



**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

November 2, 2005

Dear Mr. _____,

Attached is a copy of the findings of fact and conclusions of law on your hearing held October 31, 2005. Your hearing request was based on the Department of Health and Human Resources' action to deny medical eligibility for the Children with Disabilities Community Services (CDCSP) 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 Children with Disabilities Community Services Program are determined based on current regulations. One of these regulations is to be eligible for the Children with Disabilities Community Services Program, the child must require the level of care provided in a Nursing Facility (NF) or an Intermediate Care Facility for Individuals with Mental Retardation and/or Related Conditions (ICF/MR) or an acute care hospital or an approved in-patient psychiatric facility for children (CDCSP Manual Section D, I).

The information which was submitted at the hearing revealed that _____ meets the medical criteria to be eligible for the Children with Disabilities Community Services Program as the documentation shows that he has substantial deficits in at least three (3) major life areas.

It is the decision of the State Hearing Officer to reverse the action of the Department to deny your application for the Children with Disabilities Community Services (CDCSP) Program.

Sincerely,

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

cc: Board of Review
Susan Striar-May, BMS

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

Claimant,

v.

Action Number: 05-BOR-5664

**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 31, 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 31, 2005 on a timely appeal, filed April 20, 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 representative (Susan Striar-May) testified by speaker phone from Charleston, WV on agreement of claimant.

II. PROGRAM PURPOSE:

The program entitled CDCSP is set up cooperatively between the Federal and State Government and administered by the West Virginia Department of Health and Human Resources.

The Department has chosen the option of providing Medicaid to disabled children, up to the age of 18, who can receive necessary medical services while residing in their family (natural or adoptive) homes or communities. The Medical Services must be more cost-effective for the State than placement in a medical institution such as a nursing home, ICF/MR facility, acute care hospital or approved Medicaid psychiatric facility for children under the age of 21.

III. PARTICIPANTS:

1. _____, Claimant's father.
2. _____, Claimant's mother.
3. _____ Dir. of Service Coordination, Autism Services Ctr. (by phone).
4. _____ Assist. Dir. of Service Coordination, Autism Services Ctr. (by phone).
5. Susan Striar-May, 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 CDCSP Program.

V. APPLICABLE POLICY:

CDCSP Manual
WV Income Maintenance Manual Section 16.7 D.
State Medicaid Manual Section 3589
Common Chapters Manual Section 780 D.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 Copy of denial notification letter dated 3-18-05.
- D-2 Copy of Psychological Evaluation 9-13-04, 9-30-04, 10-7-04 (8 pages).
- D-3 Copy of Speech & Language Evaluation 1-28-05 (7 pages).
- D-4 Copy of Individualized Education Program 10-12-04 (20 pages).
- D-5 Copy of Annual Medical Evaluation 10-28-04 (4 pages).
- D-6 Copy of fax with Program Eligibility Criteria (3 pages).
- D-7 Copy of Cost Estimate Worksheet (2 pages).
- D-8 Copy of MR/DD denial.

Claimant's Exhibits:

- Cl-1 Copy of letter from _____ 10-18-05.
- Cl-2 Copy of letter from _____ M. D. 10-12-05.
- Cl-3 Copy of e-mail from _____ 10-18-05.
- Cl-4 Copy of letter from _____ 10-14-05 (2 pages).
- Cl-5 Copy of letter from _____ M. D. 10-14-05 (2 pages).
- Cl-6 Copy of letter from _____ 10-27-05 (2 pages).
- Cl-7 Copy of Psychological Evaluation 10-20-05 (5 pages).

VII. FINDINGS OF FACT:

- 1) The claimant was an initial applicant for the Children with Disabilities Community Services Program (CDCSP) when an application packet was sent by

Autism Services Center to the CDCSP Program for consideration of medical eligibility (Exhibits #D-2 through #D-5 and #D-7 and #D-8).

- 2) The packet was reviewed and the claimant was denied for medical eligibility with notification issued on 3-18-05 (Exhibit #D-1).
- 3) The claimant's hearing request was received by the Bureau for Medical Services (BMS) on 4-20-05 and by the State Hearing Officer on 5-5-05 and the hearing was convened on 10-31-05 after the claimant initially requested it be held at the Bureau for Medical Services in Charleston.
- 4) Testimony from Ms. Striar-May indicated that medical eligibility was denied as the claimant did not have substantial deficits in three (3) or more major life areas and did not require ICF/MR level of care and was not at risk of institutionalization, that of the seven (7) major life areas, two (2) are not considered for a child (Economic Self-Sufficiency and Capacity for Independent Living), that Exhibit #D-2 shows communication and socialization problems, that the claimant does meet the criteria for expressive/receptive language, that the WPPSI test shows a verbal score of 49 and a performance score of 97 which is in the average range, that the claimant has average ability in perception and gross motor skills, that the Vineland scores are borderline range with Communication at 79, Daily Living Skills at 82, Socialization at 75, that overall ABS is 81, that Full-Scale IQ is 70, that the Behavioral Scale Profile shows language as the only severe area, that he demonstrates self-direction, that the IEP shows communication issues but nothing else, that the annual medical evaluation shows he is ambulatory, that he eats independently and is alert but needs help with self-care, that Exhibit #D-8 shows that the claimant was also denied for the MR/DD Program, that the new Psychological Evaluation (Exhibit #CI-7) shows that the claimant is ambulatory, that there are some issues with self-help but the degree is questionable, that he meets the criteria for language, that the ABS scores are questionable to her because they don't typically change that much with autistic children, that the ABS numbers are low and do not make any sense, that the new Psychological Evaluation is out of character with the other evaluations, that Exhibit #CI-6 shows a wealth of language waiting to be exposed, and that the claimant does not meet the criteria for medical eligibility for the CDCSP Program.
- 5) Testimony from Mr. _____ showed that he and Mrs. _____ believe that the new Psychological Evaluation (Exhibit #CI-7) is more accurate because they now have a better understanding of their son and his deficits, that he cannot draw shapes, circles, squares or triangles, that he sounds out words but does not know the meaning, that the deficit in communication affects learning and other things, that he has to be supervised all the time, that he has no danger awareness, that he will play when around other children but will not play with other children, that Exhibit #CI-4 showed that he has to be strapped in a high chair and given a chewy tube to keep from biting himself to get him to learn something, that the new Psychological Evaluation shows that he needs assistance with self-help as he cannot bathe, dress, or groom himself, is not toilet trained, can put shoes on but not the right feet, and lacks safety awareness, that the Communication score is 46 and Daily Living Skills is 48 and scores under 55 are supposed to be eligible scores, that the Psychologist told them that in percentile ranking, no score was more than 0.1 in all domains and that these were sufficient scores, that he has no fear or understanding of danger, that he meets the criteria in self-help,

receptive/expressive language, learning, self-direction, capacity for independent living and economic self-sufficiency, that his latest GAF was 19, that the new Psychological Evaluation (Exhibit #CI-7) and Speech Therapy letter (Exhibit #CI-6) are better indicators and should be utilized.

- 6) Ms. Runyon testified that the documentation shows that the claimant meets the criteria in the areas learning, self-care, self-direction, and communication and that he requires ICF/MR level of care.

- 7) WV Income Maintenance Manual Section 16.7, D states, in part:

"The Dept. has chosen the option of providing Medicaid to disabled children, up to the age of 18, who can receive necessary medical services while residing in their family (natural or adoptive) homes or communities. The medical services must be more cost-effective for the State than placement in a medical institution such as a nursing home, ICF/MR facility, acute care hospital, or approved Medicaid psychiatric facility for children under the age of 21.

This coverage group allows children to remain with their families by providing medical services, in the home or community, that are more cost-effective than care in a medical institution. It also eliminates the requirement that the income and assets of parents and/or legal guardians be deemed to the children.

A child is eligible for Medicaid as a CDCSP client when all of the following conditions are met:

The child has not attained the age of 18;

The child has been determined to require a level of care provided in a medical institution, nursing home, ICF/MR, hospital, or psychiatric facility;

He is expected to receive the necessary services at home or in the community.

The estimated cost of services is no greater than the estimated cost of institutionalization.

The child has been denied SSI eligibility because the income and assets of his parent(s) were deemed to him, and as a result, the SSI income or asset eligibility test was not met.

The Long-Term/Alt. Care Unit in the Office of Medical Services determines medical eligibility and notifies the county office and the case management agency of the decision in writing. Refer to Chapter 12 for details about determining medical eligibility."

- 8) State Medicaid Manual Section 3589 states:

Under Section 134 of the Tax Equity and Fiscal Responsibility Act of 1982 (P.L. 97-248), States are allowed at their option, to make Medicaid benefits available to children (age 18 or under) at home who qualify as disabled individuals under Section 1614 (a) of the Social Security Act provided certain conditions are met, even though these children would not ordinarily be eligible for SSI benefits because of the deeming of parental income or resources. The specific statutory provisions establishing this option are contained in Section 1902 (e) of the Social Security Act.

This option is available even if you do not have an approved home and community-based services waiver. You are allowed to make Medicaid coverage available under this option without the burden of seeking approval, on a case-by-case basis, from the Secretary.

In order for a child to establish Medicaid eligibility under this option, determine that:

if the individual were in a medical institution, he/she would be eligible for medical assistance under the State plan for Title XIX;

the child requires a level of care provided in a hospital, skilled nursing facility, or intermediate care facility;

it is appropriate to provide the care to the child at home; and

the estimated cost of caring for the child outside of the institution will not exceed the estimated cost of treating the children.

Children meeting these standards would be eligible for Medicaid even though they were not receiving SSI cash assistance at home. Under the law these children are deemed, for Title XIX purposes only, to be receiving SSI, or a State supplemental payment. Of course, 209 (b) States which do not provide Medicaid to disabled SSI and State supplement recipients under age 19 may not take advantage of this option.

In determining whether the child requires a level of care provided in a hospital, skilled nursing facility or intermediate care facility, determine that the child requires the level of care appropriate to these facilities as defined in 42 CFR 440.10 (hospital), 440.40 (skilled nursing facilities) or 440.150 (intermediate care facilities). If you elect this option you will need to provide coverage to all disabled children who meet the conditions. This is unlike the situation that exists for home and community-based waivers for which the law authorizes a waiver of the statewideness and comparability requirements."

- 9) CDCSP Manual Section D, I states, in part:

A LEVEL OF CARE CRITERIA

Medical eligibility will be determined by the Office of Medical Services (OMS), long Term and Alternative Care Unit.

Medical eligibility will be based on:

A. The applicant must be a child who is up to, but not including, age 18. At the time of application, the child must require the level of care provided in a Nursing Facility (NF) or an Intermediate Care Facility for Individuals with Mental Retardation and/or Related Conditions (ICF/MR) or an acute care hospital or an approved Medicaid in-patient psychiatric facility for children under the age of 21.

B. Level of Care determinations are made from a medical evaluation (Form DD-2A CDCSP) for applicants requiring NF or hospital Level of Care. For an applicant

requiring ICF/MR or psychiatric facility Level of Care, the medical determination is made from a medical evaluation (Form DD-2a CDCSP completed within the previous ninety days) and current psychological and/or psychiatric evaluations....appropriate to the applicant=s age group. The evaluations must demonstrate that a child has a diagnosis of a severe, chronic disability which is :

Attributable to a mental or physical developmental impairment, or a combination of mental and physical developmental impairments for a child requiring an ICF/MR Level of Care or;

Attributable to a physical impairment and/or medical condition for individuals requiring a NF or hospital Level of Care or;

Attributable to a psychological and/or psychiatric impairment and requiring in-patient acute care psychiatric services for individuals requiring a psychiatric facility Level of Care;

2. Likely to continue indefinitely;

3. 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
- g. Economic Self-Sufficiency.

C. The applicant must have a need for one of the medical facility levels of care described in I. A. and the corresponding services for an extended duration.

D. The applicant must have an Individual Program Plan (IPP) developed by an Interdisciplinary Team (IDT).....@

10). Common Chapters Manual Section 780 D states, in part:

AD. The Decision

The State Hearing Officer shall weigh the evidence and testimony presented and render a decision based solely on proper evidence given at the hearing.....The hearing officer's decision must also be based on facts as they existed at the time of the Department's action or proposed action at issue.....

1. CASE DECISION REVERSED, RETROACTIVE PAYMENTS

If the policy was misapplied or other incorrect decision was made, the State Hearing Officer will reverse.....

2. CASE DECISION UPHELD

If the policy was properly and correctly followed, the State Hearing Officer will uphold.@

- 11) The areas of dispute involve whether the claimant meets the criteria of functionality including substantial limitations in the daily living areas of self-care, learning, self-direction, capacity for independent living, and economic self-sufficiency. The Department determined, based on the initial documentation (Exhibits #D-2 through #D-8) that the claimant met the criteria for substantial deficits in only one (1) of the areas of daily living in the area of receptive/expressive language and that, due to the claimant's young age, no determination could be made in the areas of capacity for independent living or economic self-sufficiency. The Department contended that the additional documentation, in particular the Psychological Evaluation completed 10-20-05 (Exhibit #CI-7), conflicted with the previous documentation and was questionable in the ABS scores. The State Hearing Officer agrees with the Department that a determination in the areas of capacity for independent living and economic self-sufficiency would be difficult to determine although the criteria does not exclude them based on age. Nevertheless, the State Hearing Officer cannot make a finding that the claimant meets a substantial deficit in either of those areas. In regard to the Psychological Evaluation completed 10-20-05, the State Hearing Officer finds merit in the claimant's argument that the more recent Psychological Evaluation is likely to be more accurate based on increased knowledge and understanding of the claimant's condition and circumstances. In that regard, the State Hearing Officer accepts the ABS scores from the more recent Psychological Evaluation and finds that those scores show that the claimant meets the criteria for substantial limitations in the additional areas of self-help and self-direction, in particular based on the scores of 48 in Daily Living Skills and 41 in Adaptive Behavior Composite. The State Hearing Officer finds that the claimant meets the medical criteria for substantial limitations in at least three (3) of the major life areas.

VIII. CONCLUSIONS OF LAW:

Regulations in the CDCSP Manual under Program Eligibility Criteria requires that the applicant require a level of care provided in an ICF/MR facility and that the documentation demonstrates that he has a mental or physical developmental impairment for a child requiring ICF/MR level of care, that the condition is likely to continue, that the condition substantially limits functioning in three or more of the major life areas which include Self-Care, Receptive or Expressive Language, Learning, Mobility, Self-Direction, Capacity for Independent Living, and Economic Self-Sufficiency. The claimant has a mental developmental impairment which is likely to continue. The claimant requires ICF/MR level of care. The claimant's condition limits functioning in the areas of Self-Care, Receptive or Expressive Language, and Self-Direction. The claimant meets the medical criteria for the CDCSP Program.

IX. DECISION:

It is the decision of the State Hearing Officer to reverse the action of the Department to deny medical eligibility for the CDCSP Program.

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this 2nd Day of November, 2005

Thomas M. Smith
State Hearing Officer