



**State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
State Capitol Complex, Bu
Charleston, WV 25305**

**Joe Manchin III
Governor**

**Martha Yeager Walker
Secretary**

December 12, 2005

Dear Ms.____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held December 8, 2004 and March 30, 2005. Your hearing request was based on the Department of Health and Human Resources' action to deny your application for the MR/DD Waiver 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 Waiver Program is based on current policy and regulations. One of the regulations specifies that in order to be eligible for the Title XIX MR/DD Home & Community-Based Waiver Program, an individual must have both a diagnosis of mental retardation and/or a related condition(s), and require the level of care and services provided in an Intermediate Care Facility for individuals with Mental Retardation and /or related conditions (ICF/MR Facility). (West Virginia Title XIX MR/DD Waiver Home & Community-Based Policy Manual, Chapter 1, Section I)

The information which was submitted at your hearing revealed that your functional level does not reach the level that would require the care and services provided in an ICF/MR.

It is the decision of the State Hearings Officer to UPHOLD the action of the Department to deny your application for the MR/DD Waiver Program.

Sincerely,

Erika H. Young
State Hearing Officer
Chairman, State Board of Review

cc: [REDACTED] Esquire
Kelly Ambrose, Esquire
Susan Hall, BBHMF
Board of Review

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

_____,
Claimant,

v.

Action Number: _____

**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 _____ 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 initially scheduled for March 19, 2004 on a timely appeal, filed December 23, 2003. The hearing was rescheduled to May 10 and then July 16, 2004 at Claimant's request, was rescheduled and initially convened on December 8, 2004 and was continued due to time restraints and reconvened on March 30, 2005.

It should be noted here that Claimant's application for the MR/DD Waiver Program were denied and no benefits have been issued during pending this hearing decision.

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.

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:

[REDACTED], Claimant

[REDACTED] Counsel for Claimant

[REDACTED] Witness for Claimant

Susan Hall, Program Operations Coordinator, Bureau for Behavioral Health
Kelly Ambrose, Senior Assistant Attorney General, Bureau for Medical Services
Richard Workman, Psychologist Consultant, Bureau for Medical Services

Presiding at the Hearing was Theodore R. Dues, State Hearing Officer and a member of the State Board of Review.

IV. QUESTIONS TO BE DECIDED:

The question(s) to be decided is whether the Department was correct in its determination that the claimant did not meet the medical eligibility criteria for the MR/DD Waiver Program.

V. APPLICABLE POLICY:

West Virginia Title XIX MR/DD Waiver Home & Community-Based Policy Manual, Chapter 1, Section I

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 Notice of Denial dated December 13, 2003
- D-2 Annual Medical Evaluation (Form DD-2A) dated August 22, 2003
- D-3 Chart Report from [REDACTED] Mental Health Center dated June 20, 1996
- D-4 Psychiatric Intake from [REDACTED] Hospital dated November 18, 2003
- D-5 Psychological Evaluation dated August 8, 2003
- D-6 Psychological Evaluation dated June 15, 2004
- D-7 Social History dated July 9, 2003
- D-8 Social History dated June 16 2004
- D-9 Social History dated September 2, 2004
- D-10 Copy of 42 CFR § 435.1009
- D-11 Copy of Mental Retardation Diagnosis Guidelines from DSM IV

Claimants' Exhibits:

- C-1 Initial Medical Evaluation dated August 25, 2003
- C-2 Psychological Evaluation dated August 8, 2003
- C-3 Psychiatric Consultation Report dated July 24, 2002
- C-4 Psychological Evaluation dated June 15, 2004
- C-5 Psychiatric Intake dated November 18, 2003
- C-6 Social History dated September 2, 2004
- C-7 Records from [REDACTED] County School System

Claimant proffered medical Records from [REDACTED] Hospital dated November 1984 prior to the second convening of the hearing. The documents were excluded from evidence upon objection by the Department.

VII. FINDINGS OF FACT:

- 1) Claimant applied for the MR/DD Waiver Program in November 2003. On December 15, 2003, the Department issued a notice to the claimant that her Waiver application had been denied. The reason provided was as follows:

The psychological evaluation was beyond 90 days upon receipt by the Waiver Office. A copy of the most recent psychiatric report will be required for further review. Documentation submitted indicates that substantial adaptive deficits were not manifested during the developmental period and present delays are better accounted for by chronic mental illness than cerebral palsy delays. The psychologist does not make a clear, distinct recommendation for an ICF/MR level of care and states that Ms._____ needs "limited assistance". [sic] The DD-4 does not provide a recommendation for an ICF/MR level of care.

- 2) At the time of the denial the medical eligibility criteria for the MR/DD Waiver were outlined in Chapter 1 of the Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual and read as follows:

- A. In order to be eligible for the Title XIX MR/DD Home & Community-Based Waiver Program an individual must have both a diagnosis of mental retardation and/or a related conditions(s), and require the level of care and services provided in an Intermediate Care Facility for Individuals with Mental Retardation and /or related conditions (ICF/MR Facility).

[An Intermediate Care Facility is defined as one that provides services in an institutional setting for persons with mental retardation or related conditions. The primary purpose of the institution

is to provide services to individuals who are in need of and who are receiving active treatment.]

- B. The following list includes some examples of **related conditions**. **This list does not represent all related conditions.**
1. Autism or Pervasive Developmental Disability, NOS
 2. Spina Bifida
 3. Cerebral Palsy
 4. Tuberous Sclerosis
 5. Traumatic Brain injury and/or Spinal Cord injuries (occurring during the developmental period).
- C. The evaluations must demonstrate that an individual has a diagnosis of **mental retardation** and/or a **related condition** which constitute a severe chronic disability which is:
1. Attributable to a mental or physical disability or a combination of both;
 2. Manifested before a person reaches twenty-two (22) years of age;
 3. Likely to continue indefinitely; **and**
 4. **Substantially** limits functioning in **three or more** of the following areas of major life activities;
 - a. Self-Care
 - b. Learning (functional academics)
 - c. Mobility
 - d. Capacity for Independent Living (home living, social skills, health and safety, community use, leisure)
 - e. Receptive and /or expressive Language
 - f. Self-Direction
 - g. Economic Self-sufficiency (Employment)
- D. Level of care determinations are made by the Office of Behavioral Health Services (OBHS) and the Bureau for Medical Services (BMS) based on the medical, psychological and social evaluations (DD-2A, DD-3, and DD-4)

- E. Evaluations must demonstrate the need for an ICF/MR level of care and services. This is demonstrated by the individual's need for intensive instruction, services, safety, assistance and supervision to learn new skills and increase independence in activities of daily living. The level of care and services needed must be the same level which is provided in an ICF/MR facility
- 3) At the time of this hearing, Claimant was 37 years of age. She was diagnosed at an early age with cerebral palsy. She ambulates by use of a wheelchair, and has left-sided weakness resulting from the cerebral palsy. As a part of her therapy, Claimant occasionally ambulates with a walker but needs a gait belt and the assistance of another person.
 - 4) In addition to the cerebral palsy diagnosis, Claimant has been diagnosed with schizo-affective disorder, depressive type with psychotic features and major depressive disorder and has had several psychiatric hospitalizations. At the time of the hearing, Claimant was a resident at [REDACTED] Hospital and had lived there since 1998.
 - 5) Claimant takes Zyprexa and Prozac and had had no recent disruptive behavior as of September 2004. (Exhibits D-4 and D-9)
 - 6) Claimant had no diagnosis of mental retardation until June 2004 when, at age 36, she was found, in a psychological evaluation completed by [REDACTED] (Exhibit D-6), to have a non-verbal intelligence quotient of 73 with a margin of error of plus or minus 4 thus falling in the mild mental retardation/borderline intellectual functioning range of 50 to 70). Mr. [REDACTED] did not include a verbal IQ measurement in his evaluation. A psychological evaluation completed in August 2003 by [REDACTED] (Exhibit D-5) included a measurement of intelligence that resulted in a verbal IQ of 96, a performance IQ of 58, and a Full Scale IQ of 76. Mr. [REDACTED] indicated that the verbal IQ "may be a more accurate estimate of her intellectual capacity."
 - 7) The diagnostic criteria for mental retardation found in DSM IV (Exhibit D-11) include "Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test" and "The onset is before age 18 years."
 - 8) Claimant graduated from high school with above-average grades and attended some college. Claimant makes her own medical and financial decisions. Exhibits D-5 and D-9)

- 9) Claimant regularly attends off-ward activities and off-grounds outings. (Exhibit D-8) She reported that she enjoys bingo, attending church, shopping and listening to music performed at the facility. (Exhibit D-5)
- 10) The psychological evaluations from 2003 and 2004 indicate that Claimant requires some assistance with dressing (in particular with bra, shoes and socks), needs some minimal assistance with bathing, and requires occasional assistance with toileting and personal hygiene.
- 11) Although Claimant is capable of wheeling independently, she often asks others to assist her with wheeling. (Exhibit D-6)
- 12) Social Histories completed by [REDACTED] Hospital Social Worker [REDACTED] (Department Exhibits # 7, 8, and 9) indicate that Claimant had some limited work experience in the past. It is also indicated that prior to her hospitalization in 1996, Claimant lived alone in an apartment with services from the Council on Aging and that the arrangement did not work because of psychiatric issues.
- 13) Testimony by Mr. [REDACTED] indicated that safety issues could exist if Claimant attempted to live independently because she may not be able to vacate in the event of an emergency and because of her risk of falling. He further testified that Claimant would need some assistance if she lived in the community and some training in community use. Mr. [REDACTED] testified that Claimant is very fearful of living on her own and would have a great deal of anxiety.
- 14) Claimant has no limitations in the area of expressive or receptive language.
- 15) The June 2004 psychological evaluation included an Adaptive Behavior Scale. The standard scores were rated as average to superior using a norm group of mentally retarded persons. Claimant scored in the average range in the areas of Independent Functioning, Physical Development, Prevocational/Vocational Activities, and Self-direction.
- 16) The Department, though testimony of Mr. Workman, asserted that the adaptive behavior scale scores were not relevant because there is no evidence that any delays were manifested prior to age 22.
- 17) A Vineland Adaptive Behavior Scale administered in August 2003 indicates "minimal adaptive behavior deficits." (Exhibit D-5)
- 18) The August 2003 psychological evaluation indicates that Claimant's primary training needs involve the areas of education and vocation. The August 2004 evaluation recommended training in such self-help activities as laundry and putting on shoes and socks and upper extremities exercise. It is further indicated that Claimant requires "supervision and services to maintain her current level of independence and functioning." The 2004 evaluation loses credibility by the

evaluator's having administered a non-verbal Intelligence test when the previous evaluation showed a verbal IQ of 96, and that evaluator indicated that the verbal IQ may be a more accurate estimate of her intellectual capacity than the performance IQ which was 58.

VIII. CONCLUSIONS OF LAW:

- 1) In order for a person to be medically eligible for the MR/DD Program, he must have a diagnosis of mental retardation or a related condition and require the level of care and services provided in an ICF/MR. Claimant has cerebral palsy which is a condition listed by policy as one of the examples of related conditions. By most accounts, Claimant does not have mental retardation. The only evaluation in which a diagnosis of mental retardation occurred was in 2004 when the claimant was 36 years of age. That evaluation showed a measure of intellectual functioning at one point below the highest score in the accepted range for mild mental retardation.
- 2) Policy further requires that evaluations must show that the mental retardation or related condition must constitute a severe and chronic disability which is attributable to a mental or physical disability or both, was manifested prior to age 22, is likely to continue indefinitely *and* which substantially limits functioning in three or more of the seven specified areas of major life activities cited above. The term "severe" is not defined by policy. Claimant has a related condition that was manifested prior to age 22 and is likely to continue indefinitely.
- 3) The Department did not assert that Claimant's cerebral palsy does not substantially limit her functioning in mobility. Claimant did not dispute that her functioning in language is not limited.
- 4) Claimant's cerebral palsy does not limit her functioning in learning as evidenced by her having graduated from high school with good grades and having attended college for a time. She also scored in the superior range in the areas of numbers and time and language development.
- 5) The Department asserts that the June 2004 ABS scores showing substantial deficits (indicated by scores in the average range when compared with persons with mentally retardation) in the areas of independent functioning, prevocational/vocational activities, and self-direction are not relevant because there is no evidence that those deficits existed prior to age 22. The policy does not clearly state that the deficits must have existed prior to age 22; it only indicates that the disability must have been manifested prior to age 22 and that the disability substantially limits (present tense) functioning in three or more areas of major life activities.
- 6) If one relies on testimony and narrative information from the evidence to evaluate adaptive deficits, the following is found:

- Claimant requires some assistance with self-care due to her cerebral palsy, but the level required is limited and occasional. She is able to perform most self-care activities and thus is not found to be substantially limited in that area.
 - Claimant's cerebral palsy does not substantially limit her functioning in the area of self-direction as evidenced by her being capable of managing her own finances and medical care and her choosing to participate in activities available at the facility.
 - Evidence indicates that Claimant's experience in living alone was unsuccessful because of psychiatric issues and not because of her cerebral palsy.
- 7) The final criterion needed to meet medical eligibility is the need for ICF/MR level of care as demonstrated by the individual's need for intensive instruction, services, safety, assistance and supervision to learn new skills and increase independence in activities of daily living. The more credible of the two psychological evaluations indicates that Claimant's only training needs are in the areas of education and employment.

IX. DECISION:

It is the finding of the Hearing Officer that the preponderance of evidence does not show that the Claimant's cerebral palsy results in substantial limitations in three or more areas of major life activities or that Claimant requires the level of care and services provided in an ICF/MR facility. The Department's action to deny Claimant's application for the MR/DD Waiver Program is UPHELD.

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision
Form IG-BR-29

ENTERED this 12th Day of December 2005.

Erika H. Young
Chairman, Board of Review