



State of West Virginia  
**DEPARTMENT OF HEALTH AND HUMAN RESOURCES**  
Office of Inspector General  
Board of Review  
State Capitol Complex, Building 6, Room 817-B  
Charleston, WV 25305

**Joe Manchin III**  
Governor

January 25, 2005

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

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

Attached is a copy of the findings of fact and conclusions of law on your hearing held January 7, 2004. Your hearing request was based on the Department of Health and Human Resources' proposal to terminate your son's benefits and services through the MR/DD Home & Community-Based Waiver Services 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 for the MR/DD Home and Community-Based Waiver Services 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 both a diagnosis of mental retardation and/or a related condition(s), and require the level of care and services provided in an Intermediate Care Facility for individuals with Mental Retardation and /or related conditions (ICF/MR Facility). (West Virginia Title XIX MR/DD Waiver Home & Community-Based Services Policy Manual)

Information submitted at your hearing reveals that your son's diagnosis of Asperger's Disorder does not meet the eligible diagnosis criteria to establish medical eligibility for the Title XIX MR/DD Home & Community-Based Waiver Services Program.

It is the decision of the State Hearing Officer to uphold the Department's proposal to terminate your son's benefits under the MR/DD Home & Community-Based Waiver Services Program.

Sincerely,

Erika H. Young  
State Hearing Officer  
Member, State Board of Review

cc: Healthways  
Susan Hall, Coordinator, MR/DD Waiver Program  
Board of Review

**WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
SUMMARY AND DECISION OF THE STATE HEARING OFFICER**

**NAME** \_\_\_\_\_  
**ADDRESS:** \_\_\_\_\_  
\_\_\_\_\_

**I. INTRODUCTION:**

This is a report of the State Hearing Officer resulting from a fair hearing concluded on January 3, 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 convened on January 7, 2004 on a timely appeal filed September 8, 2003.

All persons giving testimony were placed under oath.

**II. PROGRAM PURPOSE:**

The program entitled Medicaid, Title XIX MR/DD Waiver, Home and Community-Based Services, is a federal/state-funded program that provides health care coverage to low-income and medically needy West Virginians. West Virginia's MR/DD Waiver Program was implemented in March 1984 as approved by the federal Health Care Financing Administration (HCFA). The program serves individuals with mental retardation and related conditions (ICF/MR). The Waiver Program provides services in homes and local communities instead of ICF/MR. The MR/DD Waiver Program is not an entitlement program. The program is a health care coverage program that reimburses for services to instruct/train, support and assist individuals who have mental retardation and/or related conditions to achieve the highest level of independence and self-sufficiency possible in their lives. The services provided under the MR/DD Waiver Program are: services coordination, extended physician services (annual medical evaluation), day habilitation including QMRP (specialist) services, prevocational training, supported employment, residential habilitation, transportation and respite care.

**III. PARTICIPANTS:**

\_\_\_\_\_, Claimant  
\_\_\_\_\_, Mother of Claimant  
\_\_\_\_\_, Father of Claimant

**III. (Continued)**

[REDACTED] Hancock County Schools  
[REDACTED] QMRP, [REDACTED]  
[REDACTED] Case Manager, [REDACTED]

Susan Treen, MR/DD Program Operations Coordinator, BMS, participating telephonically

Richard Workman, Psychologist Consultant, BMS, participating telephonically

Presiding at the hearing was Erika H. Young, State Hearing Officer and a member of the State Board of Review.

#### **IV. QUESTION TO BE DECIDED:**

The question to be decided is whether the Department was correct in the determination that the claimant does not meet the required medical criteria necessary to establish eligibility for the MR/DD Waiver Program and in the resulting proposal to terminate the claimant's benefits under that program.

#### **V. APPLICABLE POLICY:**

West Virginia Title XIX MR/DD Waiver Home & Community-Based Services Handbook, Chapter I:

##### Level of care Criteria for medical eligibility

- A. In order to be eligible for the Title XIX MR/DD Home & Community-Based Waiver Program an individual must have both a diagnosis of mental retardation and/or a related conditions(s), and require the level of care and services provided in an Intermediate Care Facility for Individuals with Mental Retardation and /or related conditions (ICF/MR Facility).
- B. The following list includes some examples of related conditions. This list does not represent all related conditions.
  - 1. Autism or Pervasive Developmental Disability, NOS
  - 2. Spina Bifida
  - 3. Cerebral Palsy
  - 4. Tuberous Sclerosis
  - 5. Traumatic Brain injury and/or Spinal Cord injuries (occurring during the developmental period).
- C. The evaluations must demonstrate that an individual has a diagnosis of mental retardation and/or a related condition which

constitute a severe chronic disability which is:

1. Attributable to a mental or physical disability or a combination of both;
2. Manifested before a person reaches twenty-two (22) years of age;
3. Likely to continue indefinitely; and
4. Substantially limits functioning in three or more of the following areas of major life activities;
  - a. Self-Care
  - b. Learning (functional academics)
  - c. Mobility
  - d. Capacity for Independent Living (home living, social skills, health and safety, community use, leisure)
  - e. Receptive and /or expressive Language
  - f. Self-Direction
  - g. Economic Self-sufficiency (Employment)

D. Level of care determinations are made by the Office of Behavioral Health Services (OBHS) and the Bureau for Medical Services (BMS) based on the medical, psychological and social evaluations.

E. Evaluations must demonstrate the need for an ICF/MR level of care and services. This is demonstrated by the individual's need for intensive instruction, services, safety, assistance and supervision to learn new skills and increase independence in activities of daily living. The level of care and services needed must be the same level which is provided in an ICF/MR facility.

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

### **Department's Exhibits**

- D-1 Program service termination letter dated August 25, 2003
- D-2 Annual Medical Evaluation dated May 15, 2003
- D-3 Cost estimate worksheet
- D-4 Comprehensive Psychological Evaluation dated May 2, 2001

### **VI. (Continued)**

- D-5 Psychological Evaluation Updates dated May 16, 2002 and May 20, 2003

- D-6 Comprehensive Psychological Evaluation (Triennial) dated October 10, 2003
- D-7 Individual Program Plan dated June 25, 2003
- D-8 Diagnostic criteria

**Claimant's Exhibit**

- C-1 Letter from [REDACTED]

**VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Claimant in this case was 12 years old at the time of this hearing and has a diagnosis of Asperger's Syndrome. The claimant is a recipient of the MR/DD Program.
2. The Department completed an annual re-evaluation on the Claimant's case and on August 25, 2003 issued a notice of termination to the Claimant which gave as the reason for the action:

Documents submitted for review indicate that Mr. \_\_\_\_\_ neither has an eligible diagnosis nor substantial adaptive deficits which would require an ICF/MR level of care. Continued eligibility for ICF/MR level of care is not warranted. Please begin discharge planning and transition into alternative services during the next 90 to 180 days.

3. Mr. Workman testified that he initially certified the claimant for the MR/DD Program with the intention that he could benefit from services in the short term.
4. Mr. Workman referred to DSM IV diagnostic criteria for Asperger's Disorder (D-8), The criteria states those afflicted with Asperger's have no clinically significant general delays in language, cognitive development or in the development of age-appropriate self-help skills, which are areas of delay considered in determining eligibility for the MR/DD Waiver Program. Mr. Workman said social interaction could create problems for the Claimant and the Claimant may meet the substantial delay criteria for Capacity for Independent Living and possibly for Economic Self-Sufficiency but that he does not meet substantial delay criteria for mobility, academics, language, self-direction and self-care.
5. The Annual Medical Examination (DD-2A) dated May 15, 2003 (D-2) indicates the Claimant was diagnosed with global developmental delays/mental retardation, along with Asperger's Syndrome. Mr. Workman referred to the diagnostic criteria for mild mental retardation (D-8), pointing out that individuals afflicted with this condition typically have IQ scores of 50 to 55

**VII. (Continued)**

to approximately 70. To qualify for MR/DD Waiver services, individuals must have

scores under 55 along with adaptive behavior consistent with those scores.

6. Referring to Exhibit D-2, Mr. Workman testified the Claimant is ambulatory. The evaluation states the Claimant is not toilet trained, but there are differing views on his level of toilet training as he has infrequent episodes of inability to use the restroom adequately.
7. A Psychological Evaluation Update dated May 20, 2003 (D-5) revealed the following IQ scores for the Claimant: verbal IQ, 73; performance IQ, 99; and full-scale IQ, 84. Mr. Workman testified that those scores are clearly outside the range for MR/DD Waiver Program eligibility. He stated the only adaptive behavior score within the range for program eligibility is the economic activity score, which is less than 1 percentile.
7. Mr. Workman referred to the Comprehensive Psychological Evaluation dated May 2, 2001 (D-4). The document supports the diagnosis of Asperger's Disorder and states the Claimant is enrolled in regular classes, but participates in the behavioral disorder classroom as needed. IQ scores are listed as: verbal IQ, 89; performance IQ, 108; and full-scale IQ, 97. The evaluation states the Claimant is ambulatory, is toilet trained (although he has occasional accidents), and dresses independently. Mr. Workman said these are fairly well developed skills and not indicative of an individual requiring an ICF/MR level of care. Under the language segment, the evaluation notes the Claimant is verbal and is able to express his needs, wants and frustrations clearly. The Claimant also enjoys reading and watching television and prefers to be alone. His personal self-sufficiency, community self-sufficiency and personal-social responsibility scores are average or above. Overall, Mr. Workman said the Claimant's scores are incompatible with individuals requiring an ICF/MR level of care.
8. Referring to the Comprehensive Psychological Evaluation (Triennial) dated October 10, 2003 (D-6), Mr. Workman testified that the Claimant is ambulatory but unsteady. He requires prompting to groom, blow his nose, and bathe, which is not reflective of an individual requiring an institutional level of care, Mr. Workman said. The Claimant's composite IQ score on the Kaufman Brief Intelligence Test was 91, indicating a low-normal intellectual functioning range. The Claimant's scores on the Vineland Adaptive Behavior Scales are in the range considered for MR/DD Program eligibility, but are incompatible with a person afflicted with Asperger's and with other reported scores, Mr. Workman testified.
9. The Individual Program Plan (D-7) indicates the Claimant ambulates independently, has infrequent bowel incontinence and is able to verbalize his wants and needs.

**VII. (Continued)**

10. Ms. [REDACTED] testified that the Claimant requires constant supervision with his self-help skills. She said the Claimant has no regard for his own safety, so independent living is not a possibility for him. She also said the Claimant does not have adequate self-direction.
11. Mr. Workman responded that he is concerned about the Claimant's capacity for independent living, but believes he does have well developed self-direction skills in comparison to individuals in an ICF/MR facility. The Claimant also has functional academics.
12. Ms. [REDACTED] testified that the Claimant has well developed reading skills, but he does not use those skills appropriately due to his obsessive behavior. He also fails to utilize leisure skills appropriately and reacts aggressively when asked to stop certain behaviors. He does not transition well and his school must use visual aides. Ms. [REDACTED] also said the Claimant cannot be left alone, has run from his parents at stores and "cannot function in the real world" without 24-hour supervision.
13. Ms. [REDACTED] the autism coordinator for [REDACTED] County Schools, testified that the Claimant must have supervision across every setting at the middle school. She said he recently failed health class because he was unable to process the information, had no social understanding and no understanding of safety issues. She stated the Claimant, under state law, meets the criteria for autism. He is working on self-control, basic greetings, interacting with adults, meeting and addressing individuals, and following a routine. The Claimant uses a handicapped-accessible restroom, must have specific hygiene items in the restroom and must be reminded of the steps to restroom hygiene. She testified that if the Claimant did not reside with his family, he would require an institutional level of care. Ms. [REDACTED] concurred with the testimony.
14. Ms. \_\_\_\_\_ testified that her son cannot be left alone and has safety issues. In addition, Mr. \_\_\_\_\_ testified that his son has been prescribed an antidepressant medication which has helped him tremendously with aggressive behavior. He said his son's behavior would be much worse without the medication.

## CONCLUSIONS OF LAW

1. The claimant does not have a diagnosis of mental retardation. The Department's notice of termination indicates that the Claimant does not have an eligible diagnosis, i.e, a related condition. In his testimony, Mr. Workman stopped short of stating the Asperger's is not a related condition but did provide diagnostic criteria that indicates a person with Asperger's does not have significant delays in cognitive development or in the development of age-appropriate self-help skills.

2. There were four reported measures of adaptive behavior. The three sets of Adaptive Behavior Scale scores showed that the Claimant was functioning at a higher level than a person with mental retardation. The report of scores from the Vineland, completed following the notice of termination were indicative of low functioning and were not consistent with the diagnostic criteria of Aspergers or with the other three adaptive behavior measurements.
3. The preponderance of evidence shows that the Claimant is substantially limited in the area of Capacity of Independent Living. In addition, ABS scores are low in the area of pre-vocational/vocational activity. Evidence does not show that the claimant has substantial limitations in the other five areas of major life activity.

**II. DECISION:**



It is the finding of the Hearing Officer that evidence and testimony shows that, while the Claimant has substantial limitations in the area of Capacity for Independent Living and possibly in Economic Self Sufficiency, the preponderance of evidence does not support a finding that the Claimant has substantial limitations in three major life areas. It is the decision of the State Hearing Officer to uphold the Department's proposal to terminate the Claimant's benefits and services through the MR/DD Home and Community-Based Waiver Services Program.

**IX. RIGHT OF APPEAL**

See Attachment.

**X. ATTACHMENTS**

The Claimant's Recourse to Hearing Decision.

IG-BR-29