



State of West Virginia  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
Office of Inspector General  
Board of Review  
4190 Washington Street West  
Charleston, WV 25313

Joe Manchin III  
Governor

Martha Yeager Walker  
Secretary

August 15, 2007

Ms. \_\_\_\_\_ on behalf of

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

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

Attached is a copy of the findings of fact and conclusions of law on your hearing held August 1, 2007. Your hearing request was based on the Department of Health and Human Resources' action to deny services under the MR/DD Waiver 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 Waiver Program is based on current policy and regulations. Some of these regulations state in part:


The evaluations must demonstrate that a child has a diagnosis of a severe, chronic disability which - Substantially limits functions in three or more of the following areas of major life activities (a) Self Care; (b) Receptive or Expressive Language; (c) Learning; (d) Mobility; (e) Self Direction; (f) Capacity for Independent Living; and (g) Economic Self Sufficiency.

The information submitted at your hearing revealed: The submitted documentation does not support your son's diagnosis of a severe, chronic disability which substantially limits functioning in three or more of the major life areas.

It is the decision of the State Hearing Officer to **UPHOLD** the **ACTION** of the Department to deny MR/DD Waiver Program services.

Sincerely,

Ray B. Woods, Jr., M.L.S.  
State Hearing Officer  
Member, State Board of Review

cc: State Board of Review  
Steve Brady – Office of Behavioral Health and Health Facilities  
Candace Drummond, Secretary – Bureau for Medical Services  


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

\_\_\_\_\_,

**Claimant,**

**v.**

**Action Numbers: 06-BOR-2214**

**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 15, 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. The fair hearing was originally scheduled for October 27, 2006 on a timely appeal filed June 23, 2006. After several continuances, the hearing finally reconvened on August 1, 2007.

It should be noted here that the Claimant was not receiving MR/DD Waiver benefits at the time of the hearing. A pre-hearing conference was not held between the parties prior to the hearing, and the Claimant was represented by an attorney.

**II. PROGRAM PURPOSE:**

The Program entitled MR/DD 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.

### **III. PARTICIPANTS:**

\_\_\_\_\_, Mother of Claimant

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Steve Brady, Program Operations Coordinator – Office of Behavioral Health and Health Facilities (OBH&HF)

Linda Workman, M. A., Licensed Psychologist – Bureau for Medical Services (BMS)

Nisar Kalwar, Assistant Attorney General – Bureau for Medical Services

Presiding at the Hearing was, Ray B. Woods, Jr., M.L.S., State Hearing Officer and a member of the State Board of Review.

\*Participated by conference call.

### **IV. QUESTIONS TO BE DECIDED:**

The question(s) to be decided: Does \_\_\_\_\_ have substantially limited functioning in three or more of the major life areas?

### **V. APPLICABLE POLICY:**

PROGRAM ELIGIBILITY CRITERIA FOR THE MR/DD WAIVER PROGRAM, Section 503 Medical Eligibility Criteria

### **VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:**

#### **Department's Exhibits**

D-1 Chapter 500 – Covered Services, Limitations, and Exclusions, for MR/DD Waiver Services – Medical Eligibility Criteria

D-2 Denial Letter dated 06/08/06

D-3 DD-2A (Annual Medical Evaluation) 02/15/06

D-4 DD-3 (Psychological Evaluation) dated 03/09/06

D-5 Adaptive Behavior Scale-Residential and Community Second Edition Summary Report dated 03/09/06

D-6 DD-4 Social Summary dated 05/05/06

D-7 DD-5 Individual Program Plan dated 05/05/06

#### **Claimants' Exhibits:**

None

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

### **1) PROGRAM ELIGIBILITY CRITERIA FOR THE MR/DD WAIVER PROGRAM Section 503 Medical Eligibility Criteria (Exhibit D-1):**

#### **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 conditions 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).

- 2) The primary issue in this particular matter is the denial of services under the MR/DD Waiver Services Program. The Bureau for Medical Services determined that the Claimant did not have substantial adaptive deficits in three or more of the six major life areas, and documentation did not support a need for active treatment.
- 3) The Claimant has an eligible Related Developmental Condition of Cerebral Palsy.
- 4) The Claimant's Cerebral Palsy was manifested prior to the age of 22, and is likely to continue indefinitely.
- 5) In 2006, the Claimant submitted an application to the Bureau for Medical Services Office of Behavioral Health and Health Facilities for participation in the MR/DD

Waiver Program. At the time of application, the Claimant was a 22-year old Caucasian male who lived with his biological mother.

- 6) The Bureau for Medical Services Policy Unit reviewed the application packet, and denied the application by letter dated June 8, 2006 (Exhibit D-2).
- 7) The Denial Letter stated in part, "While Mr. \_\_\_\_\_ carries the potentially eligible diagnosis of Cerebral Palsy and seizure disorder, the Waiver manual requires that these related conditions must be severe to meet eligibility criteria. Documentation submitted to date does not support that Mr. \_\_\_\_\_'s condition is severe as he is ambulatory, expresses himself through language, and can perform basic self-care activities. The presence of substantial adaptive deficits in three or more of the six major life areas considered for eligibility is not supported within the documents submitted for review. Also, the psychological evaluation does not indicate a need for active treatment (Section V)."
- 8) The Board of Review received the Claimant's "Request for Hearing" on June 23, 2006.
- 9) The "Request for Hearing" was forwarded to the State Hearing Officer who received it on July 14, 2006.
- 10) A Fair Hearing was scheduled for October 27, 2006.
- 11) \_\_\_\_\_ informed the State Hearing Officer by letter dated September 15, 2006 that they would provide representation, and requested the hearing to be rescheduled due to a scheduling conflict.
- 12) The hearing was rescheduled for November 22, 2006.
- 13) On November 21, 2006, \_\_\_\_\_ requested a continuance, by e-mail, due to the unavailability of their Psychologist.
- 14) The hearing was rescheduled for February 14, 2007.
- 15) On February 9, 2007 \_\_\_\_\_ requested a continuance, by e-mail, due to the unavailability of their Psychologist. \_\_\_\_\_ failed to advise the Psychologist of the hearing date.
- 16) The hearing was rescheduled for May 31, 2007.
- 17) The hearing convened on May 31, 2007, but the Claimant's Psychologist could not be contacted during the hearing. \_\_\_\_\_ requested to re-convene the hearing to obtain the Psychologist's testimony by telephone.
- 18) The hearing convened on August 1, 2007 and the Claimant's Psychologist provided her testimony by telephone.
- 19) The BMS Psychologist was responsible for reviewing the Claimant's application, and relied on the DD-1 (Participant Monitoring Status Report); DD-2A (Annual Medical

Evaluation); D-3 (Comprehensive Psychological Evaluation); DD-4 (Social History); and DD-5 (Individual Program Plan) in making her decision.

- 20) The B. M. S. Psychologist's qualifications are provided at every MR/DD hearing and are presented as follows:

She has been a Licensed Psychologist since 1981, and is also a Licensed School Psychologist. She has performed thousand of evaluations on school age children, participated in Individual Educational Program (IEP) meetings and workshops for teachers. Her office did all of the psychological evaluations for ██████████ County Schools for seventeen years. She has also worked in five or six other counties.

The B. M. S. Psychologist's Office, Psychological Consultation and Assessment, has been contracted by the Bureau for Medical Services which oversees the Title XIX MR/DD Waiver Services Program through the Office of Behavioral Health and Health Facilities, for approximately twenty years. One of her duties is to certify/determine eligibility for ICF/MR Group Homes. All of the group homes within the State of West Virginia are visited and recertified for their participation.

The MR/DD Waiver Program is an optional program in which the State may choose not to participate. The Federal Government allows States to serve people who would ordinarily be found in institutional settings within the community. The Federal Government establishes eligibility guidelines for use by the individual States. States may make the guidelines more restrictive if they choose but not less stringent. The Department refers to the Code of Federal Regulations to determine eligibility. In West Virginia, the Department has determined that in order to qualify, you need a level of mental retardation that would result in a need for institutional level of care.

There is a wide range of abilities associated with mental retardation. There are individuals diagnosed with mild mental retardation and some with severe and profound. The differences between the two individuals are very profound. Individuals with mild mental retardation often have driver's licenses, work, and raise families. Those individuals with profound mental retardation are not able to attain such things. They require twenty-four hour supervision and training.

A diagnosis of mental retardation does not necessarily guarantee eligibility for this program, only to the point that MR requires an ICF/MR level of care. This is defined as an IQ of 55 which is three standard deviations below the mean which is 100. An average IQ is 100. A standard deviation is fifteen on a measure of intelligence such as the Wechsler Scale. The Department has determined based on documents provided and error of measurements that is the level of disability to be considered. Eligible scores would fall in the range of 55 and below.

In the area of substantial adaptive deficits, if a person in West Virginia is diagnosed with mental retardation, they are compared with a sample population across the country that also has mental retardation. The Department is looking to see if the individual's functional abilities are similar to other people identified with mental retardation requiring this level of care.



When looking at non mental retardation norms, the Department is looking at scores below the first percentile. That is out of the mild range. In reviewing the ABS in this case, the Department is looking for less than one percent in the percentile column, and scores of one and two in the standard scores columns. The B. M. S. Psychologist then proceeded to address the documents used in making their decision.

- 21) The DD-1 is a form used to provide information on the Participant (Claimant); Provider (Mother); Financial Resources; and general checklist for submitting a Full Application Packet. This form was not a part of the Department's exhibits.
- 22) The DD-2A (Exhibit D-3) states the Claimant's Physiological and Neurological functions are normal with the following exceptions: Heart – Takes med (sp.) for rapid heart beat; Gait – Disorder; Reflexes – Upper and Lower Extreme Weakness; and Seizure Disorder.
- 23) The DD-2A states the Claimant needs assistance with Mobility after seizures; He is Continent; Feeds Himself; Personal Hygiene lists Self-Care, Independent, and Needs Assistance. Comments under Personal Hygiene state the Claimant is unable to complete self-care after taking a shower; he cannot cut his nails; comb his hair; and is unable to use clothing with buttons.
- 24) The DD-2A recommends Physical and Occupational Therapy.
- 25) The Diagnostic Section of the DD-2A lists Mental Diagnoses of Comprehensive Delay and Cerebral Palsy. The Physical Diagnoses were Cerebral Palsy; Seizure Disorder; and Excessive Cognitive Disorder (OCD).
- 26) The Physician did certify on the DD-2A that the Claimant requires the level of care and services provided in an "Intermediate Care Facility" for individuals with mental retardation and/or related conditions.
- 27) The DD-3 was completed by a Licensed Psychologist on March 9, 2006 (Exhibit D-4). It indicates the Claimant was one month premature and weighing 4.12 pounds. At eight months of age, he had his first seizure and had a high fever. He was hospitalized and placed on medication. After a period of time with no seizures he was taken off the medication. He did not have any seizures from approximately 3 ½ years of age until around the age of 16 or 17.
- 28) The DD-3 states the Claimant attended Kindergarten in [REDACTED] West Virginia, and the first through the seventh grade in [REDACTED] Records indicate the Claimant was placed in a variety of classrooms to address his impaired social abilities and difficulties with attention and concentration.
- 29) The DD-3 states the Claimant was hospitalized in August 2001 for twelve (12) days for anorexia, and September 2001 for attempting suicide with a knife. The attempted suicide was attributed to his parent's pending divorce.
- 30) The DD-3 indicates the Claimant is independently ambulatory but exhibits right side motor impairment. He feeds himself with a spoon and fork neatly. He is verbal and can

adequately express himself. His mother suggested that he is able to express a wide range of emotions. He was verbal and willingly interacted with the examining Licensed Psychologist.

- 31) The Licensed Psychologist used the Kaufman Brief Intelligence Test – 2 (KBIT-2) to measure the Claimant’s Intellectual/Cognitive Measures. The Claimant obtained a Verbal Standard Score of 74, a Nonverbal Standard Score of 80, and a Composite IQ Standard Score of 73. According to the Licensed Psychologist, these scores suggest the Claimant is functioning within the range of borderline intellectual functioning.
- 32) The Licensed Psychologist used the AAMR Adaptive Behavior Scale Residential and Community II Edition (ABS-RC: 2) to measure the Claimant’s Adaptive Behavior. The Claimant was compared to adults diagnosed with mental retardation. According to the Licensed Psychologist’s written comments, the Claimant’s scores fell within the average range, and he would benefit from training programs designed to increase his efforts and abilities in domestic activities, vocational activities and social engagement.
- 33) The Licensed Psychologist did not recommend the Claimant for an ICF/MR level of care.
- 34) Section V of the DD-3 is a Summary of the Claimant’s skills commonly associated with the need for active treatment. The Licensed Psychologist made the following determinations:

1.	Able to take care of most personal care needs.	<b>Yes</b>
2.	Able to understand simple commands.	<b>Yes</b>
3.	Able to communicate basic needs and wants.	<b>Yes</b>
4.	Able to be employed at a productive wage level without systemic long term supervision or support.	<b>No</b>
5.	Able to learn new skills without aggressive and consistent training.	<b>Yes</b>
6.	Able to apply skills learned in a training situation to other environments or settings without aggressive and consistent training.	<b>Yes</b>
7.	Able to demonstrate behavior appropriate to the time, situation, or place without direct supervision.	<b>Yes</b>
8.	Demonstrates severe maladaptive behavior(s) which place the person or others in jeopardy to health and safety.	<b>No</b>
9.	Able to make decisions requiring informed consent without extreme difficulty.	<b>No</b>
10.	Identify other skill deficits or specialized training needs which necessitates the availability of trained MR personnel, 24 hours per day, to teach the person to learn functional skills.	<b>No</b>
- 35) The Licensed Psychologist testified that most of the aforementioned answers were based on supervision.

- 36) The Claimant received the following scores on the ABS-RC: 2 dated March 9, 2006 (Exhibit D-5):

<u>Subtest</u>	<u>Raw Score</u>	<u>%ile Rank</u>
Independent Functioning	68	50
Physical Development	19	75
Economic Activity	10	63
Language Development	38	95
Numbers and Time	13	95
Domestic Activity	6	37
Self-Direction	5	25
Responsibility	8	84
Socialization	19	75

- 37) The ABS scores and the Licensed Psychologist's Narrative information do not indicate a need for active treatment.

#### **VIII. 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.
- 2) Documentation presented at the hearing shows the Claimant has a related condition of Cerebral Palsy, and it was manifested prior to age 22.
- 3) 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. Functionality – stipulates that substantial limits are defined on standardized measures of adaptive behavior scores. The presence of substantial deficits must be supported not only by the relevant test scores, but also the narrative descriptions contained in the documentation submitted for review, i.e., psychological, the IEP, Occupational Therapy evaluation, etc).
- 4) The Claimant's Physician certified on the DD-2A that he requires the level of care and services provided in an "Intermediate Care Facility" for individuals with mental retardation and/or related conditions. The information contained in the DD-2A does not support the Physician's certification.
- 5) The ABS scores and Narrative Description provided by the Licensed Psychologist in the DD-3, does not support the need for active treatment. This is further enforced when the Licensed Psychologist did not "Recommend" a need for an ICF/MR level of care.
- 6) The submitted evidence fails to demonstrate that the Claimant has substantial adaptive deficits in three (3) or more of the major life areas. The Claimant requires prompting and supervision in some areas of functionality, but he does not require the level of care and active treatment provided in an ICF/MR facility

- 7) Based on the evidence, eligibility for the MR/DD Waiver Program cannot be established.

**IX. DECISION:**

It is the decision of this State Hearing Officer to **UPHOLD** the **ACTION** of the Department to deny MR/DD Waiver Program Services.

**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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**Ray B. Woods, Jr., M.L.S.**  
**State Hearing Officer**