



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

January 18, 2006

\_\_\_\_\_ for \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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

Attached is a copy of the findings of fact and conclusions of law on your hearing held January 13, 2006. 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,

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

cc: Erika H. Young, Chairman, Board of Review  
Steve Brady, BHFF  
Richard Workman, BMS  
\_\_\_\_\_

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

\_\_\_\_\_,

**Claimant,**

v.

**Action Number: 05-BOR-6007**

**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 January 13, 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 convened on January 13, 2006 on a timely appeal, filed June 16, 2005. It should be noted that the hearing was originally scheduled for September 21, 2005 and November 17, 2005 but was rescheduled both times at claimant's request.

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.
2. \_\_\_\_\_, Claimant's mother.
3. \_\_\_\_\_
4. Steve Brady, Program Coordinator, BHHF (participating by speaker phone).
5. 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.

42 CFR 435.1009, 42 CFR 483.440(a).

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

**Department's Exhibits:**

- D-1 Copy of notification letter dated 4-1-05.
- D-2 Copy of notification letter 9-12-05.
- D-3 Copy of Annual Medical Evaluation 2-7-05 (4 pages).
- D-4 Copy of Psycho-educational Evaluation Report 11-03-03 (12 pages).
- D-5 Copy of Educational Evaluation (6 pages).
- D-6 Copy of Psychological Evaluation 1-24-05 (9 pages).
- D-7 Copy of Social History (3 pages).
- D-8 Copy of Individualized Education Program 1-24-05 (11 pages).

**Claimant's Exhibits:**

None.

**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 \_\_\_\_\_ to the MR/DD Waiver Program on 3-4-05 for consideration of medical eligibility (Exhibits #D-3 and #D-6 through #D-8).

- 2) The packet was reviewed and the claimant was denied for medical eligibility with notification issued on 4-1-05 requesting additional information from psycho-educational assessments conducted by the school system (Exhibit #D-1). Additional information was received (Exhibits #D-4 and #D-5) and the packet was again denied with notification issued on 9-12-05 (Exhibit #D-2).
- 3) The claimant's hearing request was received by the Bureau for Medical Services (BMS) on 6-16-05 and by the Board of Review on 6-21-05 and the hearing was convened on 1-13-06.
- 4) Mr. Brady testified regarding the medical eligibility criteria listed in Chapter 500.
- 5) Mr. Workman testified that the claimant met the diagnostic criteria of having a related condition (Pervasive Developmental Disorder, NOS) as evidenced by the diagnosis on the Psychological Evaluation (Exhibit #D-6) but the packet was denied as the claimant did not have substantial limitations in at least three (3) of the major life areas and did not show that the claimant required institutional level of care.
- 6) The DD-2 showed the claimant was ok with ambulation, was continent and fed herself.
- 7) Additional documentation was requested and received from the school system including a Psycho-educational evaluation (Exhibit #D-4) which showed borderline to average intelligence with an Adaptive Composite score of 91 in the home setting and 81 in school setting, that she had all A and B grades, that she did well in class, that there was no inappropriate behavior observed, that rapport was easily established, that she had normal gait, that expressive and receptive language skills were unimpaired. that the test results may be underestimated, that she had standard scores of 62 in Verbal, 75 in Performance, and 66 in Full-scale, that the scores on the Woodcock Johnson Individual Achievement Test were all borderline to average, that academic skills were 87 and calculation were 89 indicating that she did not have a deficit in learning, that the ABAS scores showed a wide range of difference between home and school versions, that a score of 8-12 would be considered average and below 4 would be of serious concern, that the claimant scored 9 or above in school version in all areas but scored less than 4 in 6 areas in the home version , that the Gilliam Autism Rating Scale score of 66 showed that she was in the low range for the likelihood of autism, that Visual Motor showed a score of 79, that the summary and conclusion stated that there was a significant difference between scores from home and school. The Psycho-educational evaluation (Exhibit #D-4) does not support a finding of substantial deficits in receptive or expressive language, learning, or mobility.
- 8) The educational evaluation showed academic skills to be low average (Exhibit #D-5).
- 9) The Psychological Evaluation completed by Mr. [REDACTED] showed verbal IQ of 66, Performance of 73 and full-scale of 68, that the claimant suffers from autism but there is no autism diagnosis listed, and that Mr. [REDACTED] did not have the school evaluations available to him when he completed his evaluation.
- 10) The Social History (Exhibit #D-7) does not recommend ICF/MR level of care.

- 11) Ms. \_\_\_\_\_ testified that her daughter gets her spelling and vocabulary work on Mondays and has until Fridays to learn it, that she works 2-3 hours a day on it through Thursday, that the school does not see what she is doing, that her safety awareness is an issue, that she does not look both ways when crossing a road or look at stop lights, that she is on a routine and must stay on it, that she has social problems as she only has two (2) friends at school and one (1) friend at home, that she will not talk to people and her social interaction is limited, that she interrupts conversations, that she has lunch at school with an aide, that she does not know to walk away from a stranger, that you can barely read her cursive writing, that she was diagnosed with a form of autism when she was 2 years old, that she gets her underclothes dirty when she uses the bathroom,, that she has menstrual problems and was put on birth control, and that she has a high tolerance for pain.
- 12) Mr. [REDACTED] testified that the claimant is doing well in school but falls apart at home, that the family is unusually involved with her, that her home is like an institution, that there is no way she could live independently if not for her family, that he believes she has a need for ICF level of care due to developmental disability.
- 13) 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).

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 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."

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."

16) 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, learning, mobility, self-direction, and capacity for independent living. The documentation and testimony show that the ABAS scores from the Psycho-educational evaluation (Exhibit #D-4) show that the claimant does not meet the criteria in any of the daily living areas when school setting is evaluated but has some serious concerns when home setting is evaluated. Clearly, the claimant has no substantial limitations in the areas of receptive or expressive language, learning, and mobility. The claimant appears to have some limitations while at home in the areas of self-care, self-direction, and capacity for independent living, but the preponderance of evidence does not support a finding of substantial limitations in those areas which would meet the criteria for the Title XIX MR/DD Waiver Services 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 has a diagnosis of PDD, NOS and the Department did not contest that the claimant met the diagnostic criteria. The PDD, NOS 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.
- 3) Regulations require that the individual require an ICF/MR level of care. The claimant does not require an ICF/MR level of care.

**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 18th Day of January, 2006.**

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**Thomas M. Smith  
State Hearing Officer**