



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
P.O. Box 2590
Fairmont, WV 26555-2590

Joe Manchin
Governor

Martha Yeager Walker
Secretary

May 26, 2006

_____ for

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing convened on January 6 and April 7, 2006. Your Hearing request was based on the Department of Health and Human Resources' action to deny your brother's application for benefits and services through the MR/DD Waiver Program.

In arriving at a decision, the State Hearing 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 a related condition. 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 individuals with Mental Retardation and /or related conditions (ICF/MR Facility). (West Virginia Title XIX MR/DD Waiver Home & Community-Based Policy Manual, Chapter 502.1).

The information submitted at the hearing reveals that Mr. _____ was not diagnosed with Mental Retardation prior to the age of 18 as required by the DSM-IV. In addition to an incompatible diagnosis of Mental Retardation, the evidence fails to support the existence of substantial adaptive deficits within the developmental period or the need for active treatment.

It is the decision of the State Hearing Officer to **uphold** the action of the Department in its decision to deny your application for benefits and services through the MR/DD Waiver Program.

Sincerely,

Thomas E. Arnett
State Hearing Officer
Member, State Board of Review

Cc: Chairman, Board of Review
Alva Page III, Esq., BMS
[REDACTED]

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

Claimant,

vs.

Action Number: 05-BOR-5672

**West Virginia Department of
Health and Human Resources,**

Respondent.

DECISION OF THE STATE HEARING OFFICER

I. INTRODUCTION

This is a report of the State Hearing Officer resulting from a fair hearing concluded on May 26, 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 originally convened on January 6, 2006 and reconvened on April 7, 2006, on a timely appeal filed April 27, 2005.

All persons giving testimony were placed under oath.

In accordance with a verbal agreement entered upon by both parties, written closing arguments were to be provided to the State Hearing Officer, post marked no later than April 24, 2006. However, two extensions were granted by the State Hearing Officer, wherein it was agreed that said closing arguments would be post marked no later than April 28, 2006 and finally May 2, 2006. It should be noted that Counsel for the Claimant failed to meet the agreed May 2, 2006 deadline and her document entitled "Closing Argument," accompanied by five individual court orders from the [REDACTED] Circuit Court, was received on May 4, 2006 (post marked May 3, 2006).

II. PROGRAM PURPOSE:

The program entitled MR/DD Home and Community-Based Waiver is set up cooperatively between the Federal and State Government and administered by the West Virginia Department of Health and 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 sister

Psychologist

Steven Brady, Acting Program Coordinator, MR/DD Waiver Program
Richard Workman, Psychologist Consultant, Bureau for Medical Services
Kelly Ambrose, Esq., BMS (Represented the Department on January 6, 2006)
Alva Page III, Esq., BMS (Represented the Department on April 7, 2006)

Presiding at the hearing was Thomas E. Arnett, State Hearing Officer and a member of the State Board of Review.

IV. QUESTION(S) TO BE DECIDED

The question to be decided is whether the Department is correct in its decision to deny the Claimant's application for benefits and services through the MR/DD Waiver Program.

V. APPLICABLE POLICY

West Virginia Title XIX MR/DD Waiver Home & Community Based Services Handbook, Chapter 1 & 42 CFR § 435.1009 and 42 CFR § 483.440.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Department's Exhibits:

- D-1 Diagnostic Statistical Manual (DSM 4-TR), Page 49 - Diagnostic Criteria for Mental Retardation
- D-2 42 CFR § 483.440 Condition of participation: Active treatment services
- D-3 42 CFR § 435.1009 Definitions relating to institutional status (24-hour supervision)
- D-4 Notice of Denial dated February 3, 2005
- D-5 DD-2a, Annual Medical Evaluation dated December 13, 2004
- D-6 DD-2a, Annual Medical Evaluation dated March 29, 2005
- D-7 [REDACTED] Schools Psychoeducational Report dated April 20, 1978
- D-8 Report of Classroom Performance I.E.P Annual Review dated May 28, 1979
- D-9 [REDACTED] Schools Psychoeducational Report dated February 19, 1981
- D-10 Individual Education Program Implementation Instructional Plan dated October 29, 1981
- D-11 Correspondence to Mr. & Mrs. _____ from [REDACTED] Behavior Disorders Teacher, [REDACTED] Schools
- D-12 [REDACTED] Schools Psychoeducational Data Sheet dated February 18, 1988
- D-13 [REDACTED] Schools Learning Disabilities Report (Test Administered 1-22-88)
- D-14 Psychological Evaluation completed on October 19, 2004 by [REDACTED] Ph.D & Associates, PLLC.
- D-15 Psychological Evaluation Addendum completed on April 1, 2005 by [REDACTED]
- D-16 Eligibility Criteria, MR/DD Handbook, Chapter 1.

Claimant's Exhibits:

- C-1 Psychological Evaluation dated October 23, 1997 from [REDACTED]
- C-2 Psychological Evaluation dated October 26, 1998.
- C-3 Social History dated October 19, 2004
- C-4 (DD-5) Individual Program Plan

VII. FINDINGS OF FACT:

- 1) On or about February 3, 2005, the Claimant was notified via a Notice of Denial that his application for benefits and services through the MR/DD Waiver Program was denied (D-4). This notice states, in pertinent part:

Your Waiver application is hereby denied.

Your application was denied because: Documentation submitted for review does not support the presence of moderate mental retardation within the developmental period which resulted in substantial adaptive deficits which would require active treatment such as that provided in an institutional setting and an ICF/MR level of care.

- 2) The Department contends that the Claimant did not present a diagnosis of Mental

Retardation prior to the age of 18 (as required by the DSM –IV, exhibit D-1) and he did not demonstrate substantial adaptive deficits within the developmental period (prior to the age of 22) or require active treatment as required by eligibility criteria.

Exhibits D-7 through D-13 were entered by the Department and contain some of the following pertinent facts:

The [REDACTED] Schools Psychoeducational Report dated April 20, 1978 (**Exhibit D-7**) was completed when the Claimant was 8 years, 11 months old. The Wechsler Intelligence Scale for Children was administered and the following scores were recorded: Verbal IQ 85, Performance IQ 63 and Full Scale IQ of 72. The Peabody Individual Achievement Test was administered and the Claimant scored the following: Math 90, Reading Recognition 99, Reading Comprehension 85, Spelling 105, General Information 95 and a total test score of 94. According to testimony provided by the Department, scores falling in the range of 90 – 100 are considered average. An asterisk on the bottom of the first page is followed by the following statement – “Scores per se are invalid. No psychometric instrument can accurately assess the cognitive development of a child so emotionally deviant, who shows erratic spotty intellectual gains. Scores are quoted only to give a relative index of test mastery over time.”

Exhibit D-8 is a Report of Classroom Performance dated May 28, 1979. This report indicates that the Claimant completed the third grade reader that school year and completed the third grade speller with an “A” average. He was reported to show much improvement in math, particularly in addition, multiplication, and division, where he has completed third grade work. The fourth page of this exhibit is the Record of SBAT Meeting held on October 30, 1979 and indicates that the Claimant’s handicapping condition is BD and LD (Behavior Disorder and Learning Disabled).

Department’s **Exhibit D-9** is a Psychoeducational Report dated February 19, 1981, completed when the Claimant was 11 years & 6 months of age. The Wechsler Intelligence Scale for Children was administered and yielded the following scores: Verbal IQ of 84, Performance IQ of 72 and a Full Scale IQ of 76. The last paragraph of the Discussion section states that “_____ seems well placed in his present educational setting (BD classes [REDACTED] School).” An asterisk at the bottom of page one marks the statement – “Scores are only suggestive (see discussion) and are seen as very minimal estimates of _____’s capabilities.”

The Individual Education Program: Implementation Instructional Plan, **Exhibit D-10**, dated October 29, 1981 was completed when the Claimant was 12 years & 3 months old. This IEP indicates that the area of exceptionality is Behavioral Disorder.

Exhibit D-11 is correspondence from [REDACTED] a Behavioral Disorders Teacher at [REDACTED] [REDACTED] advising Mr. & Mrs. _____ that she was appointed to teach the Behavioral Disorder Program at [REDACTED]

The Psychoeducational Data Sheet, **Exhibit D-12**, was completed on February 18, 1988 (the Claimant was 18 years and 7 months old). This report provides the following scores from the Wechsler Intelligence Test for Children - Revised (WISC-R): Verbal IQ 91, a performance IQ of 77 and a Full Scale IQ of 83. These scores are consistent with previous test results provided in this section. The *COMMENTS* section at the bottom of the first page concludes with the following statement – “According to teacher reports, clinical interview and Devereaux results, _____ is still

viewed as socially immature and dependent student in need of support services from the Behavioral Disorders Specialist.” {Emphasis added} The _____ last page of this exhibit shows Cluster Analysis by Grade. The Claimant’s abilities at age 18 _____ were at the following grade levels: Reading 9.1, Mathematics 8.6, Written Language 9.8, _____ Knowledge 5.3 and Skills 11.0.

Exhibit D-13 is a Learning Disabilities Report from _____ Schools on January 22, 1988 (Claimant was 18 years 6 months of age). This report indicates that the Claimant was given the Woodcock-Johnson Psycho-Educational Battery and scored the following Standard Scores: Reading Cluster-92, Math Cluster-91 and Written Language Cluster-92. According to testimony provided by the Department, the average range of achievement is 90-109. In this case, the Claimant scored in the low-average range and did not exhibit a deficit in functional academics.

- 3) The Department reviewed both of the current Annual Medical Evaluations submitted for eligibility and noted the following pertinent findings:

Exhibit D-5 The Annual Medical Evaluation completed on December 13, 2004 reveals on page 3 that the Claimant exhibits abnormalities in the abdomen (overweight) and that his speech is slow and deliberate. Page 4 (Problems Requiring Special Care) reveals that the Claimant is ambulatory, continent and feeds himself. His personal hygiene is listed as self care and his mental and behavior Difficulties are listed as “alert.” While the physician provides a mental diagnosis of “Mentally Challenged,” it appears as though the word retarded was originally selected to follow “Mentally” but it was scratched out. His prognosis is listed as “Good” and the physician certified that the Claimant requires the Level of Care and Services provided in an ICF/MR facility for individuals with Mental Retardation and/or related conditions.

To the contrary, **Exhibit D-6**, Annual Medical Evaluation completed on March 29, 2005, (less than 4 months later by the same physician) lists several abnormalities on page 3 - abdomen, speech, coordination, gait and reflexes, and page 4 (Problems Requiring Special Care) indicates that the Claimant needs assistance with personal hygiene and that his mental and behavioral difficulties are now described as “Needs Close Supervision.” The Claimant’s diagnosis is “Mental Retardation” and his prognosis is now “Poor.” The physician again certifies that the Claimant requires an ICF/MR Level of care.

- 4) Department's **Exhibit D-14** is a Psychological Evaluation completed on October 19, 2004 by [REDACTED]. This evaluation was completed for the sole purpose of determining eligibility for the MR/DD Waiver Program. The evaluation reveals that the Claimant resides with his 82-year-old father and that he does not currently receive any services. He graduated from [REDACTED] School in 1988 and he is currently employed in the housekeeping department at [REDACTED] University.

A review of section II (Current Status) reveals that the Claimant is independent in virtually all activities and does not require active treatment. The Claimant is ambulatory and his fine and gross motor skills are intact and unimpaired. His self-help skills are developed as he is able to eat, dress, toilet, and bathe independently. He is reported to be verbal and able to make his needs and wants known through functional conversation. He has good Self-Direction skills as he plays on his computer, plays old rock and roll records that he collects and can plan his week and days around work. The Claimant is oriented to time, place, person, and circumstances and he enjoys walking on the walking trails and goes to flea markets once a week to peruse old albums and 45s.

The Wechsler Adult Intelligence Scale – Third Edition was administered and the Claimant recorded the following scores: Verbal 73, Performance 73, and Full Scale of 70. A score of 70 is in the extreme upper Mild Mental Retardation to low Borderline Range of performance, however, this finding alone does not qualify an individual for an ICF/MR level of care.

Exhibit D-15, Psychological Evaluation Addendum, dated April 1, 2005, fails to provide any new information but does conclude with this statement from the psychologist. "While Mr. _____ may appear to function better than some ICF-MR Waiver funding recipients, he has a life long pattern of symptoms. If unsupervised, the probability of behavioral and emotional decompensation is high."

- 5) Claimant's **Exhibits C-1**, Psychological Evaluation completed on October 23, 1997, was done to assess current functioning levels in order to assist in diagnosis and treatment planning. The evaluator notes in the Pertinent History section that the reports reviewed for the evaluation indicate _____ had "slight" developmental delays. This report goes on to say that he lives with his father and is reportedly capable of most self-care tasks. He is able to cook with a microwave and reports that he has been previously employed. Prior testing (page 2) reveals that the Claimant has recorded Full Scale IQ scores of 81 and 83. The Slosson Intelligence Test – Revised was administered for this evaluation resulting in a Total Standard Score (TSS) of 71. According to the evaluator, this TSS score falls within the Below Average range of intellectual functioning.
- 6) Claimant's **Exhibit C-2**, Psychological Evaluation dated October 26, 1998, was completed when the Claimant was 29 years & 3 months of age. It is in this evaluation that the Claimant is first diagnosed with Mild Mental Retardation. This exhibit contains much of the same information as Exhibit C-1 with the exception of results from the Peabody Picture Vocabulary Test – Revised (PPVT-R). It is unclear how the evaluator arrived at a Mild Mental Retardation diagnosis but it appears to be the

result of the Claimant scoring a 68 on the PPVT-R.

- 7) The DSM-IV (**Exhibit D-1**) provides Diagnostic Criteria for Mental Retardation and states under section “C” - The onset is before age 18 years.
Mild Mental Retardation is identified by an IQ level of 50-55 to approximately 70.
Moderate Mental Retardation is identified by an IQ level of 35-40 to 50-55.
- 8) The Code of Federal Regulations found at 42 CFR §483.440(a)(2) states that 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.
- 9) The Code of Federal Regulations, 42 CFR §435.1009(b)(2)(b), provides definitions relating to institutional status for mentally retarded persons or persons with related conditions. This regulation states that the institution provides, in a protected residential setting, ongoing evaluation, planning, 24-hour supervision, coordination and integration of health rehabilitative services to help each individual function at his greatest ability.
- 10) MR/DD Policy Manual, Chapter 1 (effective 6/1/01 to 6/30/05):
 - I. Level of care Criteria for medical eligibility:
 - 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 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).
 - 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

VIII. CONCLUSIONS OF LAW:

- 1) The evidence reveals that the Claimant was evaluated on several occasions by the [REDACTED] Board of Education for placement in an appropriate educational setting. These evaluations, and the supporting documentation (Individual Educational Plans and correspondence), reveal that the Claimant received some Special Education training in the area of Learning Disability and Behavioral Disorder (LD & BD). These diagnoses, LD & BD, consistently appear on the Claimant's evaluations through the age of 18 years (Exhibit D-12).
- 2) According to the DSM-IV, the onset of Mental Retardation must be identified prior to the age of 18. A diagnosis of Mental Retardation does not appear on any of the evaluations submitted into evidence until the Claimant is 29-years old (Exhibit C-2). A diagnosis of Mental Retardation is incompatible with the evidence submitted.
- 3) The evidence fails to identify substantial adaptive deficits within the developmental period and the Claimant performs most daily tasks independently or with minimal supervision.
- 4) The Claimant does not require active treatment or the level of care and services provided in an ICF/MR facility to individuals with Mental Retardation or related conditions. Therefore, eligibility for participation in the MR/DD Waiver Program cannot be established.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the Department's action in denying your application for benefits and services through the MR/DD Waiver 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 May, 2006

Thomas E. Arnett
State Hearing Officer