



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

October 3, 2006

Dear Ms. \_\_\_\_\_:

Attached is a copy of the findings of fact and conclusions of law on your hearing held September 8, 2006. 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 substantiate that you met 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  
Stephen Brady, BHHF  
Linda Workman, BMS

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

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

v. **Action Number: 06-BOR-2203**

**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 September 8, 2006 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 September 8, 2006 on a timely appeal, filed June 21, 2006.

**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  
Michelle Cook, Claimant’s Social Worker, DHHR  
\_\_\_\_\_, Claimant’s Caseworker, [REDACTED] School

Department’s Witnesses:

Steve Brady, Bureau of Behavioral Health & Health Facilities (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 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 Annual Medical Evaluation dated February 24, 2006
- D-3 Psychological Evaluation dated August 18, 2005
- D-4 Notification of denial dated May 15, 2006
- D-5 Updated Psychological dated March 29, 2006
- D-6 Social History dated April 20, 2006
- D-7 Individual Program Plan (IPP) dated April 20, 2006
- D-8 Individual Education Program (IEP) dated February 23, 2006

**VII. FINDINGS OF FACT:**

- 1) Social Workers for the claimant submitted an application packet to the Bureau of Behavioral Health in May 2006 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 based on the information made available to them that the claimant did not meet the medical criteria for the program.

- 2) The claimant is currently participating in an extended school year setting at the [REDACTED] School, which provides a 24 hour structured environment. The Social Worker at the school reports that the claimant requires prompting for daily hygiene. Both Ms. \_\_\_\_\_ and Ms. \_\_\_\_\_ believe that the claimant could not live on her own. Ms. \_\_\_\_\_ testified that the claimant gets angry and upset and cannot regulate her emotions.
- 3) The Department sent a denial notice on May 15, 2006 advising that the application had been denied. The notice stated that the documentation did not support the presence of the level of mental retardation, which typically results in the need for an institutional level of care, or the presence of substantial adaptive deficits in three or more of the six major life areas as defined for Waiver eligibility.
- 4) At the time of the application, the claimant was twenty years old. An Annual Medical Evaluation (Exhibit D-2), dated February 24, 2006, identified an Axis II diagnosis of Borderline Trait. The evaluation also noted a diagnosis of Bipolar D/O NOS and Post Traumatic Stress Disorder. This document did not identify a Mental Retardation diagnosis.
- 5) A Psychological Evaluation dated August 18, 2006 lists Axis II diagnosis as Mild Mental Retardation, Borderline Personality Traits and R/O Fetal Alcohol Syndrome. Prior Psychological testing completed in May of 2002 was mentioned on this 2006 evaluation. The prior testing found the claimant to have significant learning disabilities and emotional problems.
- 6) The Annual Medical Evaluation notes that the claimant is ambulatory, continent, and that she can feed her self. It indicates that she can care for her own hygiene and is alert.
- 7) The Psychological Evaluation (Exhibit D-3) reports results under Current Behaviors: A Psychomotor ratings of superior, A Self-Help rating of above average and a Language rating of above average. A Wechsler Adult Intelligence Scale test results show a full scale I.Q. of 65, a Verbal of 69 and a Performance of 67. In the Part One Domain Subtest section, the claimant received percentage scores of 84% in Independent Function, 84% in Language Development, 98% in Self-Direction, 95% in Responsibility and a 63% in Economic Activity. The Department looks for scores at 75% or below for the MR/DD program. The score of 63% in Economic Activity was the only score that was below the 75-percentile range however; Economic Activity does not directly relate to any of the Six (6) major life areas. The evaluator noted that these scores indicated significant strengths in Personal Self-sufficiency. The evaluator recommended training and indicated that she will continue to require services and care at an ICF/MR level.
- 8) The updated Psychological Evaluation (Exhibit D-5) reports lower Adaptive Behavior Scores in the Part One Domain Subtest section. The Psychiatrist reports these lower scores to be the result of the claimant's defiance and anxiety and indicates that the scores were not representative of functional levels.

- 9) 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

\* Tuberos 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).

10) **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

11) 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 exist which must be severe and chronic and have been manifested prior to age 22 and is likely to continue. The claimant does have a diagnosis of Mild Mental Retardation. Her condition while chronic, does not meet a definition of severe.
- (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. Testimony and evidence did not support that the claimant has substantial limitations in three (3) of the major life areas. Her Intelligence Scores and Adaptive Behavioral Scores do not support substantial limitations.
- (3) Regulations 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. While it may be true that the claimant is not able to live alone, evidence does not support the belief that she needs such level of services as is provided in an Institutional setting.

### **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 3rd Day of October, 2006.**

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**Sharon K. Yoho  
State Hearing Officer**