



**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**

May 5, 2008

_____ III
by _____

Dear Ms _____:

Attached is a copy of the findings of fact and conclusions of law on your son's hearing held April 28, 2008. Your hearing request was based on the Department of Health and Human Resources' proposed action to terminate services under the Title XIX MR/DD Waiver Services 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 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 support that your son is demonstrating substantial limitations in three of the six major life areas. He therefore, no longer meets 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
Steve Brady, BHMF
Linda Workman, BMS

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

[REDACTED]

Claimant,

v.

Action Number: 07-BOR-2162

**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 April 28, 2008 for [REDACTED]. 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 April 28, 2008 on an appeal, filed September 13, 2007.

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's Witnesses:

_____, Claimant's mother

Department's Witnesses:

Beverly Dorcas, Bureau of Behavioral Health (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 eligibility 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 Title XIX MR/DD Waiver Program Revised Manual Chapter 500
- D-2 Notification of termination dated January 29, 2007
- D-3 DD-2A Level of Care Evaluation dated September 28, 2006
- D-4 Psychological Evaluation dated July 19, 2006
- D-5 Social History Update dated May 10, 2006
- D-6 IEP [REDACTED] County Schools dated March 17, 2006
- D-7 Notification of termination dated March 18, 2008
- D-8 DD-2A Level of Care Evaluation dated September 25, 2007
- D-9 Psychological Evaluation dated July 27, 2007
- D-10 Social History Update dated May 15, 2007
- D-11 IEP [REDACTED] County Schools dated October 26, 2007

VII. FINDINGS OF FACT:

- 1) The claimant is an active recipient of the Title XIX MR/DD Waiver program. His case was reviewed in January 2007 for medical eligibility. The Department determined that the claimant no longer met the medical eligibility criteria for the program. A notice of termination was mailed to the claimant on January 29, 2007. Indications are that this mailing did not make it to the claimant's home. The Department did not follow through

with terminating the benefits. When the claimant's mother realized that her son was found to no longer be eligible, she requested a hearing. This request was received by the Department on September 13, 2007. The Department reviewed updated documents in March 2008 and again determined that the child no longer met the medical eligibility criteria. Another notice of termination was mailed March 18, 2008. This denial stated in part, "Documentation submitted does not support the presence of substantial adaptive deficits in three or more of the six major life areas identified for Waiver eligibility." The Department found substantial deficits in the area of self-care only.

- 2) The claimant is a fourteen-year-old male who resides with his parents and three siblings. He is about to enter High School. At age three, he experienced a head injury due to a light fixture that fell from the ceiling. He suffers from Frontal Lobe syndrome which the Department identifies as an eligible diagnosis.
- 3) The most current DD-2A, Level of Care Evaluation, (Exhibit D-8) reports that the claimant is ambulatory, continent and feeds himself. He has some bedwetting and needs assistance with personal hygiene/self care. This report notes that he needs close supervision. The physician recommends speech, occupational and physical therapy. The physician also certifies that the child requires the level of care and services provided in an "Intermediate Care Facility."
- 4) A Psychological dated July 27, 2007, (Exhibit D-9) notes that the claimant has Post Traumatic Brain Injury, Seizure Disorder and Frontal Lobe Syndrome. It reports Intellectual testing results from a 2006 Adaptive Behavior Scale evaluation to show Borderline Intellectual Functioning. Testing results for this claimant were derived from non-MR normative populations. Part I subtest scores indicated that the claimant was functioning at or below the three-year level in: Independent Functioning, Physical Development, Economic Activity, Language Development, Self-Direction, Responsibility, and socialization. His Part II scores indicated a multitude of severe maladaptive behaviors. The Psychologist notes his current behavior to be at a five year six month level in Psychomotor, a less than three year in Self-Help and a less than three year in Language. The Psychologist recommends an ICF/MR level of care.
- 5) A Wechsler Abbreviated Scale of Intelligence test dated July 27, 2007 resulted in the following scores:

Verbal IQ	90
Performance	94
Full Scale IQ	91

These scores placed the child in the low average range of intelligence.

An Adaptive Behavior Scale test dated July 27, 2007 produced the following Part I factor standard scores:

Independent Functioning	1	<3yrs 0mos	Very Poor
Physical Development	7	5yrs 6mos	Below Ave
Economic Activity	1	3yrs 9mos	Very Poor
Language Development	4	4yrs 3mos	Poor
Numbers and Time	8	7yrs 9mos	Average
Pre-vocational Activity	4	3yrs 0mos	Poor

Self-Direction	4	<3yrs 0mos	Poor
Responsibility	5	3yrs 6mos	Poor
Socialization	5	3yrs 0mos	Poor

The Department's Psychologist reports that a standard score of less than 1 is 3 standard deviations from the norm and therefore an eligible score for the program.

Subtest for Achievement produced scores of:

Word Reading	87	Grade Level 4:3
Math Computation	71	Grade Level 3:0

A Wechsler Individual Achievement Test scores in 2005 reported standard scores in Word Reading – 82 Numerical Operations – 72 and Spelling – 75.

The Department looks for scores of 50 or below as eligible scores.

- 6) ABS score in 2006 (Exhibit D-4) reports a standard score of 1 in the area of Trustworthiness and a score of 2 in the area of Socialization.
- 7) The Social History Update dated May 15, 2007 (Exhibit D-10) reports that the claimant has discontinued Depakote medication in February 2007. His mother reported that he had become more social in 2007. His teacher reported that his attention span increased and he was able to tolerate more activities. His mood shifts without reason and he has impulse control behaviors, which cause him to be aggressive toward others. He tends to withdraw in social situations and requires assistance at all times, as he needs constant re-direction.
- 8) The claimant's mother reported a recent incident where he was up in the middle of the night, went to the basement where his brother sleeps, lit a piece of paper on fire and put it in the trashcan. He then went back upstairs to bed. Fortunately, his brother was awakened and he put the flame out.
- 9) The claimant's mother voiced her concerns regarding the Department's not finding substantial limitations in Learning and in Capacity for Independent Living. He has stayed at a 3rd grade level with no increase in the past two years. The Department considered the Achievement scores for reading, math and spelling and found no scores at 50 or below. No information was gathered to allow the Department to gage the claimant's ability to perform household chores. They considered the ABS scores in the areas of Socialization, Responsibility and Pre-Vocation activity in reaching a decision that the claimant did not have substantial limitations in the area of Capacity for Independent Living. None of these scores was in the eligible range.
- 10) The claimant's mother reports that her son tests well on the Psychological tests because he is in a structured environment when these test are performed. She indicates that the scores are not representative of his functioning in the real world. The claimant referred to percentile scores of 1 on an earlier Psychological completed in 2006 in (Exhibit D-9). These 2006 results were lower than the results in the same categories in 2007.

	% Rank	Standard Score
Pers. Self-Sufficiency 2006	1	59
Pers. Self-Sufficiency 2007		68
Comm. Self-Sufficiency 2006	1	59
Comm. Self-Sufficiency 2007		61
Personal-Social Resp. 2006	1	62
Personal-Social Resp. 2007		64

The Department would be looking at either a <1% score or a 50 or below Standard Score. The scores above are in the Very Poor range however, none of the scores are in the eligible range.

- 11) 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

* Substantial deficits associated with a diagnosis other than mental retardation or a related diagnosis do not meet 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 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).

12) 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

13) 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 substantial limited functioning be defined on standardized measures of adaptive behavior scores as three (3) standard deviations below the mean or less than 1% when derived from non-MR normative populations. The claimant did not score below 1% in any category with the 2006 testing or with the 2007 testing. The

Department however, considered the Independent Functioning score of 1% at <3 yrs, 0mos received in both test along with written reports to determine substantial limitations in the area of Self Care.

- (2) Achievement scores in the areas of reading, math and spelling do not support a finding of substantial limitations in the area of learning.
- (3) The claimant received an ABS Socialization score of 2 in 2006 and a score of 1 in the area of Trustworthiness. These scores along with documentation regarding the claimant's impulse control behaviors, and the setting of a fire in the home, then returning to bed support substantial limitations in Capacity for Independent Living.
- (4) The Department should have found substantial limitation in two of the major life areas however three is required for eligibility. The Department was correct to deny medical eligibility for the MR/DD program.

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 5th Day of May 2008.

Sharon K. Yoho
State Hearing Officer