



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
State Board of Review
2699 Park Avenue, Suite 100
Huntington, West Virginia 25704
June 13, 2005

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

Dear Mr. _____,

Attached is a copy of the findings of fact and conclusions of law on your hearing held April 11, 2005. Your hearing request was based on the Department of Health and Human Resources' action to deny medical eligibility for the Title XIX 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 and benefit levels for the MR/DD Waiver Program case are determined based on current regulations. One of these regulations is that the applicant must have both a diagnosis of mental retardation and /or a related condition and require the level of care and services provided in an ICF/MR facility (Title XIX MR/DD Home and Community-Based Waiver Program revised Operations Manual October 1, 2003).

The information which was submitted at the hearing revealed that you do not meet the medical criteria for the Title XIX MR/DD Waiver Services Program.

It is the decision of the State Hearing Officer to uphold the action of the Department to deny medical eligibility for the Title XIX MR/DD Waiver Program.

Sincerely,

Thomas M. Smith
State Hearing Officer
Member, State Board of Review

cc: Board of Review
Susan Hall, BHHF
Linda Workman, BMS
Alva Page, III, Dept. Attorney
[REDACTED], Claimant's Attorney

_____,'

Claimant

v.

Action Number: 05-BOR-4424

**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 June 7, 2005 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 originally convened on April 11, 2005 on a timely appeal filed January 5, 2005.

It should be noted here that any benefits under the Title XIX MR/DD Waiver Program have been denied pending the results of this hearing. It should also be noted that the hearing was convened in the _____ County DHHR office with Department representatives participating by speaker phone from Charleston, WV.

All persons giving testimony were placed under oath.

II. PROGRAM PURPOSE

The program entitled Title XIX MR/DD Waiver Program is set up cooperatively between the Federal and State Government and administered by the West Virginia Department of Health and Human Resources.

The MR/DD Waiver Program serves individuals who are eligible to receive services in an Intermediate Care Facility for Individuals with Mental Retardation and Related Conditions (ICF/MR). The MR/DD Waiver Program provides services in homes and local communities instead of ICFs/MR.

III. PARTICIPANTS

1. _____, Claimant's mother.
2. _____, Claimant's godmother.
3. _____, Autism Services Center, _____
4. _____, Special Education Teacher (by speaker phone).
5. _____, Claimant's Attorney.
6. Susan Hall, Program Manager, BHHF.
7. Linda Workman, Psychologist Consultant, BMS.
8. Alva Page, III, Dept. Attorney.

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

V. QUESTION TO BE DECIDED

The question to be decided is whether the claimant (_____) meets the medical eligibility requirements for the Title XIX MR/DD Waiver Program.

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V. APPLICABLE POLICY

Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, October 1, 2003.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Department's Exhibits

- Exhibit #D-1 Copy of Medical Eligibility Criteria.
- " #D-2 Copy of notification letter 12-9-04.
- " #D-3 Copy of letter from [REDACTED] 11-9-04 (4 pages).
- " #D-4 Copy of Annual Medical Evaluation 9-23-04 (4 pages).
- " #D-5 Copy of Psychological Evaluation Update 10-18-04 (9 pages).
- " #D-6 Copy of Comprehensive Evaluation 6-28-04 (8 pages).
- " #D-7 Copy of Initial Social History 9-23-04 (5 pages).
- " #D-8 Copy of Individual Program Plan 9-20-04 (11 pages).
- " #D-9 Copy of Individualized Education Program 2-27-04 (22 pages).
- " #D-10 Copy of Cost Estimate Worksheet (2 pages).
- " #D-11 Copy of Informed Consent (2 pages).
- " #D-12 Copy of Mr. Page's closing arguments (21 pages).

Claimant's Exhibits

- Exhibit #Cl-1 Copy of Civil Action No. 03-AA-97 4-2-04 (9 pages).
- " #Cl-2 Copy of IEP request and IEP 1-13-05 (13 pages).
- " #Cl-3 Copy of notification letter 12-9-04.
- " #Cl-4 Copy of MRDD Waiver Manual Program (10 pages).
- " #Cl-5 Copy of letter from [REDACTED] 11-9-04 (4 pages).
- " #Cl-6 Copy of annual medical evaluation 9-23-04 (4 pages).
- " #Cl-7 Copy of Psychological Evaluation Update 10-18-04 (9 pages).
- " #Cl-8 Copy of Comprehensive Evaluation 6-28-04 (8 pages).
- " #Cl-9 Copy of Individual Program Plan 9-20-04 (11 pages).
- " #Cl-10 Copy of Individualized Education Program 2-27-04 (22 pages).
- " #Cl-11 Copy of Cost Estimate Worksheet (2 pages).
- " #Cl-12 Copy of Informed Consent (2 pages).
- " #Cl-13 Copy of Ms. [REDACTED] closing arguments (33 pages).

VII. FINDINGS OF FACT

1. A packet was submitted to the MR/DD Waiver Office to consider medical eligibility of the claimant for the MR/DD Waiver Services Program on 11-9-04 (Exhibits #D-3 & #Cl-5) and was denied with notification issued on 12-9-04 (Exhibits #D-2 & #Cl-3) stating that the claimant had not been awarded an eligible diagnosis and did not exhibit substantial adaptive and behavioral deficits similar to those manifested by individuals with mental retardation who require ICF/MR level of care.

2. Testimony from Ms. Workman indicated that the claimant has diagnoses of Asperger's Disorder and Disruptive Behavior Disorder and that Asperger's is not considered a related disorder, that cognitive delays are not part of Asperger's and there are no substantial limitations, that the IEP shows that the claimant feeds himself, showers, and takes care of toilet needs, that he does not meet the criteria for self-care as he has no ABS score less than 1%, that he is on grade level for reading, that he is in Special Education due to behavior, that he had a score of 10 on mobility, that he had a standard score of 6 in self-direction, that verbal IQ was average with an ABS score of 8, that economic self-sufficiency and capacity for independent living were not applicable for a person his age, that the claimant does not meet the medical criteria, and that she did not review the IEP dated 1-13-05 (Exhibit #Cl-2) as it was not a basis for the denial.

3. Testimony of [REDACTED] indicated that the claimant does not take direction well, that he cannot follow simple commands or directions, that he will answer questions but not completely, that lighting is too strong for his eyes, that he has sensory issues, that he needs on-going prompting, that his sensory issues are common to others with related conditions such as Autism and PDD-NOS, that she believes the claimant has substantial deficits in self-care, language,

capacity for independent living, economic self-sufficiency, and self-care, that academically, his only weakness is math, that he would not be expected to live on his own and economic self-sufficiency and capacity for independent living would be thrown out, that self-care, language, and self-direction would be left, that he can bathe and dress himself, perform household chores, microwave food.

4. Testimony from Ms. [REDACTED] indicated that she sees the claimant about three (3) times a week, that he only understands things that are presented to him logically, that he is challenged in math, that he cannot tell time or tie his shoes, that he has sensory issues to clothes, smells, light and noise, that he likes to bite things, that he talks jibberish, and that he has no fear of

authority or any repercussions.

5. Testimony from Ms. _____ indicated that her son cannot adjust the temperature of bath water, that he thinks bad odors are pleasant, that he wears no underwear and does not want to wear a coat, that he cannot count money and cannot tell time, that he did not go to school for three (3) months beginning in 2004, that Mr. Little was hired to work with him but he is not doing academics, that he is not involved in sports and does not get around people, that she has to keep sharp things away from him, that he gets aggressive, complains, and head-bangs, that he talks jibberish, that he cannot do a task unless it is important to him, that she is afraid of him hurting her or himself.

6. Testimony from Mr. _____ indicated that he has been a teacher for 25 years, that the claimant comes to school at 12 or 12:30 p.m. and stays 2-3 hours a day, 2-3 days a week, that he refuses to work on academics, that he does do art and socialization, that other children come in and socialize with him but he teaches him by himself, one on one, that he needs constant monitoring, that he does not interact appropriately with other children his age, that he socializes on a five (5) year old level, that he is aggressive toward him and other children, that he needs a lot of re-directing and prompting, that he is aware of the DSM-IV diagnosis for Asperger's, that he has an 85 IQ, that he does not go to the bathroom by himself as he has to take him, and that he is there 2 to 2 ½ hours a day.

7. Both parties agreed to provide closing arguments but requested that the due date be left open pending a court case and the parties agreed to postmark closing arguments by 6-3-05. On 6-1-05, Mr. Page requested without objection from Ms. _____ an extension to postmark closing arguments by June 6, 2005 and the request was granted and the same extension was granted to Ms. _____. On 6-7-05, the closing arguments were received from both parties.

8. In her closing arguments, Ms. _____ argued that Psychologist _____ determined that the claimant had deficient social interaction, that insight and judgement were markedly impaired, that he requires assistance in setting water temperature for the shower, that he does not dress himself appropriately, and that he met the criteria for placement in an ICF/MR facility. Ms. _____ argued that the social worker, _____, concluded that the claimant is substantially limited in self-care, learning, capacity for independent living, self-direction, and economic self-sufficiency. Ms. _____ stated that _____, QMRP, testified that the claimant cannot follow simple directions or commands when presented with choices, that he needs constant supervision and prompting, that he is in special education 100% of the time, that he engages in head banging, that he has significant sensory issues, especially with lighting and textures. Ms. _____ argued that _____, the claimant's godmother, has observed him having no respect for authority and that he cannot tie his shoes or tell time. Ms. _____ argued that the claimant's mother testified that he did not know the difference between shampoo and conditioner until recently, that he has a body odor problem and does not want to wear deodorant, that he has sensory issues with clothing, that he has a one-on-one teacher, that he pokes holes in bedsheets and other items. Ms. _____ argued that the claimant's special education teacher, _____, testified that he works only on socialization, that the claimant does not interact appropriately with other children, that he needs constant prompting and redirection, that he functions at a five (5) year old level. Ms. _____ argued that excluding the major life areas of economic self-sufficiency

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and capacity for independent living for children is not supported by the manual, that the claimant's limitations in socialization substantially limits his capacity for independent living, that Ms. Workman testified in a previous hearing that an ABS score of 12 or less indicates a substantial limitation, that the claimant met the criteria in self-care, self-direction, and economic self-sufficiency, that the _____ case ruled that the Department cannot ignore the findings and conclusions of experts and that the entire record be examined.

9. In his closing arguments, Mr. Page argued that the claimant's diagnosis of Asperger's Disorder is not an eligible diagnosis because of its lack of cognitive deficiencies, that there are no delays in cognitive development or the development of age appropriate self-help skills or adaptive behavior, that the IEP showed that the claimant was in the fifth grade and was reading on the fifth grade level, spelling on the third grade level, and performing arithmetic on the third grade level, that the IEP shows that the claimant is in special education classes 87% of the time due to behavioral concerns. Mr. Page stated that the claimant is not substantially limited in three (3) or more major life activities,

that under self-care, he is able to dress, undress and bathe himself, that he is able to perform household chores but refuses to, that he can prepare sandwiches, cereal, and microwave food with minimal supervision, that in the area of learning, his only academic deficiency is in math, that he can speak in complex sentences, can recall four unrelated items immediately, that in mobility, he is ambulatory with effective use of all extremities, that in capacity for independent living, he enjoys playing video games and writing about the games, prepares sandwiches, cereal and microwavable foods with little supervision, that in the area of receptive and/or expressive language, he has a verbal IQ of 91, is reading at grade level, and was able to name four of four unrelated items immediately, that in the area of self-direction, the claimant plays video games, makes self-determining choices, writes notes and letters and is not substantially limited, and that he is not old enough to qualify under economic self-sufficiency. Mr. Page stated that Ms. Workman testified that scores of less than 1% are eligible scores and none of his scores were less than 1%. Mr. Page argued that the claimant is 13 years old and is not age appropriate under the major life area of economic self-sufficiency as the WV Code Section 21-6-1 provides for permitted employment by children under age 14 and the claimant is limited in options and no evidence shows that he was offered employment and that the Board of Review has previously held that age is a factor in determining whether an individual is substantially limited in economic self-sufficiency. Mr. Page argued that the documentation shows that the claimant does not require active treatment in an ICF/MR facility. Mr. Page argued that the Gibson court order does not apply to this case as the claimant in that case had nine (9) diagnoses, including Asperger's Disorder and the order held that the Department must consider the entire record, which Ms. Workman testified that she did in the claimant's case.

CONCLUSIONS OF LAW

1. Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500, October 1, 2003 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 supports.

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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

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

* Tubercous 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

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- 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. 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 means 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."

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3. 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."

4. The Department contended that the claimant's diagnosis of Asperger's Disorder was an exclusionary one and the Claimant contended that the Gibson Court Order (Exhibit #C1-1) required that Asperger's be considered as an eligible diagnosis.

The State Hearing Officer finds that the Gibson Court Order required the Department to consider the entire record in determining medical eligibility and does not specifically require that Asperger's Disorder be considered an eligible diagnosis. In reviewing the entire record, the State Hearing Officer finds that the claimant has limitations in the areas of self-care, self-direction and capacity for independent living but does not meet the required ABS scores of less than 1% in any major life area in the testing conducted on 10-18-04 by [REDACTED], Supervised Psychologist. Mr. [REDACTED] determined scores of 1% in Independent Functioning, Economic Activity and Socialization but gave no scores under 1%. Regulations in the MR/DD Waiver Program Manual (listed in Conclusions of Law #1) clearly require ABS scores of under 1% when compared to non-MR norms, which Mr. [REDACTED] scores were compared with. Therefore, the claimant does not meet the ABS score criteria for substantial limitations in the any major life areas, including

self-care, self-direction and capacity for independent living. However, in addressing those three (3) major life areas without taking the ABS scores into consideration, the State Hearing Officer finds that, according to Mr. [REDACTED] evaluation, in the area of self-help, the claimant is able to dress, undress, and bathe himself with assistance needed in water temperature control, prepare food, and can perform household chores but chooses not to do so. Thus, Mr. [REDACTED] report indicates that the only self-help deficit would be with water temperature control. The testimony of the claimant's witnesses also indicated that the claimant cannot tell time or tie his shoes. However, the claimant appears to be able to perform most self-help functions with some limitations. In the area of self-direction, the testimony of the claimant's witnesses showed that he does not follow simple commands and needs constant prompting and supervision. The Department contends that he plays video games, prefers to play alone, and makes self-determining choices. The fact that the claimant has a one-on-one Special Education teacher shows that he has considerable limitations in the area of self-direction. The claimant's teacher, Mr. [REDACTED], testified that the claimant needs constant monitoring, redirecting and prompting and that he has to be taken to the restroom. The claimant meets the requirements for a substantial limitation in the area of self-direction except for his ABS scores. In the area of capacity for independent living, the claimant is able to perform most home living functions with a deficit in social skills. Therefore, the claimant does not meet the criteria in the area of capacity for independent living. According to Mr. [REDACTED] evaluation, the claimant has no limitations in the remaining areas of learning ("cognitive ability appears to fall in the low average range to average range" with "Full-Scale IQ = 86"), receptive or expressive language ("he presented no verbal or language based deficits" with "Verbal IQ = 91"), or mobility. Therefore, the State Hearing Officer finds that the claimant meets the criteria for substantial limitations only in the area of self-direction even though the ABS scores do not support such a finding. The State Hearing Officer does not find that the documentation supports a finding of substantial limitations in the areas of self-help, capacity for independent living, learning, receptive or receptive language, or mobility.

4. The claimant is a twelve year old (will be 13 on 7-10-05) and is not of age

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to be employable. Therefore, the Department's argument that economic self-sufficiency (employment) cannot be considered as a major life area because it is not age appropriate is accepted by the State Hearing Officer. The State Hearing Officer notes that the regulations used by the Department in this case do not include the category of economic self-sufficiency as a major life area but the State Hearing Officer did consider that category.

VIII. DECISION

Based upon the evidence and testimony presented, I must uphold the action of the Department to determine that the claimant does not meet the medical eligibility criteria for the MR/DD Waiver Services Program.

IX. RIGHT OF APPEAL

See Attachment.

X. ATTACHMENTS

The Claimant's Recourse to Hearing Decision.

Form IG-BR-29.