



**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

August 15, 2007

\_\_\_\_\_  
by \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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

Attached is a copy of the findings of fact and conclusions of law on your daughter's hearing held July 25, 2007. 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 support that your daughter's mental retardation or related condition is the primary cause of her substantial deficits and therefore; she does not meet 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: 07-BOR-1186**

**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 July 25, 2007 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 July 25, 2007 on a timely appeal, filed April 24, 2007.

**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 father (participating by speakerphone)

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 Notification of denial mailed April 17, 2007

D-3 DD-2A Level of Care Evaluation dated December 6, 2006

D-4 Psychological Evaluation dated January 22, 2007

D-5 Mental Health Treatment Discharge Summary dated September 20, 2005

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

- 1) The claimant's father and [REDACTED] submitted an application packet to the Bureau of Behavioral Health on March 16, 2007 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 claimant did not meet the medical criteria for the program.
- 2) The Department mailed a notice of denial on April 17, 2007 stating in part: "Overall, documentation does not support the presence of mental retardation with associated substantial adaptive deficits within the developmental period. Documents do support the presence of a major illness, which results in deficits in adaptive functioning. Those whose primary diagnosis is mental illness are specifically excluded from participation in the Title XIX MR/DD Waiver program."

- 3) The claimant is currently a 29-year-old female who is residing with her father and attending [REDACTED] day treatment program and receives psychiatric services from a [REDACTED] psychiatrist.
- 4) The claimant's father reports that her kindergarten teacher advised that she was a little behind and was having learning difficulties. At age 5, the claimant was hit by a car, knocked unconscious and experienced multiple injuries, which included a closed head injury. The father testified that she got worse after this accident. She graduated from High School in 1999 at age 21 after attending special education classes.
- 5) The DD-2a dated December 6, 2006; (Exhibit D-3) does not list a diagnosis of Mental Retardation. Primary diagnosis listed on this document is Autism, Asperger and Schizophrenia. It reports her to be ambulatory, continent and needing assistance with personal hygiene and with feeding. This document reports her to sometimes have irrational behavior and sometimes to need close supervision.
- 6) The Psychological Evaluation dated January 22, 2007; (Exhibit D-4) lists an Axis II diagnosis of Mild Mental Retardation. This evaluation also lists Axis I diagnoses of Schizoaffective Disorder, Bi Polar Type. It refers to a reported Lesion on the Temporal Lobe. No supporting documentation was provided for this report. Adaptive Behavior Scale scores recorded with this Psychological shows low standard scores in most areas. Her independent functioning score was 20, but all other scores in the Part One Domain were below 12. A full-scale IQ score of 62 was issued. These scores support that the claimant 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; however the Department determined that these deficits are primarily associated with a condition of mental illness as opposed to mental retardation or related condition.
- 7) The psychologist completing the psychological notes under Developmental Findings/Conclusions: "her symptoms of mental illness have had a significant impact on her scores on the IQ exam. This implies that her mental retardation is a reflection of her ability with interference from mental illness rather than her capabilities prior to adulthood or the disabling symptoms of schizoaffective disorder."
- 8) The claimant's father reports that his daughter's mental illness showed itself in the teen years. He also accepts that the vast majority of her problems are due to mental illness.
- 9) The father believes that his daughter has Traumatic Brain Injury resulting from her accident at age 5 and feels that the reported lesion on her Temporal Lobe supports this.
- 10) 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

\* Substantial deficits associated with a diagnosis other than mental retardation or a related diagnosis do not meet eligibility criteria. Individuals diagnosed with mental illness whose evaluations submitted for medical eligibility determination with no indication of a previous co-occurring history of mental retardation or developmental disability prior to age 22 must provide clinical verification through the appropriate eligibility documentation that their mental illness is not the primary cause of the substantial deficits and the mental retardation or developmental disability occurred prior to the age of twenty-two (22).

### **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 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

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

(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 substantial limitations must be associated with the presence of mental retardation or a related condition. It specifically provides that substantial deficits associated with a diagnosis other than mental retardation or a related diagnosis do not meet eligibility criteria. While this claimant appears to have a qualifying diagnosis of mental retardation, proper documentation was not provided to prove this condition existed prior to the age of 22. Documentation presented at this hearing supports that a diagnosis of mental illness is the primary cause for this claimant's substantial limitations and deficits.
- (2) The DD-2a, Exhibit D-3, does not note a diagnosis of mental retardation but rather only mental illness diagnoses are noted. This supports that the primary difficulties that this claimant is experiencing are due to mental illness instead of mental retardation. The Psychological did list a diagnosis of mild mental retardation.
- (3) Regardless of whether mental retardation or related condition could be proven to have been present in the developmental years, this would not negate the evidence pointing to mental illness being the primary cause for her limitations.

#### **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 15th Day of August 2007.**

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