



State of West Virginia  
**DEPARTMENT OF HEALTH AND HUMAN RESOURCES**  
Office of Inspector \_\_\_\_\_ral  
Board of Review  
P.O. Box 1736  
Romney, WV 26757

Joe Manchin \_\_\_\_\_I  
Governor

Martha Yeager Walker  
Secretary

September 11, 2006

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

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

Attached is a copy of the findings of fact and conclusions of law on your son's hearing held August 31, 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 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 \_\_\_\_\_ral 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 substantiate that your son 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 **reverse** 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, BHMF  
Linda Workman, BMS

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

\_\_\_\_\_ by: \_\_\_\_\_,

**Claimant,**

**v.**

**Action Number: 06-BOR-1941**

**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 August 31, 2006 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 August 31, 2006 on a timely appeal, filed May 5, 2006.

\_\_\_\_\_. **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:**

#### **Claimant's Witnesses:**

\_\_\_\_\_, Claimant's father

\_\_\_\_\_, Claimant's mother

\_\_\_\_\_, Claimant, was present but did not speak

#### **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 January 12, 2006
- D-3 Psychological Evaluation dated October 18, 2005
- D-4 Social History dated January 4, 2006
- D-5 Individual Program Plan (IPP) dated December 19, 2005
- D-6 Request for additional documentation dated February 3, 2006
- D-7 Notification of denial dated May 11, 2006

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

- C-1 Report from Pediatric Ophthalmologist dated April 12, 1978
- C-2 Medical report dated November 20, 1989
- C-3 Physician's Psychiatric Evaluation dated November 1991
- C-4 Hospital records from \_\_\_\_\_ dated January 22, 1996
- C-5 Letter from \_\_\_\_\_ MD dated October 16, 2003
- C-6 Letter from Dr. \_\_\_\_\_ dated July 2, 2002
- C-7 Annual Medical dated June 13, 2006

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

- 1) The parents of \_\_\_\_\_ and \_\_\_\_\_ submitted an application packet to the Bureau of Behavioral Health on January 11, 2006 to determine if \_\_\_\_\_, (\_\_\_\_) would qualify for services under the Title XIX MR/DD Waiver Program. The Bureau of Behavioral Health reviewed the documents submitted and determined additional documentation was needed to determine eligibility.
- 2) The Department sent a request for additional documentation on February 3, 2006, (Exhibit D-6) stating, "Additional documentation is requested. Please submit records, which substantiate the presence of mental retardation within the developmental period."
- 3) \_\_\_\_\_ is currently 32-years-old. He experienced brain damage at birth. His mother's saddle block did not take; he was delivered by forceps and taken immediately to an incubator. His mother did not see him for a day. He did not walk or talk until he was almost 3 years old. He was enrolled in Kindergarten and his teacher sent a note home to advise the parents that she did not know what to do with him and that she was not able to teach him. He continued through school in Learning Disability (LD) classes up to the 10<sup>th</sup> grade when he quit school.
- 4) \_\_\_\_\_'s parents have tried unsuccessfully to obtain school records from the \_\_\_\_\_ County School system. They have been told that neither the \_\_\_\_\_ County Board of Education nor the schools that he attended have any records on him. The parents did supply what they could find that fell within the developmental years.
- 5) The Annual Medical Evaluation dated January 17, 2006; (Exhibit D-2) does list a diagnosis of Mental Retardation – mild. A diagnosis of Schizo Affective Disorder is also listed on that evaluation.
- 6) The Annual Medical Evaluation, (Exhibit C-7) completed by another physician on June 13, 2006 lists Mental Retardation due to traumatic brain injury at birth as a diagnosis. Schizo Affective Disorder is also listed. This evaluation reports that a variety of previous medications, which treat Psychotic disorders, had been stopped and \_\_\_\_\_ was at that time prescribed Paxil and Risperdal. His father testified that \_\_\_\_\_ had improved as these psychotropic medications were reduced. Risperdal is prescribed in cases of Mental Retardation for behavioral issues as well as for Psychotic patients. Paxil is not a medication used for psychotic diagnosis.
- 7) The Psychological Evaluation dated October 18, 2005; (Exhibit D-3) lists an Axis \_\_\_\_\_ diagnosis of Mild Mental Retardation (PRIMARY). This evaluation also refers to a previous Psychological report of year 2004, which also reported a diagnosis of Mild Mental Retardation. A Wechsler Adult Intelligence Scale- Third Edition test was performed during this October Psychological. This Intelligence test produced a Full Scale I.Q. of 59. Other scores support that \_\_\_\_\_ does have substantial deficits in three or more of the six major life areas, which was not disputed by the Department's witnesses at this hearing.
- 8) A report provided by a Pediatric Ophthalmologist, (Exhibit C-1) reports that \_\_\_\_\_ at age five (5) had extreme limitations in his intellectual functions related to letter recognition, picture, or any form of concepts. He was unable to transcribe even the

simplest of characters. This Ophthalmologist strongly supported a neurological evaluation as well as a psychological and psychometric evaluation.

- 9) A Physician's Psychiatric Evaluation completed on \_\_\_\_\_ at age 18, (Exhibit C-3), reports that his Intellectual functioning is way below average. This evaluation listed diagnosis: Axis I – Bipolar Disorder, Manic, without Psychotic Features. His Axis \_\_\_\_\_ diagnosis was deferred.
- 10) A hospital discharge diagnosis was reported on (Exhibit C-4) as 1. Psychotic disorder secondary to brain injury. Affective disorder secondary to brain injury. 2. Learning disability secondary to brain injury, developmental delay secondary to brain injury. 3. Perinatal central nervous system insult. 4. Acathisia secondary to neuroleptics.
- 11) A letter from \_\_\_\_\_ M.D., (Exhibit C-5) states: "Despite the improvement of his psychotic symptoms, he continues to have difficulty taking care of himself and I believe this is due to his mental retardation." This doctor notes improvements in \_\_\_\_\_ with the tapering off of his psychotropic medications.
- 12) A condition of Mental Retardation does not present itself later in life if it was not present at birth.
- 13) 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).

#### **14) 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 \_\_\_\_\_al 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

15) 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  
(\_\_\_\_\_) 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.

#### **VIV. CONCLUSIONS OF LAW:**

- (1) Regulations require that a diagnosis of Mental Retardation or related condition exists which must be severe and chronic and have been manifested prior to age 22 and is likely to continue. Documentation presented at this hearing includes diagnoses of Mental Retardation given by five (5) different physicians. \_\_\_\_\_'s Full Scale IQ score



of 59 supports the diagnosis of Mental Retardation. It is unfortunate that ample information could not be located to document his condition during the developmental years. The documented improvement in his condition upon the reduction of psychotropic medications also supports the diagnosis of Mental Retardation as a primary diagnosis.

- (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 support that \_\_\_\_\_ has substantial limitations in three (3) of the major life areas. This was not an item in dispute.
- (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. Evidence does support the belief by at least three physicians that \_\_\_\_\_ does need such level of services as is provided in an Institutional setting.

**IX. DECISION:**

It is the decision of the State Hearing Officer to **reverse** 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 11th Day of September, 2006.**

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**Sharon K. Yoho  
State Hearing Officer**