



**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**

September 6, 2007

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

Dear \_\_\_\_\_:

Attached is a copy of the findings of fact and conclusions of law on your sister's hearing held August 13, 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 sister.

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 sister's diagnosis of mental retardation produces concurrent substantial deficits in three or more of the six major life areas. She therefore 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-1386**

**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 13, 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 August 13, 2007 on a timely appeal, filed May 14, 2007.

**II. 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 sister and guardian

\_\_\_\_\_, Claimant's sister

Department's Witnesses:

Steve Brady, Bureau of Behavioral Health & Health Facilities

Linda Workman, Psychologist Consultant, BMS

Presiding at the Hearing was Sharon K. Yoho, State Hearing Officer and a member of the State Board of Review.

All parties participated by speakerphone.

### **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 March 15, 20007

D-3 DD-2A, Annual Medical evaluation dated October 3, 2006

D-3a Page 4 of DD-2-A with additional signature of claimant's doctor

D-4 Psychological Evaluation dated February 21, 2007

D-5 Notification of denial mailed May 4, 2007

D-6 Psychological Re-Evaluation dated August 31, 1965

D-7 Comprehensive Psychological Evaluation dated August 2, 2006

D-8 Report of High School scores, grades 10, 11, and 12.

D-9 Admissions, discharge summaries, and physician's notes

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

C-1 Letter from sheltered workshop

C-2 Same as D-8 High School scores

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

- 1) The claimant's sister submitted an application packet to the Bureau of Behavioral Health on March 1, 2007 to determine if her sister would qualify for services under the Title XIX MR/DD Waiver Program. The Bureau of Behavioral Health reviewed the documents submitted and determined additional information was needed to determine medical eligibility for the program.
- 2) The Department mailed a notice of denial on March 15, 2007 requesting current social history and documentation, which supports the presence of mental retardation with associated deficits within the developmental period. The Department also requested a measure of academic achievement. They also advised that certification for ICF/MR level of care had not been made, by a physician on the DD-2A.
- 3) The claimant's family re-submitted the DD-2A with the physician's signature along with other additional documentation. The Department reviewed this additional documentation along with previously received documents and determined that the claimant did not meet the medical eligibility criteria for the program. A letter of denial was mailed on May 4, 2007 stating, "Documentation submitted for review did not support the presence of the degree of cognitive impairment which is associated with the need for an ICF/MR level of care within the developmental period and did not support the presence of substantial adaptive deficits which are related to the presence of mental retardation in three or more of the six major life areas."
- 4) The claimant is a 53-year-old female with a diagnosis of Mild Mental Retardation, Psychosis, Anxiety, Acute Stress Disorder and Delusional Disorder. She currently resides with her sister. She graduated from High School with a Special Education Diploma. She has held employment at a few fast food restaurants working mainly in repetitive tasks. She was employed at a private restaurant for eleven (11) years and suffered a mental decline after the owner of the restaurant was shot and killed.
- 5) The DD-2a, Annual Medical, dated October 3, 2006 (Exhibit D-3) reports the following. She is ambulatory, is continent, can feed self, is independent with personal hygiene and is alert. This report however, asserts that the claimant needs the level of care and services provided in an Intermediate Care Facility for individuals with Mental Retardation and/or Related Conditions (ICFMR) facility.
- 6) The Psychological Evaluation dated February 21, 2007; (Exhibit D-4) reports that the claimant is able to take care of most personal care needs, is able to understand simple commands and is able to communicate basic needs and wants. The evaluation reports that she is not able to be employed without systematic supervision or support. It reports that she is not able to learn or apply new skills without aggressive and consistent training. The Psychological reports that she is not able to demonstrate behavior appropriate to the time, situation or place without direct supervision and is not able to make decisions requiring informed consent without extreme difficulty. The evaluation notes that she does not demonstrate severe maladaptive behaviors, which place her or other in jeopardy to health and safety. The Psychologist states, "areas of strength were in Language Development, Numbers and Time, Domestic Activity, Self-Direction, and Personal Self-Sufficiency. Her areas of weakness were in Sexual Behavior, Disturbing Interpersonal Behavior, Social Adjustment, and Personal Adjustment."

- 7) The psychological lists Axis I diagnosis as Acute Stress Disorder and Delusional Disorder and Axis II diagnosis as Mild Mental Retardation. The evaluation provided Adaptive Behavior test score results. The Psychologist's Discussion noted areas of strength were in Language Development, Numbers and Time, Domestic Activity, Self-Direction, and Personal Self-Sufficiency. Her areas of weakness were in Sexual Behavior, Disturbing Interpersonal Behavior, Social Adjustment, and Personal Adjustment."
- 8) The test score results in Part One Domain show average or above average scores in all categories except for the area of Language Development, which was in the superior range. A standard score of 12 was reported for the areas of Independent Functioning, Physical Development, Pre-Vocational Activity and Socialization. Economic Activity received a standard score of 8 and Responsibility received a standard score of 11. All other scores were above 12 with Language Development receiving a score of 16. Test score results in Part Two Domain show a below average score for Sexual Behavior and a poor score in the area of Disturbing Interpersonal Behavior. Social Engagement received an above average score and all other areas received average scores.
- 9) The psychologist recommends training in washing and drying clothes without assistance, money handling, banking, budgeting, purchasing and food preparation. He states, "she does appear to have self-direction, responsibility and socialization." He also recommends a behavior modification evaluation to determine the most appropriate behavior plan for her. He notes that the claimant has significant behaviors and that it may be beneficial for her to be involved in counseling to work on her maladaptive behaviors. Some adverse behaviors noted in the psychological are, threatening gestures, kicks, strikes, slaps, screams, stomping feet, banging objects, slamming doors, temper tantrums, rebellion, undressing in public, sexual aggression, and hoarding.
- 10) Psychological of August 2006 (Exhibit D-7) reports claimant to have effective use of limbs. She is reported to be able to use table utensils, and drink without spilling. She is independent with toileting, personal hygiene and dressing. Her language was noted to be in the superior range. Her full scale IQ was noted to be 60, which puts her in the Mild Mental Retardation range. This evaluation noted that the testing "indicated significant strength in Language Development, Numbers and Time, Domestic Activity, Self-Direction, and Personal Self-Sufficiency. Her areas of weakness were in Sexual Behavior, Disturbing Interpersonal Behavior, Social Adjustment, and Personal Adjustment."
- 11) This Psychologist notes, "Due to significant deficits in all adaptive levels, \_\_\_\_\_ continues to require 24-hour ICF/MR level of care. She has significant deficits in socialization, communication, daily living skills, and vocational skills."
- 12) Exhibit D-9 reports on seven different admissions to [REDACTED] Hospital from August 1989 through May 2004. All of these admissions were for psychiatric issues. Reason listed for admissions were, Acute Psychosis, Paranoid Ideation, Multiple Delusions, Agitation, Insomnia, Anxiety, Paranoid Delusions, Catatonic-Like Posturing, Hallucinative and Disorganized State.
- 13) The claimant's sisters testify that the claimant can do most things, but that she does not think to do them. She can make phone calls, prepare cold foods, run the sweeper, wash

dishes, bath, dress, read and communicate effectively. The sisters report that she mainly needs constant reminders of what she should or could be doing. She will sit staring at and flipping through magazines for long periods unless told to do otherwise.

- 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
- \* 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 limits in functioning must be supported by not only the relevant test scores, but also the narrative descriptions. The six major life areas in which the client must be substantially limited are, Self-care, Receptive or expressive language, Learning, Mobility, Self-direction and Capacity for independent living.
- (2) The 2007 psychological produced an ABS score of 12 in Independent Functioning, which is within the eligible range however, this claimant is reported to have proficient **Self-Care** skills as is noted in item 10 above. Domestic Activity was also noted to be a significant strength. The score of 12 in Physical Development is not supported by documentation that shows the claimant to be ambulatory and to have full use of limbs therefore, substantial limits were not found in **Mobility**. The **Self-Direction** score of 13 was not within the eligible range and the Psychologist notes that Self-Direction was one of her significant strengths. Language Development was also noted to be one of the claimant's significant strengths with a superior range score, which supports that there is

no substantial functional limit in **Receptive or expressive language**. This claimant graduated from High School and she is able to read. The 2007 psychological notes that one of her significant strengths is in Numbers and Time. Substantial limitations are not made evident for the area of **Learning**. Documentation does support substantial limitations in the area of **Capacity for Independent Living**. Her score of 11 in Responsibility and 12 in Socialization problems along with documentation of psychiatric admissions to the Hospital support that she most likely could not live independently.

- (3) Testimony and evidence support that this claimant does have a diagnosis of Mental Retardation, which manifested during the developmental years. It supports that the claimant has substantial limitations in one of the major life areas however; policy requires substantial limitations to be present in three or more of the major life areas.
- (4) Policy requires that the claimant have a need for intensive instruction, services, assistance, and supervision in order to learn new skills, maintain current level of skills, and increase independence in activities of daily living. Evidence and testimony assert that this claimant possesses the necessary skills for activities of daily living and only needs reminders and prompting to complete these activities regularly. Witnesses for the claimant testified that she knows how to do most of these things, but needs reminded. It was not proven that this claimant needs the same level of care and services that is provided in an ICF/MR 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 6th Day of September 2007.**

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