



State of West Virginia  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
Office of Inspector General  
Board of Review  
4190 Washington Street West  
Charleston, WV 25313

Joe Manchin III  
Governor

Martha Yeager Walker  
Secretary

November 9, 2006

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Case Name: \_\_\_\_\_

Dear Mrs. \_\_\_\_\_:

Attached is a copy of the findings of fact and conclusions of law on your hearing held November 6, 2006. Your hearing request was based on the Department of Health and Human Resources' denial of services under the MR/DD Waiver Program and CDCS 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 Waiver and CDCS Programs are based on current policy and regulations. Some of these regulations state in part:

The evaluations must demonstrate that a child has a diagnosis of a severe, chronic disability which - 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; and (g) Economic Self Sufficiency.

The information submitted at your hearing revealed: \_\_\_\_\_ did not have substantially limiting functioning in three or more of the major life activities for the MR/DD Waiver and CDCS Programs.

It is the decision of the State Hearings Officer to **UPHOLD** the **ACTION** of the Department to deny the MR/DD Waiver and CDCS Program applications.

Sincerely,

Ray B. Woods, Jr., M.L.S.  
State Hearing Officer  
Member, State Board of Review

cc: State Board of Review  
Susan Hall, MA, Program Manager – OBH&HF  
Susan Striar-May, Consultant – B.M.S.

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

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

**v.**

**Action Numbers:   06-BOR-1974 (MR/DD)  
                          06-BOR-2468 (CDCSP)**

**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 November 9, 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. The MR/DD fair hearing was originally scheduled on August 14, 2006 on a timely appeal filed May 26, 2006. It was later rescheduled at the parents request for November 6, 2006. A hearing request was received on July 19, 2006 for a denial of the CDCS Program. Mrs. \_\_\_\_\_ consented to have both hearings conducted on November 6, 2006.

It should be noted here that the Claimant was not receiving any benefits through the Department, and Mrs. \_\_\_\_\_ did not have legal representation. A pre-hearing conference was held between the parties and the issues could not be resolved. The matter then proceeded to the hearing.

**II.    PROGRAM PURPOSE:**

The Programs entitled MR/DD Waiver and CDCS are 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.

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/Mother of \_\_\_\_\_

\_\_\_\_\_, Aunt/Caregiver

\_\_\_\_\_, Owner – Applied Behavior Analysis

Susan Hall, M. A., Program Manager – Office of Behavioral Health and Health Facilities

Linda Workman, M. A., Psychologist – Bureau for Medical Services

Susan Striar-May, Consultant – Bureau for Medical Services

Presiding at the Hearing was, Ray B. Woods, Jr., M.L.S., State Hearing Officer and a member of the State Board of Review.

**IV. QUESTIONS TO BE DECIDED:**

The question(s) to be decided: Does the child, \_\_\_\_\_, have substantially limited functioning in three or more of the major life activities?

**V. APPLICABLE POLICY:**

PROGRAM ELIGIBILITY CRITERIA FOR THE MR/DD WAIVER PROGRAM, Section 503 Medical Eligibility Criteria, and Eligibility Guide for Children With Disabilities Community Services Program (09/01/94) – Program Eligibility Criteria: I. LEVEL OF CARE CRITERIA.

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

**Department's Exhibits:**

D-1 MR/DD Waiver Policy

D-2 Denial Letter dated 05/01/06

D-3 DD-2A (Annual Medical Evaluation) dated 01/27/06

D-4 DD-3 (Psychological Evaluation) dated 02/07/06

D-5 DD-4 (Social History) dated 01/19/06

D-6 CDCSP Eligibility Criteria

D-7 Denial Letter dated 06/22/06

D-8 Pediatric Evaluation dated 10/04/05

D-9 West Virginia Birth to Three Psychological Evaluation dated 09/25/05

D-10 West Virginia Birth to Three Individualized Family Service Plan (IFSP) dated 11/16/05

D-11 Report from [REDACTED] Associates, Inc., dated 03/15/06

**Claimants' Exhibits:**

None

**VII. FINDINGS OF FACT:**

**1.** The West Virginia Department of Health and Human Resources Eligibility Guide for Children with Disabilities Community Services Program (09/01/94) – Program Eligibility Criteria: I. LEVEL OF CARE CRITERIA (Exhibit D-6) 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.

## 2. PROGRAM ELIGIBILITY CRITERIA FOR THE MR/DD WAIVER PROGRAM

Section 503 Medical Eligibility Criteria (Exhibit D-1) states:

### **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 conditions 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).

3) The Claimant applied for services on behalf of her son under the Medicaid Home and Community-Based MR/DD Waiver Program (MR/DD), and Children with Disabilities Community Services Program (CDCSP). The Claimant's son was born on April 22, 2004 and is diagnosed with Autism. Autism meets the eligible diagnosis as a related condition and was not the subject of the hearing. The issue is whether the Claimant's son has substantially limited functioning in three or more of the following major life areas: (a) Self Care; (b) Receptive or expressive language (communication); (c) Learning (functional academics); (d) Mobility; (e) Self direction; and finally, Capacity for independent living (home living, social skills, employment, health and safety, community use, leisure). The issue of *substantially limited functioning* is the same criteria used for both the MR/DD Waiver and CDCS Programs. The same documentation (Exhibits) was used by the Department representatives for both Program areas.

4) The Bureau for Medical Services denied the MR/DD application by letter dated May 1, 2006 (Exhibit D-2). The letter stated in part:

Documentation submitted for review does not support the presence of substantial adaptive delays as defined for the Title XIX MR/DD Waiver eligibility in three or more of the six major life areas considered at this time.

The Reviewer(s) relied on the following facts: DD-1 through DD-5; 9/6/05 Report from the Klingberg Clinic, Birth to Three IFSP, and Assessments.

5) The Bureau for Medical Services denied the CDCSP application by letter dated June 22, 2006 (Exhibit D-7). The letter stated in part:

According to the documentation submitted \_\_\_\_\_ does not have substantial deficits in three major life areas and therefore is not eligible for ICF/MR level of care. In addition, \_\_\_\_\_ is not at risk of institutionalization which is also a criteria for the Children with Disabilities Community Services Program. Lastly, a Cost Estimate Worksheet (DD-6 CDCSP) was not submitted as required.

6) The DD-2A (Exhibit D-3) was completed on January 27, 2006. The Claimant's son was 1 year and 9 months of age at the time of this evaluation. The only "Abnormal" reference under the Neurological section was Speech. The physician indicated it was Delayed - 8 months of age. Under Problems Requiring Special Care, the physician marked Ambulatory; Incontinent; Feeds Self; Needs Total Care for Personal Hygiene; and Needs Close Supervision. The physician also gave a Diagnosis of Autism, and certified the child's need for a level of care and services provided in an Intermediate Care Facility for individuals with Mental Retardation.

7) A Psychological Evaluation (DD-3) was completed by ACP – [REDACTED] on February 7, 2006 (Exhibit D-4). The report stated that the child was evaluated at the [REDACTED] Children's Hospital on October 4, 2005 and the diagnosis of Autism was given.

The Psychology Report describes the child as being ambulatory with slight delays in his fine and gross motor skills; Unable to complete any daily living skills like: dressing, washing hands, washing hair, brushing teeth, brushing hair and bathing himself without hand over hand assistance with supervision and is able to drink from a sippy cup, but not a regular cup.

8) The Report further states that the child was not given an IQ test due to his age and the severity of his cognitive, physical, and medical difficulties. The Childhood Autism Rating Scale (CARS) lists the child within the Severely Autistic range. The Vineland Adaptive Behavior Scales evaluation was completed by an interview with the Claimant and her son. The scores were as follows:

<b><u>Domain</u></b>	<b><u>Standard Score</u></b>	<b><u>% Rank</u></b>	<b><u>Adaptive level/Age Equivalent</u></b>
Communication	59	0.3	Low (0-1)
Daily Living Skills	57	0.2	Low (0-3)
Socialization	54	0.1	Low (<0-1)
Motor Skills	92	30	Adequate (1-7)
Adaptive Behavior Composite	60	0.4	Low (0-1)

9) The only eligible score in measuring the child's functionality would be Socialization. Since Socialization is part of the larger category of Capacity for Independent Living, the child does not have supporting documentation to meet the criteria for either of the MR/DD Waiver and CDCS Programs.

10) The evaluating psychologist recommended that the child required an ICF/MR level of care with 24-hour support, training, and supervision.

11) The Social History (Exhibit D-5) was completed on January 19, 2006. The child receives early intervention services from the Birth to Three program which provides Speech Therapy, Occupational Therapy, a Developmental Specialist and adaptive equipment rental. The evaluating Social Worker recommended that the child required an ICF/MR level of care.

12) A Pediatric Evaluation was completed by the Cincinnati Children's Hospital on October 4, 2005 (Exhibit D-8). The child was 17 months of age. A Developmental Evaluation was conducted using the Revised Gesell Developmental Schedules. The child had the following skills:

Adaptive -	11 to 12 months
Gross Motor -	18+ months
Fine Motor -	12 to 15 months
Personal/Social	Scattered up to 10 months
Language -	Expressive 5 to 7 months and receptive 8 months

13) The score for Language indicates a delay, but the evaluation is more than a year old.

**14)** The West Virginia Birth to Three Psychological Evaluation was dated September 25, 2005 (Exhibit D-9). It describes the child's "Variety of symptoms consistent with a diagnosis of Autism." The evaluation listed in Exhibit D-4 provides more accurate information.

**15)** The West Virginia Birth to Three Individualized Family Service Plan (IFSP) was completed on November 16, 2005 (Exhibit D-10). The Report lists the following facts:

- The child is making better contact and is transitioning from one activity to another
- The child is pointing to the things that he wants and is shaking his head "no"
- The child is pointing, making better eye contact, more calm, and is transitioning from one activity to another better
- The child is responding more to "no", he is more attention focused, he is sharing

**16)** A Report from Speech Pathology Associates, Inc. was completed on March 15, 2006 (Exhibit D-11). It summarized that the child has demonstrated ongoing and constant progress under communication domain of development.

**17)** The Claimant's testimony compared the child with his twin sister. In the areas of Self Care, the sister is able to assist herself while her brother does not. The child does not brush his teeth and does not understand commands. In the area of health and safety, the Claimant stated that while in the yard, she turned her back for a moment and the child ran and jumped in her neighbor's pond. She would not have known where he was if the neighbor had not brought the child home.

**18)** The Owner of Applied Behavior Analysis has a Masters Degree in Psychology and is a Licensed Counselor. Testimony revealed that the child receives 30 hours of intensive training to assist him in the areas of stacking and playing with others. The child requires one on one assistance and is in the early stages of compliance. It was estimated that he was at 20% compliance.

**19)** Testimony from the Aunt indicates the child climbs on everything and does not respond well to instructions. This was also reflected in the report of the Psychologist.

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

**1) PROGRAM ELIGIBILITY CRITERIA FOR THE MR/DD WAIVER PROGRAM**  
Section 503 Medical Eligibility Criteria on Functionality states:

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).

2) The Psychology Evaluation conducted on February 7, 2006, lists the child's only eligible functionality score to be in the area of Socialization. Socialization is part of the larger category of Capacity for Independent Living that also includes home living; employment, health and safety, community use and leisure.

3) The child does not have supporting documentation that he has "Substantially limited functioning in three or more of the major life areas" to meet the criteria for either of the MR/DD Waiver and CDCS Programs.

#### **IX. DECISION:**

It is the decision of this State Hearing Officer to **UPHOLD** the **ACTION** of the Department in this particular matter.

#### **X. RIGHT OF APPEAL:**

See Attachment

#### **XI. ATTACHMENTS:**

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

**ENTERED this 9th Day of November, 2006.**

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**Ray B. Woods, Jr., M.L.S.**  
**State Hearing Officer**