of law on your hearing held March 23, 2007. Your hearing request was based on the Department of Health and Human Resources' proposal to terminate services under the MR/DD Waiver Program for your son, \_\_\_\_\_.

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 Waiver Program is based on current policy and regulations. Some of these regulations state in part:

The evaluations must demonstrate that a child has a diagnosis of a severe, chronic disability which - Substantially limits functions in three or more of the following areas of major life activities (a) Self Care; (b) Receptive or Expressive Language; (c) Learning; (d) Mobility; (e) Self Direction; (f) Capacity for Independent Living; and (g) Economic Self Sufficiency.

The information submitted at your hearing revealed: The submitted documentation does not support your son's diagnosis of mental retardation with substantially limited functioning in three or more of the major life areas.

It is the decision of the State Hearing Officer to **UPHOLD** the **PROPOSAL** of the Department to terminate MR/DD Waiver Program services.

Sincerely,

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

cc: State Board of Review  
Steve Brady – Office of Behavioral Health and Health Facilities

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

\_\_\_\_\_,  
**Claimant,**

**v.**

**Action Numbers: 07-BOR-683**

**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 March 27, 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. The fair hearing was scheduled for March 23, 2007 on a timely appeal filed January 30, 2007.

It should be noted here that the Claimant was receiving continued MR/DD Waiver benefits at the time of the hearing. A pre-hearing conference was not held between the parties prior to the hearing, and the Claimant was not represented by an attorney.

**II. PROGRAM PURPOSE:**

The Program entitled MR/DD 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.

### **III. PARTICIPANTS:**

Steve Brady, Program Operations Coordinator – Office of Behavioral Health and Health Facilities (OBH&HF)\*

Richard Workman, M. A., Licensed Psychologist – Bureau for Medical Services (BMS)\*  
\_\_\_\_\_, Mother of Claimant\*

Presiding at the Hearing was, Ray B. Woods, Jr., M.L.S., State Hearing Officer and a member of the State Board of Review. \*

\*All parties participated by conference call.

### **IV. QUESTIONS TO BE DECIDED:**

The question(s) to be decided: Does \_\_\_\_\_ have substantially limited functioning in three or more of the major life areas?

### **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 Chapter 500 – Covered Services, Limitations, and Exclusions, for MR/DD Waiver Services

D-2 Denial Letter dated 01/09/07

D-3 DD-2A (Annual Medical Evaluation) 11/28/06

D-4 DD-3 (Psychological Evaluation) dated 07/05/06

#### **Claimants' Exhibits:**

None

### **VII. FINDINGS OF FACT:**

1) PROGRAM ELIGIBILITY CRITERIA FOR THE MR/DD WAIVER PROGRAM  
Section 503.1 Application and Medical Eligibility (Exhibit D-1) states:

Medical Eligibility Criteria

The MR/DD State Waiver Office determines the medical eligibility for an applicant in the MR/DD Waiver Program. In order to be eligible 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 monitoring, supervision, training, and supports.
  - MR/DD State Waiver Office determines the level of care (medical eligibility) based on the Annual Medical Evaluation (DD-2A), the Psychological Evaluation (DD-3) and verification if not indicated in the DD-2A and DD-3, that documents that the 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. Other documents, if applicable and available, that can be utilized include the Social History, IEP for school age children, Birth to Three assessments, and other related assessments.

The evaluations must demonstrate that an applicant has a diagnosis of mental retardation 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 not only by the relevant test scores, but also the narrative descriptions contained in the documentation.

- Must have a diagnosis of mental retardation, with concurrent 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, and requires services similar to those required for persons with mental retardation.
    - 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.
- Must have the presence of a least three (3) substantial deficits as that term is defined in Title 42, Chapter IV, Part 435.1009 of the Code of Federal Regulations (CFR). Substantial deficits associated with a diagnosis other than mental retardation or a related diagnosis do not meet eligibility criteria. Additionally, any individual needing only personal care services does not meet the eligibility criteria. Individuals diagnosed with mental illness whose evaluations submitted for medical eligibility determination with no indication of a previous co-occurring history of mental retardation or developmental disability prior to age 22 must provide clinical verification through the appropriate eligibility documentation that their mental illness is not the primary cause of the substantial deficits and the mental retardation or developmental disability occurred prior to the age of twenty-two (22).

#### Functionality

- Substantially limited functioning in three (3) or more of the following major life areas; (“substantially limited” is defined on standardized measures of adaptive behavior scores as three (3) standard deviations below the mean or less than one (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 not only by the relevant test scores, but also the narrative descriptions contained in the documentation submitted for review, i.e., psychological, the IEP, Occupational Therapy evaluation, etc.). Applicable categories regarding general functioning include:
  - 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 and leisure activities).

Refer to Code of Federal Regulation (CFR): 42 CFR 435.1009.

#### 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, maintain current level of 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 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 primary issue in this particular matter is the denial of recertification for continued services under the MR/DD Waiver Services Program.
- 3) The Claimant has an eligible diagnosis of mental retardation.
- 4) The Claimant's mental retardation was manifested prior to the age of 22, and is likely to continue indefinitely.
- 5) The Department reviewed the DD-2A (Medical Evaluation), and DD-3 (Psychological Evaluation) in determining the Claimant did not meet the medical eligibility criteria for continued services.
- 6) A Termination Letter dated January 9, 2007 was sent to the Claimant (Exhibit D-2). The letter stated in part, "Documentation submitted for recertification review does not support the presence of substantial adaptive deficits in three or more of the six major life areas."
- 7) At the hearing, the BMS Psychologist reviewed the DD-2A (Exhibit D-3) dated November 28, 2006.
- 8) The Claimant is twenty-two (22) years of age, and lives alone next door to his parents.
- 9) The DD-2A indicates the Claimant's Physiology is normal with the exception of Scoliosis of the Spine.
- 10) The DD-2A indicates the Claimant's Neurological functions are normal with the exception of Delayed Coherence and Slurring Speech.
- 11) The DD-2A did not indicate the Claimant needed any special care with Mobility; Continence Status; Feeding; or Personal Hygiene/Self Care.
- 12) The Diagnostic Section of the DD-2A lists Mild Mental Impairment; Delayed Cognitive Function; and Slurring of Speech.

- 13) The Physician did certify on the DD-2A that the Claimant requires the level of care and services provided in an "Intermediate Care Facility" for individuals with mental retardation and/or related conditions.
- 14) At the hearing, the BMS Psychologist reviewed the DD-3 (Exhibit D-4) dated July 5, 2006.
- 15) The DD-3 indicates the Claimant was a full term baby, and developmental milestones were within normal limits.
- 16) The DD-3 indicates the Claimant graduated with a modified diploma in 2003 from [REDACTED] School.
- 17) The DD-3 indicates the Claimant is fully ambulatory and has no problems with gross motor skills.
- 18) The DD-3 indicates the Claimant needs monitoring and prompting in the area of Self-help. He can do simple chores and understands the use of a microwave.
- 19) The Claimant was administered the AAMR Adaptive Behavior Scale Residential and Community II Edition (ABS-RC: 2).
- 20) The Department is looking for scores of the 75<sup>th</sup> percentile and below to assist in determining eligibility.
- 21) The Claimant received the following scores on the ABS-RC: 2:

<u>Subtest</u>	<u>Raw Score</u>	<u>%ile Rank</u>
Independent Functioning	100	91
Physical Development	22	91
Economic Activity	14	84
Language Development	38	95
Numbers and Time	11	84
Domestic Activity	14	84
Self-Direction	17	84
Responsibility	7	75
Socialization	19	75

- 22) The DD-3 indicates the Claimant socializes with people that his parents do not like. He walks to a local gas station or rides his bike in the local area.
- 23) The DD-3 indicates the Licensed Psychologist recommended a 24 hour level of care, hence on an ICF/MR level of care.
- 24) The DD-3 indicated the Claimant has a history of being placed in a food service training at rehab center but due to interactions with others was asked to leave, but they said "he could come back."



- 25) The BMS Psychologist testified that the Rehab Center will not admit persons who are unable to live on their own and provide self care. You have to be able to live without those services that an individual would receive in an institutional setting.

#### **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 shows that the Claimant has a diagnosis of mental retardation, and was manifested prior to age 22.
- 2) Regulations 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. Functionality – stipulates that substantial limits are defined on standardized measures of adaptive behavior scores. The presence of substantial deficits must be supported not only by the relevant test scores, but also the narrative descriptions contained in the documentation submitted for review, i.e., psychological, the IEP, Occupational Therapy evaluation, etc.).
- 3) The submitted evidence fails to demonstrate that the Claimant has substantial adaptive deficits in three (3) or more of the major life areas. The Claimant requires prompting and supervision in some areas of functionality, but he does not require the level of care and active treatment provided in an ICF/MR facility
- 4) Based on the evidence, eligibility for the MR/DD Waiver Program cannot be established.

#### **IX. DECISION:**

It is the decision of this State Hearing Officer to **UPHOLD** the **PROPOSAL** of the Department to terminate MR/DD Waiver Program Services.

#### **X. RIGHT OF APPEAL:**

See Attachment

#### **XI. ATTACHMENTS:**

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

**ENTERED this 27th Day of March, 2007.**

---

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