



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

April 17, 2008

____--

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held April 10, 2008. Your hearing request was based on the Department of Health and Human Resources' action to deny eligibility for services under the Title XIX MR/DD Waiver Services Program.

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 condition has, caused substantial deficits in three of the six major life areas or that you would require the level of care and services provided in an ICF/MR facility. Therefore, you do not meet 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
Jon Sassi, BHHF
Linda Workman, BMS

WEST VIRGINIA DEPARTMENT OF HEALTH & HUMAN RESOURCES
BOARD OF REVIEW

Claimant,

v. Action Number: 08-BOR-871

**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 10, 2008 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 April 10, 2008 on a timely appeal, filed February 21, 2008.

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
_____, claimant's mother
_____, claimant's father
_____, [REDACTED]
_____, [REDACTED]

Department's Witnesses:

Jon Sassi, Bureau of Behavioral Health & Health Facilities

Linda Workman, Psychologist Consultant, BMS

Presiding at the Hearing was Sharon K. Yoho, State Hearing Officer and a member of the State Board of Review.

All participants appeared by speaker phone

IV. QUESTIONS TO BE DECIDED:

The question to be decided is whether the claimant meets 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 Title XIX MR/DD Waiver Program Revised Manual Chapter 500
- D-2 Notification of denial mailed February 1, 2008
- D-3 DD-2A Level of Care Evaluation dated January 7, 2008
- D-4 Psychological Evaluation dated December 28, 2007
- D-5 Vineland II report and scores dated December 28, 2007
- D-6 Adaptive Behavior Scale report dated February 12, 2007
- D-7 Social History dated January 11, 2008
- D-8 Letter from Physician, [REDACTED] Hospital dated July 16, 1999
- D-9 Clinic notes from [REDACTED] dated December 3, 2001
- D-10 Initial Evaluation from [REDACTED] Institute dated August 1995
- D-11 Initial and Discharge Evaluation from [REDACTED] dated January 23, 1996
- D-12 Initial Evaluation from [REDACTED] Institute dated March 31, 1997

VII. FINDINGS OF FACT:

- 1) The claimant's parents submitted an application packet to the Bureau of Behavioral Health in January 2008 to determine if she would qualify for services under the Title XIX MR/DD Waiver Program. The Bureau of Behavioral Health reviewed the documents submitted and determined that claimant did not meet the medical criteria for the program.
- 2) The Department mailed a notice of denial on February 1, 2008 stating in part: "The packet lacked documentation which supports the presence of mental retardation with associated adaptive deficits within the developmental period." Additional documentation was provided and another denial notice was mailed on March 28, 2008 stating 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. Specifically, the documentation failed to demonstrate substantial limitations in the following major life areas: Self-Care, Learning, Receptive or Expressive Language, Mobility and Capacity for Independent Living.
- 3) The claimant is a 28-year-old female who is her own guardian and resides in a home with her parents. She attends the [REDACTED] in her hometown where she receives supported employment services. She has worked two hours weekly at a Drug Store for the past four years stocking shelves, and putting lids on medications. She graduated from High School. She likes to work jigsaw puzzles, word search puzzles, read and watch television. She has never been able to develop friendships.
- 4) She has a diagnosis of Hydrocephalus with Brain Injury and Mild Mental Retardation. She was born eight weeks prematurely due to placenta previa. She remained in the hospital until she was 4 months old. She could not breathe on her own and developed a grade 3 intraventricular hemorrhage due to oxygen. She has had several shunt revisions to treat her Hydrocephalus and has had twenty-three surgeries.
- 5) The DD-2a, medical assessment dated January 7, 2008 (Exhibit D-3) was found by the Department to have been altered with no initials to indicate who altered the document. It reports that the claimant is ambulatory and also ambulatory with human help. It reports that she can feed self and also that she needs assistance with feeding. It reports her to be continent and needing assistance with personal hygiene. It notes that she was alert, confused, disoriented and that she needs close supervision. This document assigned an Axis I diagnosis of Mental Disorder NOS due to hydrocephalus. It assigned an Axis II diagnosis of Mild Mental Retardation. The Physician indicates that the claimant needs the level of care and services offered in an ICF/MR facility.
- 6) The Psychological Evaluation dated December 28, 2007, Exhibit D-4) notes current behaviors. Under Psychomotor, it reports her to be ambulatory with an unsteady gait. Under Self-Help, it reports the claimant is mostly independent in tooth brushing and eating. She requires monitoring with bathing, menstrual care and hair care. In the category of Language, the psychological reports that she is able to express her basic needs and wants with speech that is clear and without impediment. She was reported to be fully cooperative during the evaluation with mood and affect being appropriate. The psychological included a Wechsler Adult Intelligence Scale test, which produced the

following results. The psychologist, completing the psychological, notes that the claimant will require an ICF/MR level of care.

Verbal IQ	74
Performance IQ	62
Full Scale IQ	66

- 7) The psychological included scores from a Vineland II Parent test completed by the claimant's mother. (Exhibit D-5). These low scores did not coincide with narrative documentation.

Under Communication, her standard score was	29
Under Daily Living Skills	33
Socialization	33
Motor Skills	51
Adaptive Behavior Composite	28

- 8) Adaptive Behavior Scale testing completed on February 12, 2007 utilizing MR norms produced scores in the Average to Above Average range. Subtest standard scores were reported as follows.

Independent Functioning	14
Physical Development	15
Economic Activity	11
Language Development	14
Numbers and Time	14
Domestic Activity	12
Pre/Vocational Activity	13
Self-Direction	12
Responsibility	13
Socialization	10

These scores are more inline with the narrative documentation provided.

- 9) Documents from [REDACTED] and [REDACTED] Institute, provided to the Department in March 2008, give insight into the claimants early years. At age 15, she was reported to have apparent learning difficulties since first grade. Her WISC-III scores at age 15 show a verbal IQ of 78, a performance IQ of 52 and a full scale IQ of 62. A performance IQ of 52 does indicate mild mental retardation. Her WRAT3 math score was 78. It was noted that her oral reading was at a good speed however, comprehension was very poor. Her parents at this time had hopes of her being able to attend a college for the learning disabled.
- 10) The documents provided from the [REDACTED] Institute show that the claimant was not identified for Special Education until fifth grade. At age 17, her WISC-III Performance IQ was at 52, which again indicates mild mental retardation. As of this age, no institutionalization had been suggested and no diagnoses of Mental Retardation had been assigned.

- 11) The Department has identified a substantial limited functioning in the area of Self Direction. Based on narrative documentation and test scores, they were not able to identify substantial limitation in any of the other four major life areas.
- 12) 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).

13) **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
- 14) 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. The claimant's standard scores fell below this range on the Vineland II Parent completed test. Other reported scores for the most part fell above this range. Narrative documentation supports the higher scores results. Much of the documentation and test results provided contradicted each other. The information provided on the DD-2a of January 2008 was contradictory within itself, especially in the areas of ambulation and feeding.
- (2) The Department denied eligibility due to substantial limits in functioning was not found however; an eligible diagnosis was also an issue. While this claimant may not have been officially diagnosed as Mentally Retarded within the developmental years, documentation from the developmental years strongly supports the later Mild MR diagnosis. It is reasonable to believe that efforts may have been made to avoid such labeling during those early years.
- (3) The Department found substantial limitation in the area of Self Direction only. In the area of Mobility, the claimant was found to be ambulatory and to have sufficient motor control. She stocks shelves at a drug store and puts lids on medication bottles. Documents show an ABS score of 15 for Physical Development. The Department would be looking for a score of 12 or below as an eligible score.
- (4) For Self Care, the Department found the ABS scores for Independent Functioning and Physical Development of 14 and 15 respectively supported the narrative documentation. No substantial limitations were found in this area.

- (5) In the area of language, the ABS score of 14 for Language Development coincided with narrative documentation indicating that the claimant can express her needs and wants using clear speech.
- (6) In the area of Learning, no substantial limitations are supported by scores or narrative documentation. The claimant scored a WRAT3 Math score of 78 and she enjoys reading. Clearly, she is functional in academics.
- (7) Capacity for Independent Living involves home living, social skills, employment, health and safety, and community and leisure activities. This claimant is her own Guardian. While it is noted that she has not been able to develop friendships, the psychological of December 2007 reports her to be socially appropriate. She works out in the public for short intervals weekly and makes use of her leisure time reading, working puzzles and watching television. While monitoring and supervision may be necessary, substantial limitations in the area of Capacity for Independent Living were not supported by evidence and testimony.

IX. DECISION:

It is the decision of the State Hearing Officer that the claimant does have a qualifying diagnosis for the program; however, she does not have substantial limitation in three of the five major life areas. I rule 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 17th Day of April 2008.

Sharon K. Yoho
State Hearing Officer