



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

December 29, 2006

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your son's hearing held December 6, 2006. Your hearing request was based on the Department of Health and Human Resources' action to deny medical 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 substantiate that your son met 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
Susan Hall, BBHFF
Alva Page, Attorney, BBHFF

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

_____ by: _____,

Claimant,

v.

Action Number: 06-BOR-2011

**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 December 6, 2006 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 scheduled for September 6, 2006, rescheduled for November 15, 2006 due to the claimant's acquiring counsel and again rescheduled at the request of the claimant's counsel. The hearing was convened on December 6, 2006 on a timely appeal, filed May 26, 2006.

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.

PARTICIPANTS:

Claimant's Witnesses:

_____, Claimant
_____, Claimant's husband
[REDACTED] Evaluating Psychologist
[REDACTED] Pre-School Special Needs Teacher
[REDACTED] Speech Pathologist and owner of [REDACTED]

Department's Witnesses:

Susan Hall, Bureau of Behavioral Health & Health Facilities (participating by speakerphone)
Linda Workman, Psychologist Consultant, BMS (participating by speakerphone)

Counsel for Claimant: [REDACTED]
Co Counsel for Claimant: [REDACTED]

Counsel for Department: Alva Page III, Attorney at Law

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 letter dated April 19, 2006
- D-3 Annual Medical Evaluation dated January 12, 2006
- D-4 Psychological Evaluation dated March 6, 2006
- D-5 Social History dated March 2, 2006
- D-6 Individual Education Program (IEP) dated January 6, 2006
- D-7 Letter from _____ to Susan Hall dated August 7, 2006
- D-8 [REDACTED] County Schools Evaluation Report
- D-9 Addendum to Psychological Evaluation Dated March 5, 2006
- D-9a Vineland Adaptive Behavior Scales scores dated March 6, 2006

Claimant's Exhibits:

C-1 Vineland Adaptive Behavior Scales without Motor Skills included

Vouched Exhibits not entered into evidence:

- V-1 Vineland Interview Edition
- V-2 Individual Program Plan, [REDACTED]
- V-3 Cost Estimate Worksheet
- V-4 Notice of Education Program Team Meeting

VII. FINDINGS OF FACT:

- 1) The claimant submitted an application packet to the Bureau of Behavioral Health in March 2006 to determine if her son would qualify for services under the Title XIX MR/DD Waiver Program. The Bureau of Behavioral Health reviewed the documents submitted and determined that based on the information made available to them her son did not meet the medical criteria for the program.
- 2) The Department sent a denial notice on April 24, 2006 advising that the application had been denied. The reason stated on the denial letter was, "Documentation submitted for review does not support the presence of substantial adaptive deficits in three or more of the six major life areas identified for Waiver eligibility".
- 3) The claimant requested a fair hearing on May 26, 2006. She also provided additional documentation in August 2006 to the Department. The Department reviewed this documentation and the decision of denial did not change.
- 4) At the time of the application, the claimant's son was four years old. He has a diagnosis of Autism, which is an eligible diagnosis for the MR/DD Waiver program.
- 5) An Annual Medical Evaluation, Exhibit D-3, completed on January 12, 2006 reports the child to have delayed language, short attention span and delayed speech. This document notes that the child is ambulatory, continent and can feed himself. It reports that he needs total care and close supervision. The evaluating physician notes that the child requires the level of care and services provided in an Intermediate Care Facility for Individuals with Mental Retardation (ICFMR). This evaluator noted under the mental diagnostic section that the patient was alert.
- 6) A Psychological Evaluation, Exhibit D-4, dated March 6, 2006 notes under Behavioral History that the claimant's son exhibits a variety of behavioral problems. The evaluation reports that he is able to ambulate without assistance from others and that he is able to run, jump and climb stairs without assistance. It reports him to have no difficulty with vision or hearing. Under Self-Help, the evaluation reports him to be very dependent on others for assistance to complete self-care tasks but that he can feed himself with a spoon and fork. He is able to drink from an open cup without spilling, is toilet trained and can put on pull-up garments independently. The evaluation notes that he requires supervision and assistance with bathing, tooth brushing, washing his hands and face and for getting dressed. Under Language, it reports his expressive and receptive language to be intact. This report notes that he appeared very alert and happy as he engaged in the leisure activity of watching a portable DVD player. He was

reported to get along with peers in school, show interest in interacting with others but that he prefers to be alone. An Axis diagnosis of Autistic Disorder was noted.

- 7) At age 4 years 2 months of age, a Vineland Adaptive Behavior Scale test was administered during the above Psychological. The Vineland test resulted in the following scores:

A communication standard score of 71 and percentile score of 3 was reported with an age equivalent of 2 years 4 months. He was reported to use first names of those he is familiar with, can read at least 3 commonly encountered signs, recite the alphabet, ask "wh" questions, say at least 50 recognizable words, and indicate preferences. He cannot print, read, state his address, phone number or the date.

A daily living standard score of 62 and percentile score of 1 was given with an age equivalent of 2 years 1 month. He can use the toilet, put on pull-up garments and get a drink independently. He does not require others to bathe him, assist with tooth brushing, had washing, putting on shoes and other clothing and answer the phone.

A socialization standard score of 55 and a percentile score of 0.1 was given with an age equivalent of 1 year 1 month. He does not share without prompting, label emotions, indicate preference for friends, or engage in imaginary play.

A motor skills standard score of 62 and a percentile score of 1 was given with an age equivalent of 2 years 8 months. The psychological reports him to be able to ambulate, run, jump and climb without assistance. It also notes that he can feed himself and drink from a cup without spilling.

- 8) The Social History, Exhibit D-5, supports that the child has behavioral problems and requires assistance and supervision in daily activities. It reports that he is unable to communicate wants and needs to unfamiliar others. It notes that he enjoys playing with blocks, toy cars and watching TV.
- 9) An Individualized Education Program, IEP, reports the child to be able to identify target vocabulary words with 97% accuracy and name target vocabulary words with 95% accuracy. He names actions using -ing words with 80% accuracy. His average length of spontaneous utterance is 3.6 words. His use of descriptive concepts has increased dramatically from 17% to 66% accuracy. He answers general questions with 63% accuracy and no questions with 72% accuracy. He identifies negation with 30% accuracy and categorizes with 25% accuracy. He cannot comprehend under, beside, in front and in back. He is able to match and sort by size and shape 100% of the time.
- 10) In August, following the April 2006 denial, the claimant provided an evaluation report, Exhibit D-8, to the Department for review. This report was an outdated assessment completed in September 2005 when the child was 3 years 8 months old. It reported the child to be developing at a 25% delay. At that time, he was reported to be able to independently feed himself using a fork and spoon, drink from an open cup and get a snack. This additional document did not cause a change in the Department's decision to deny.

- 11) The standard scores offered by the Vineland Adaptive Behavior Scales test include a margin of error in each category. If the band of error were subtracted from each standard score, then three or more of the scores would reflect a percentage score below the 1% range. The test results do indicate that a band of error of 8 applies to the three categories of communication, daily living, and socialization and that 15 would be the band of error for motor skills. Psychologist, Ms. Workman testified that this band of error could be an error to the negative or to the positive and therefore is not used by the Department to alter the reported standard scores. The report itself, Exhibit D-9a clearly shows a + and – associated with the band of error.
- 10) Testimony of the claimant supports the recorded documentation offered in the Annual Medical, Psychological, IEP, Social History and School Evaluation Report. The claimant testified to the difficult task of dealing with her son throughout the day. She reports that he requires constant supervision. He will not always come when she yells for him. He sometimes fights them when they try to dress him. If he does not want to eat, he will not. He will feed himself if it is what he wants to eat. He can use a fork and spoon if he wants to. She has to lay down with him to get him to fall asleep. He cannot always answer yes and no questions. The family has a full time hired babysitter at the home to help with him even when the claimant is at home. The claimant reports that the cost of caring for her son is very high.
- 11) The evaluating Psychologist also supports the documented evidence. She states that the child requires assistance with bathing and with some of his dressing. She reports that he requires a more intrusive level of prompting than an average 4year 2month old child and that he might object and be non-compliant. She states that his learning is slower due to behavior issues. She states that non-compliance is a symptom of Autism. She reports that he likes to push toy cars back and forth and sometimes throw them. She voiced her concerns regarding the child being unaware of danger and feels he needs 24 hour care.
- 12) The Special Needs teacher testified to the information held in the body of the IEP, which she helped to complete.
- 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

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 along with a qualifying diagnosis substantial limitations in functioning must exist in three (3) or more of the six (6) major life areas. Policy #13 Functionality - stipulates that substantial limits is defined on standardized measures of adaptive behavior scores. Policy further states that the presence of substantial deficits must be supported by the documentation submitted for review, ie, the IEP, Occupational Therapy evaluation, narrative descriptions, etc.
- (2) The Vineland scores indicate that this applicant is not demonstrating substantial delays as compared to other children his age except in the area of Socialization, which is not one of the major life areas in itself. The claimant's counsel argues that if the margin of error noted in the Vineland scores were subtracted from the standard scores assigned to this child that his scores would define substantial limits in three or more of the major life areas. Even if the Department did follow such a practice, the documentation, narratives etc. would still have to support these lowered scores. Testimony and evidence did not support that this applicant has substantial delays in three or more of the major life areas.
- (3) In the major life area of Self Care, it is noted that the child can feed himself and drink from an open cup. He can do some of his own dressing. He does need assistance with bathing. Evidence indicates that he does know how to do much of his care, but his behavioral issues interfere with his success in these areas. In the area of Learning, it is evident in the documentation that this child is capable of learning and is showing much progress. There is no evidence to point towards a substantial delay in Mobility. He can walk, jump and climb. In the area of Self-Direction we find that he chooses to play with cars and trucks and he likes to watch videos and TV. A child of his age would not yet be expected to have the capacity for independent living however; his delay in socialization may in the future adversely affect this possibility.
- (4) It is evident that this child does exhibit delays as a result of his Autism diagnosis. His delays most likely will progress to be more evident as he matures and is compared to his peers. At this time, the documentation supports that this claimant does not exhibit the level of delay, which is required for medical eligibility for the MR/DD program. It does not support that this child requires the level of services that are provided in an ICFMR facility.

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 29th Day of December, 2006.

**Sharon K. Yoho
State Hearing Officer**