



State of West Virginia  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
Office of Inspector General  
Board of Review  
4190 W Washington St  
Charleston, WV 25313  
304-746-2360 EXT 2227

Joe Manchin III  
Governor

Martha Yeager Walker  
Secretary

April 23, 2008

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dear Mr. \_\_\_\_\_:

Attached is a copy of the findings of fact and conclusions of law on your hearing held March 10, 2008. Your hearing request was based on the Department of Health and Human Resources' decision to terminate the title XIX MRDD Home & Community-Based Waiver 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 submitted at the hearing, fails to demonstrate that you meet the eligibility criteria necessary for participation in the MR/DD Waiver Program.

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

Sincerely,

Jennifer Butcher  
State Hearing Officer  
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review  
Steve Brady, BMS  
\_\_\_\_\_, Mother

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

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**Claimant,**

**v.**

**Action Number:08-BOR-2586**

**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 10, 2008. 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 March 10, 2008 on a timely appeal, filed December 4, 2007.

All persons giving testimony were placed under oath.

**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:**

\_\_\_\_\_, Mother of Claimant  
Steve Brady, Bureau of Behavioral Health & Health Facilities  
Linda Workman, Psychologist Consultant, BMS  
\_\_\_\_\_, Mother

Presiding at the hearing was Jennifer Butcher, 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 Department acted correctly according to policy to terminate the Claimant [REDACTED] 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 of denial dated November 21, 2007
- D-2 Title XIX MR/DD Home and Community-Based Waiver Program Chapter 500 Medical Eligibility Criteria and Functionality
- D-3 ICR/MR Level of Care Evaluation dated June 12, 2007
- D-4 Comprehensive Psychological Evaluation administered by [REDACTED] MA Psychologist and Supervised by \_\_\_\_\_ dated May 23, 2007
- D-5 Special /Modified E/IEP Data Transportation Request dated April 27, 2007

#### **Claimant's Exhibits:**

- C-1 Basic skills performance sheet

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

- 1) The Claimant was an applicant for services under the Title XIX MR/DD Waiver Program. The Bureau of Behavioral Health reviewed the documents submitted for re-evaluation and determined that he did not qualify medically for the program.
- 2) Documentation submitted to the Department by the Claimant did not support the presence of substantial adaptive deficits in three or more of the major life areas identified for Waiver eligibility. Specifically, the documentation failed to demonstrate substantial limitations in the following major life areas: Self Care, Learning, Self-Direction, and Mobility. Also had questions about the Mental retardation diagnosis that

was rendered because it was not consistent with the Comprehensive Psychological Evaluation report in D-4Exhibit as stated by Department's Psychologist Linda Workman.

- 3) Based on the testimony and evidence explained by the Department's Psychologist of the D-4 Exhibit Comprehensive Psychological Evaluation, the ABS-S: 2 was used to determine \_\_\_\_\_'s Adaptive Behavior Skills as he compared to other children his age, non-mental retardation norm. Claimant needed to score **below** the 1<sup>st</sup> percentile on these test. This would signal he required an institutional level of care. The results of the ABS: S2 test as the following:

- Independent Functioning (Self-Care) scored at the 1<sup>st</sup> percentile
- Physical Development (Mobility) scored at the 25<sup>th</sup> percentile
- Language (Receptive or Expressive) scored at the 5<sup>th</sup> percentile
- Learning(Functional Academics) functioning at a fifth grade level
- Self Direction scored at the 2<sup>nd</sup> percentile
- Socialization (Capacity for Independent Living) less than 1percentile

According to her testimony the only deficit the claimant has, falls under is a subsection in Capacity for Independent Living for Social Skills and Health and Safety.

- 4) Claimant's mother also agrees with the finding of the need for supervision in the Health and Safety area of the Independent Living section. "\_\_\_\_\_, if not closely watched has a tendency to wonder away and her does not understand that he could be in danger."
- 5) The department also had difficulty in determining the Claimant has Mild Mental Retardation. According to D-4 Exhibit under the Intellectual/Cognitive Measures the Kauffman Brief Intelligence Test was given. Claimant Verbal Ability Score was 64 and the Nonverbal Ability Score was 105, which gave him a composite score of 82. According to testimony from the department's psychologist she referred to the "DSM4 a book with all medical diagnosis stating that it is clear that 70 and below is mental retardation and if there are substandard deficits can go up to as many as 75 but \_\_\_\_\_'s full scale score was 82 ,which is well beyond the score of 70. The department does not feel he meets the eligibility of Mental Retardation."
- 6) The department did agree that \_\_\_\_\_ has been diagnosed with Autistic Disorder.
- 7) 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).

- 8) The mother stressed that if her son did not get the help through this program that he will not progress any further then where he is at this stage of his life. The department's Psychologist did reinforce that if claimant's progression stopped moving forward that she could reapply at anytime.

#### **VIII. CONCLUSIONS OF LAW:**

- (1) Regulations required by the MR/DD Waiver Program for eligibility is for an individual to have a diagnosis of Mental retardation (and /or a related condition), which must be severe and chronic, in conjunction with substantial deficits. Substantially limited functioning in three or more of the major life areas is required. Substantial limits is defined on standardized measures of adaptive behavior scores three (3) standard deviations below the mean or equal to or below the seventy fifth (75) percentile when derived from MR normative populations.
- (2) The evidence presented at the hearing does not support a finding that Claimant meets requirements. It was determined the Claimant does have substantial limitations in one of the major life area of Capacity for Independent Living.
- (3) Regulations also 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 presented at the hearing does not support this requirement.

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

It is the decision of the State Hearing Officer to **uphold** the action of the Department to deny 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 23rd Day of April 2008**

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**Jennifer Butcher  
State Hearing Officer**