



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 your application for Children with Disabilities Community Services Program (CDCSP) benefits.

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.

The Children with Disabilities Community Service Program provides medical services for disabled children who would otherwise be at risk of institutionalization so that they may reside in their family homes. Eligibility and benefit levels for the CDCSP Program are determined based on current regulations. One of these regulations specifies that in order to be eligible, the client must have substantial limits of functioning in three or more of the major life areas and require the level of care provided in a medical institution.

The information which was submitted at the hearing revealed that your son's limitations are not at the substantial level required for the program and he is not at a risk of institutionalization.

It is the decision of the State Hearing Officer to **uphold** the action of the Department in their denial of medical eligibility for services under the CDCSP Program.

Sincerely,

Sharon Yoho  
State Hearing Officer  
Member, State Board of Review

cc: Susan Striar May, BMS  
Erika Young, Chairman, BOR  
Alva Page, Attorney, B.M.S.  
Jeffrey Matherly, Attorney  
Linda Workman, BBHFF



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

\_\_\_\_\_ by El \_\_\_\_\_

**Claimant,**

**v.**

**Action Number: 05-BOR-2464**

**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 December 6, 2006 for C\_\_\_\_\_. It should be noted that this CDCSP hearing was held in conjunction with a hearing for a denial of MR/DD waiver services due to the eligibility criteria being similar.

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 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. This fair hearing was convened on December 6, 2006 on a timely appeal filed July 19, 2006.

It should be noted here that the claimant=s application for the CDCSP Program has been denied. All persons giving testimony were placed under oath.

**II. PROGRAM PURPOSE:**

The program entitled Children with Disabilities Community Service Program (CDCSP) is set up cooperatively between the Federal and State Government and administered by the West Virginia Department of Health and Human Resources.

The Children with Disabilities Community Service Program provides medical services for disabled children who would otherwise be at risk of institutionalization so that they may reside in their family homes. 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**

Claimant's Witnesses:

\_\_\_\_\_, Claimant

\_\_\_\_\_, Claimant's husband

\_\_\_\_\_ Evaluating Psychologist

\_\_\_\_\_ Pre-School Special Needs Teacher

\_\_\_\_\_ Speech Pathologist and owner of Therapy Services Company

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: Jeffrey Matherly, Attorney at Law

Co Counsel for Claimant: Rebecca O'Black, Attorney at Law

Counsel for Department: Alva Page III, Attorney at Law

Presiding at the hearing was Sharon Yoho, State Hearing Officer and a member of the State Board of Review.

### **IV. QUESTION(S) TO BE DECIDED**

The question to be decided is whether it has been established that the claimant meets the medical eligibility criteria for the CDCSP Program

### **V. APPLICABLE POLICY**

Bureau of Medical Services Program Eligibility Criteria

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

Departments= Exhibits:

D-1 Title XIX MR/DD Waiver Program Revised Manual Chapter 500  
CDCSP policy was not entered, but stipulated to be understood

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 \_\_\_\_\_ dated August 7, 2006
- D-8 \_\_\_\_\_ 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, \_\_\_\_\_ System
- 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 Medical Services in April 2006 to determine if her son would qualify for services under the Children with Disabilities Community Services Program (CDCSP). The Bureau of Medical Services 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 May 4, 2006 advising that according to the documentation submitted the child does not have substantial adaptive deficits in three major life areas and therefore is not eligible for ICF/MR level of care. In addition, the child is not at risk of institutionalization which is also a criteria for the CDCSP program.
- 3) The claimant requested a fair hearing on July 19, 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.
- 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 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.
- 12) 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.

- 13) 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.
- 14) The Special Needs teacher testified to the information held in the body of the IEP, which she helped to complete.
- 15) The Federal Code of Regulations, found at 42 CFR § 435.225, states that individuals under age 19 who would be eligible for Medicaid if they were in a medical institution.
  - (a) The agency may provide Medicaid to children 18 years of age or younger who qualify under section 1614(a) of the Act, who would be eligible for Medicaid if they were in a medical institution, and who are receiving, while living at home, medical care that would be provided in a medical institution.
  - (b) If the agency elects the option provided by paragraph (a) of this section, it must determine, in each case that the following conditions are met:
    - 1) The child requires the level of care provided in a hospital, SNF, or ICF.
    - 2) It is appropriate to provide that level of care outside such an institution.
    - 3) The estimated Medicaid cost of care outside an institution is no higher than the estimated Medicaid cost of appropriate institutional care.



(c) The agency must specify in its State plan the method by which it determines the cost-effectiveness of caring for disabled children at home.

16) Regulations found at 42 USC § 1396a (e) (3) state:

(3) At the option of the State, any individual who-

(A) Is 18 years of age, or younger and qualifies as a disabled individual under section 1382c (a) of this title;

(B) With respect to whom there has been a determination by the State that-

(i) the individual requires a level of care provided in a hospital, nursing facility, or intermediate care facility for the mentally retarded,

(ii) it is appropriate to provide such care for the individual outside such institution, and

(iii) the estimated amount which would be expended for medical assistance for the individual for such care outside an institution is not greater than the estimated amount which would otherwise be expended for medical assistance for the individual within an appropriate institution; and

(C) If the individual were in a medical institution, would be eligible for medical assistance under the State plan under this subchapter,

shall be deemed, for the purposes of this subchapter only, to be an individual with respect to whom a supplemental security income payment, or State supplemental payment, respectively, is being paid under subchapter IVI of this chapter.

17) The West Virginia Department of Health and Human Resources Eligibility Guide Children with Disabilities Community Services Program (09/01/94) – Program Eligibility Criteria: I. LEVEL OF CARE CRITERIA states:

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:
1. 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) consisting of the child, family or legal representative,

service providers, advocate, professionals, paraprofessionals and other stakeholders needed to ensure the delivery of the necessary level of services and develop a comprehensive IPP in accordance with Medicaid policies. The IPP must include:

1. Instructional (behavioral) objectives, applicable to the type of disability, developed with professional oversight and supervision aimed at teaching the child skills which will maintain, increase and/or support his/her independence in the activities of daily living and inclusion in community life; and
2. Services provided or supervised by qualified professionals aimed at increasing, maintaining and/or restoring the child's skills and/or health to the best physical, intellectual and/or social level that presently or potentially may be achieved.

#### **VIII. CONCLUSIONS OF LAW:**

- (1) Regulations for the CDCSP program require that substantial limitations in functioning must exist in three (3) or more of the major life areas. It further requires that the child at the time of application require the level of care provided in a intermediate care facility for individuals with Mental Retardation and/or related conditions.
- (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 or economic self-sufficiency 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 CDCSP 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 Children With Disabilities Community Services Program.

**X. RIGHT OF APPEAL:**

See Attachment.

**XI. ATTACHMENTS:**

The Claimant's Recourse to Hearing Decision.

Form IG-BR-29.

**ENTERED this 29 Day of December, 2006**

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**Sharon K. Yoho**  
**State Hearing Officer**