



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

Joe Manchin III  
Governor

Martha Yeager Walker  
Secretary

October 14, 2005

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

Attached is a copy of the findings of fact and conclusions of law on your hearing held October 12, 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 Services Program.

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 and benefit levels for the Title XIX MR/DD Home and Community Based Waiver Program are determined based on current regulations. One of these regulations is the individual 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 (Chapter 500 of Title XIX MR/DD Home and Community Based Waiver Program Revised Operations Manual, 11-1-04).

The information which was submitted at the hearing revealed that you do 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,

A handwritten signature in cursive script, appearing to read "Thomas M. Smith".

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

cc: Erika H. Young, Chairman, Board of Review  
Susan Hall, BHHF  
Richard Workman, BMS

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

**Claimant,**

v.

**Action Number: 05-BOR-6008**

**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 October 12, 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 convened on October 12, 2005 on a timely appeal, filed June 16, 2005.

It should be noted here that the claimant's benefits have been denied pending a hearing decision. It should also be noted that the Department's representatives testified by speaker phone from Charleston, WV on agreement of claimant.

**II. PROGRAM PURPOSE:**

The Program entitled Title XIX MR/DD Wavier Services is set up cooperatively between the Federal and State governments and administered by the West Virginia Department of Health & Human Resources.

Under Section 2176 of the Omnibus Budget Reconciliation Act of 1981, states were allowed to request a waiver. 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:**

1. \_\_\_\_\_, Claimant's mother.
2. Susan Hall, Program Coordinator, BHHF (participating by speaker phone).
3. Richard Workman, Psychologist Consultant, BMS (participating by speaker phone).

Presiding at the Hearing was Thomas M. Smith, 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 November 1, 2004.

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

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

- D-1 Copy of notification letter dated 3-16-05.
- D-2 Copy of Chapter 500 regulations (10 pages).
- D-3 Copy of MR/DD Waiver Application Packet Cover Sheet (4 pages).
- D-4 Copy of Annual Medical Evaluation 4-12-05 (4 pages).
- D-5 Copy of Psychological Evaluation 2-1-05 (7 pages).
- D-6 Copy of Initial Social History (8 pages).
- D-7 Copy of Individual Program Plan (11 pages).
- D-8 Copy of Cost Estimate Worksheet (2 pages).
- D-9 Copy of Informed Consent (2 pages).
- D-10 Copy of Individualized Education Program (5 pages).
- D-11 Copy of Speech-Language Evaluation Report.
- D-12 Copy of Occupational Therapy report (4 pages).

It should be noted that the claimant stated that she did not receive the packet of evidence marked as Exhibits #D-1 through #D-12 and the claimant was provided with a copy of the packet by the State Hearing Officer prior to proceeding with the hearing and was afforded the opportunity to either review the evidence packet prior to convening the hearing or to have the hearing rescheduled. The claimant chose to review the packet prior to convening the hearing and to proceed with the hearing.

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

- 1) The claimant was an initial applicant for the Title XIX MR/DD Waiver Services Program when an application packet was sent by [REDACTED] to the MR/DD Waiver Program on 4-29-05 for consideration of medical eligibility (Exhibits #D-3 through #D-12).
- 2) The packet was reviewed and the claimant was denied for medical eligibility with notification issued on 5-27-05 (Exhibit #D-1).
- 3) The claimant's hearing request was received by the Bureau for Medical Services (BMS) on 6-16-05 and by the State Hearing Officer on 6-21-05 and the hearing was convened on 10-12-05.
- 4) Ms. [REDACTED] testified regarding the medical eligibility criteria listed in Chapter 500 (Exhibit #D-2).
- 5) Mr. Workman testified that the claimant met the diagnostic criteria of mental retardation (MR) as evidenced by the diagnosis on the Psychological Evaluation (Exhibit #D-5) which also included a related condition (Pervasive Developmental Disorder or PDD) although the diagnosis of MR was not on the Annual Medical Evaluation (Exhibit #D-4) and may not have been accurate, that the claimant did not meet the criteria for having substantial limitations in three (3) or more major life areas and that was the reason for the denial, that the Annual Medical Evaluation (DD-2A) is marked normal for most things and shows the claimant is ambulatory and does not meet the mobility criteria, that she can feed herself and the diagnosis given was Fetal Alcohol Syndrome which is not a related condition, that the Psychological Evaluation (DD-3) was conducted when she was 3 years 2 months old and showed that she walked at 15 months and put words together at 2 years, 8 months, that she feeds and dresses herself, that her language was understandable, that she did not speak to the evaluator and the WPPSI-III test could not be administered, that the ABS scores were 64 in Communication, 74 in Daily Living Skills, 71 in Socialization which were above the 55 scores the Waiver Program looks for which is 3 standard deviations below the norm, that non-MR norms were used even though the evaluator diagnosed her with MR, that the subtest scores showed standard scores which were above the 1 score they are looking for, that the scores indicate that she does not meet the criteria in self-direction, self-care, capacity for independent living, language, mobility, communication, or economic self-sufficiency, that she was close in language but nothing else, that the ABS Factor Scores showed scores of 102 in Personal Self-Sufficiency and 90 in Personal Social Responsibility and that 100 is an average score, that the diagnosis of MR unspecified was accepted although there should be adaptive behavior and intellectual delays to receive that diagnosis, that the Pediatric Evaluation showed that she likes to climb, run, jump, and play with balls, that memory was age appropriate, that she can follow directions, that portions of the Peabody Developmental Motor Scales showed that she has slight delays but the delays must be substantial to be on the MR/DD Program, and that she did not meet the criteria for the MR/DD Program.
- 6) Ms. [REDACTED] testified that her daughter has PDD which is in the spectrum of Autism, that her mother drank and there is a link in her brain missing, that she is inconsistent with language, that she does some signing but it is inconsistent, that she seems to understand what you are saying but cannot communicate back, that she was diagnosed by Dr. [REDACTED] as having Oropharyngeal Dysfunction which means from the back of her tongue to the

esophagus, something is not working right, that she has to be redirected at school a lot, that she has delays in expressive, articulate and receptive language according to the speech therapist, that both PDD and Fetal Alcohol Syndrome are incurable, that she has inappropriate behaviors, that she tries to hide behind chairs if embarrassed, that she has lots of autistic tendencies, that she definitely has special needs, that she could get more help with the Waiver Program, that she is overly trusting, that she has sensory problems with oral motor feeding and cannot handle extremely cold food, that she is not potty trained, that body awareness is missing, that she has no safety awareness, and that she cannot be reasoned with.

- 7) 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.

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

- 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).

8) 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."

9) 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."

10) The areas of dispute involve whether the claimant meets the criteria of functionality including substantial limitations in the daily living areas of self-care, receptive or expressive language, self-direction, and capacity for independent living. Mr. Workman testified that the claimant's ABS scores and the documentation did not meet the criteria in any of the daily living areas although language was close. Under the Functionality criteria in Chapter 500 of the MR/DD Waiver Manual, substantial limitations are defined as 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. The ABS scores for the claimant were derived from non-MR normative population and showed no scores less than 1 percentile and no scores three (3) standard deviations below the mean. The documentation showed that the claimant had limitations in communication but did not appear to be severe enough to meet the criteria as a substantial limitation. While the claimant has limitations and deficits in several areas, her limitations and deficits do not meet the severity level to qualify as substantial limitations for the Title XIX MR/DD Program.

## VIII. CONCLUSIONS OF LAW:

1) Regulations require that a diagnosis of MR or related condition exist which must be severe and chronic and have been manifested prior to age 22 and is likely to continue. The claimant meets this criteria as she has a diagnosis of MR unspecified and PDD which manifested prior to age 22 and is likely to continue.



- 2) Regulations require that substantial limitations in functioning must exist in three (3) or more of the major life areas. The claimant does not meet the criteria for substantial limitations in the major life areas of self-care, receptive or expressive language, learning, mobility, self-direction, or capacity for independent living.

**IX. DECISION:**

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

**X. RIGHT OF APPEAL:**

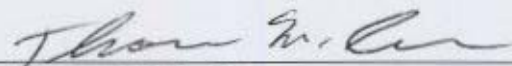
See Attachment

**XI. ATTACHMENTS:**

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

**ENTERED this 14th Day of October, 2005.**



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**Thomas M. Smith**  
**State Hearing Officer**