



**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 26, 2006

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

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

Attached is a copy of the findings of fact and conclusions of law on your son's hearing held October 18, 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 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 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 **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, BHMF  
Linda Workman, BMS

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

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

**Claimant,**

**v.**

**Action Number: 06-BOR-2395**

**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 October 18, 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 October 18, 2006 on a timely appeal, filed May 30, 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's Son (applicant)  
\_\_\_\_\_, Claimant  
\_\_\_\_\_, Claimant's Psychologist

#### **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 19, 2006
- D-3 Psychological Evaluation dated February 13, 2006
- D-4 Psychological Evaluation dated October 28, 2005
- D-5 Social History dated March 9, 2006
- D-6 Letter from \_\_\_\_\_, Deaf and Blind School dated May 17, 2006
- D-7 Individual Program Plan (IPP) dated March 9, 2006
- D-8 Individualized Education Program (IEP) dated May 19, 2006
- D-9 Letter from \_\_\_\_\_ dated April 26, 2005
- D-10 Discharge Summary from \_\_\_\_\_
- D-11 Denial notice dated April 13, 2006
- D-12 Denial notice dated August 2, 2006

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

- 1) The claimant, \_\_\_\_\_, submitted an application packet to the Bureau of Behavioral Health in March 2006 to determine if her son, \_\_\_\_\_, 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 her son did not meet the medical criteria for the program.
- 2) The Department sent a denial notice on April 13, 2006 advising that the application had been denied because additional information was needed to further evaluate his eligibility. The Department requested psycho-educational assessments conducted by the school system, the discharge summary from a 2005 psychiatric hospitalization and a progress summary from the treating psychiatrist.
- 3) The claimant supplied additional documentation to the Department. After reviewing this additional information, the Department determined that the claimant's son did not have the presence of substantial deficits in three or more of the six major life areas as required for Waiver eligibility. A denial notice dated August 4, 2006 was sent to the claimant explaining the reasons for denial.
- 4) At the time of the application, her son was sixteen-years-old. An Annual Medical Evaluation dated January 19, 2006 identified diagnosis of Attention Deficit Hyperactivity Disorder, Oppositional Defiance Disorder, Aspergers Disorder, Pervasive Development Disorder, and Mild Mental Retardation. A Psychological Evaluation dated October 28, 2005 lists the above diagnosis as well as Mood Disorder and Intermittent Explosive Disorder. A Psychological Evaluation dated February 13, 2006 lists the same diagnosis as listed in the October Evaluation.
- 5) The January Annual Medical Evaluation reports that her son is ambulatory, continent, feeds self, alert and able to take care of his own personal hygiene. Medications listed on this evaluation are all in the category of psychotropic medications. This evaluator indicates that the patient requires the level of care and services provided in an ICFMR facility.
- 6) The Psychological Evaluation dated February 13, 2006 reports that his level of functioning continues to be at the mild range of Mental Retardation. Concerns of his behavior are addressed. There was an incident of his hitting his mother and this report states that, "his behaviors have decreased since his being informed that he would have an incorrigibility petition filed against him if he hit his mother again". This Evaluation refers to Adaptive Behavior Scale (ABS) scores from the previous October 2005 Psychological. The Department looks for standard scores of 12 or below in determining substantial deficits in the major life areas. Scores in the Part One Domain include only one standard score in the below average rating. This score of 7 was in the area of Economic Activity, which would relate to the major life area, Capacity for Independent Living. He scored in the above average range for Physical Development, and Numbers and Time. He scored in the average range for Independent Functioning with a score of 10, in Pre/Vocational Activity with a score of 9, Self-Direction with a score of 10, Responsibility with a score of 9, and Socialization with a score of 9. Both the areas of Pre/Vocational Activity and Responsibility relate to the Major Life area of Capacity for Independent Living. The category of Self-Direction is in itself a Major Life Area. The

category of Independent Functioning relates to the Major Life area of Capacity for Independent Living. He scored in the superior range for Language Development. His scores were much lower in the Part Two Domain however; the subtest categories in the Part Two Domain do not directly relate to any of the Major Life Areas.

- 7) The Department indicated that the score of 10 in Independent Living contradicts the other documentation regarding the individual's ability to self-care. The Psychological (Exhibit D-4) which recorded this score of 10 reports under C. Current Behaviors, Self-Help: "He is able to feed himself but does have spilling, is toilet trained, washes his hands with soap, washes and dries himself with help, brushes his teeth with supervision, puts his clothes in the drawer, puts clothes in the washer and dryer and starts it with assistance, completely dresses himself with verbal prompting only, completely undresses himself, uses money but does not make change correctly, and makes minor purchases without help. He is unable to do banking, budgeting or errands." The Annual Medical (Exhibit D-2) does not indicate any assistance needed for feeding or personal hygiene. The claimant reports that her son does need reminded to clean self fully after toileting. She reports that he will stand in the shower and won't bath himself and that sometimes she has to wash him. She states that she will tell him to brush his teeth but he will not.
- 8) The Department questions the low score for self-direction as well. Evidence supports that the claimant's son does make some choices for himself. Social History (Exhibit D-5) indicates that he voices interest in numerous jobs, (e.g. professional wrestling, food service, factory work). This document suggests that it appears he could function as an employee in a supported position. The claimant reports that her son likes to play Nintendo video games and does not like to go places. She indicates that he would play Nintendo all day if permitted to.
- 9) The Psychological evaluation dated October 28, 2005 reports results from a Wechsler Intelligence Scale test. The claimant's son scored a Full Scale IQ of 63. He attends the [REDACTED] and is expected to receive a standard diploma. The IEP (Exhibit D-8) reports that, "He is able to work independently at a 4<sup>th</sup> grade level but with teacher assistance and Total Communication he is able to comprehend on a variety of levels." He has a history of chronic middle-ear-infections that have resulted in some hearing loss so he uses a combination of speech and sign language to effectively communicate in a total communication environment. His hearing loss along with other diagnosed disabilities has an adverse affect on his educational progress in the general curriculum.
- 10) Much of the evidence presented focused on limitations associated with behavioral issues.
- 11) 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).

12) **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

13) **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) Policy requires the applicant to have a qualifying diagnosis for the MR/DD program and evidence does support that this individual does meet that criteria for the program.
- (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 this applicant has substantial limitations in the area of Capacity for Independent Living.
- (3) Evidence and testimony did not support that he has substantial limitation in Independent Functioning. It rather concludes that the claimant's son is able to perform most aspects of self-care on his own, but often chooses not to.
- (4) Evidence and Testimony was not conclusive that the applicant has substantial deficits in the area of Self-Direction. It does suggest that he exhibits some weakness in this area.
- (5) The low ABS scores in Part Two Domain refers to behavioral problems as opposed to functioning problems. Much of the evidence presented asserts that much of this applicant's delays are due to behavior problems. Policy stipulates that substantial limitations must be associated with the presence of mental retardation or related condition.
- (6) 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. Criteria under Medical Eligibility, Level of Care states: 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. Evidence does not support the belief that this applicant needs such level of services, which 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 26th Day of October, 2006.**

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**Sharon K. Yoho**  
**State Hearing Officer**