



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
State Board of Review
2699 Park Avenue, Suite 100
Huntington, West Virginia 25704
March 15, 2005

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

c/o _____

Dear Mr. & Mrs. _____,

Attached is a copy of the findings of fact and conclusions of law on your hearing held March 10, 2005. 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 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 MR/DD Waiver Program case are determined based on current regulations. One of these regulations is that the applicant 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 (Title XIX MR/DD Home and Community-Based Waiver Program revised Operations Manual June 1, 2001).

The information which was submitted at the hearing revealed that you do not meet the medical criteria for the Title XIX MR/DD Waiver Services Program.

It is the decision of the State Hearing Officer to uphold the action of the Department to deny medical eligibility for the Title XIX MR/DD Waiver Program.

Sincerely,

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

cc: Board of Review
Susan Hall, BHHF
Linda Workman, BMS

NAME: _____

ADDRESS: c/o _____

SUMMARY AND DECISION OF THE STATE HEARING OFFICER

I. INTRODUCTION

This is a report of the State Hearing Officer resulting from a fair hearing concluded on March 10, 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 originally convened on March 10, 2005 on a timely appeal filed November 24, 2004.

It should be noted here that any benefits under the Title XIX MR/DD Waiver Program have been denied pending the results of this hearing. It should also be noted that the hearing was held in Charleston, WV at claimant's request.

All persons giving testimony were placed under oath.

II. PROGRAM PURPOSE

The program entitled Title XIX MR/DD Waiver Program is set up cooperatively between the Federal and State Government and administered by the West Virginia Department of Health and Human Resources.

The MR/DD Waiver Program serves individuals who are eligible to receive services in an Intermediate Care Facility for Individuals with Mental Retardation and Related Conditions (ICF/MR). The MR/DD Waiver Program provides services in homes and local communities instead of ICFs/MR.

III. PARTICIPANTS

1. _____, Claimant's mother.
2. _____, Claimant's father.
3. Susan Hall, Program Manager, BHHF
4. Linda Workman, Psychologist Consultant, BMS.

Presiding at the hearing was Thomas M. Smith, State Hearing Officer and a member of the State Board of Review.

V. QUESTION TO BE DECIDED

The question to be decided is whether the claimant (_____) meets the medical eligibility requirements for the Title XIX MR/DD Waiver Program.

V. APPLICABLE POLICY

Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, June 1, 2001.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

- Exhibit #1 Copy of denial letter dated 11-9-04.
- " #2 Copy of Annual Medical Evaluation 9-2-04 (4 pages).
 - " #3 Copy of Psychological Evaluation 8-25-04 & 8-26-04 (5 pages).
 - " #4 Copy of Vineland ABS Scales 8-13-04.
 - " #5 Copy of Application Packet Cover Sheet.
 - " #6 Copy of Needs Summary for ICF/MR Waiver.
 - " #7 Copy of letter from _____ 9-1-04.
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- " #8 Copy of Participant Monitoring Status Report 8-31-04.
 - " #9 Copy of Social History 8-31-04 (3 pages).
 - " #10 Copy of IPP8-31-04 (9 pages).
 - " #11 Copy of Cost Estimate Worksheet 8-31-04.
 - " #12 Copy of Informed Consent 8-13-04 (2 pages).
 - " #13 Copy of IEP 5-21-04 (10 pages).
 - " #14 Copy of ABS Scale 3-1-05 (2 pages).
 - " #15 Copy of letter from _____ revising ABS scores (4 pages).

- Exhibit #C1-1 Copy of diagnostic evaluations (Psychology, Communication, and Communication Addendum reports) 3-24-04 (10 (pages)).
- " #C1-2 Copy of statement from _____ 2-14-05 (2 pages).
- " #C1-3 Copy of Professional Therapy Services, Inc. Progress Report (3 pages).
- " #C1-4 Copy of claimant's written statement 3-10-05.

VII. FINDINGS OF FACT

1. The claimant's packet was denied for medical eligibility under the Title XIX MR/DD Waiver Services Program with notification sent on 11-9-04.

2. Testimony from Ms. Hall indicated that in order to meet medical eligibility for the Title XIX MR/DD Waiver Services Program, the packet submitted for the individual must show that the applicant has been diagnosed with Mental Retardation (MR) or a related condition which manifested itself prior to age 22, that he requires ICF/MR level of care, and that he has substantial deficits in at least three (3) major life areas including self-care, learning, mobility, capacity for independent living, expressive and/or receptive language, self-direction, and economic self-sufficiency.

3. Ms. Workman testified the packet showed that the claimant did not have an eligible diagnosis as Asperger's Syndrome does not meet the DSM IV criteria for a related condition as there cannot be substantial limitations in three (3) major life areas, that Asperger's Syndrome does not include a language problem other than social conversation and that there are no intelligence deficits, that physical examination gave no diagnosis (Exhibit #2) and stated there were no medications or physical problems, that the claimant was ambulatory, that he was not toilet trained, that it gave mental analysis as developmental delays, behavioral problems, feeding difficulties, and sensory disturbance, that the DD-2a did recommend ICF/MR level of care, that the Psychological Evaluation (Exhibit #3) at 4 years and 5 months showed no psychomotor problems, that there were no self-help needs, that no problems were noted with language, that no intelligence testing was completed, that Asperger's Disorder was the Axis I diagnosis, that there was no diagnosis in Axis II where MR would be, that ICF/MR care was recommended, that ICF/MR level of care would be indicated with ABS scores of 3 standard deviation below mean and 55 or 50 or lower, that the ABS scores were invalid (Exhibit #4), that a letter from The Arc (Exhibit #15) was received with a new score summary but the scores were unusable, that with ABS scores, they are looking for under 1% and only Independent Functioning was scored under 1%, that the claimant did not meet the criteria under self-care as he can feed and dress himself even though independent functioning was his weakest area, that there was no deficit in the area of language, that there was no deficit in the area of mobility, that there was no deficit in the area of self-direction as the claimant does things and is very active, that there was no substantial deficit in the area of learning as the IEP showed that he could do age appropriate things, that the other two (2) areas are not really applicable to children (capacity for independent living and economic self-sufficiency), that they were unable to find the claimant medically eligible as he had no eligible diagnosis and did not have substantial deficits in three (3) major life areas.

4. Mr. _____ testified that he thinks the system is set up to eliminate and that it is a money issue, that they went to _____ and relied on them and the report was scored in error, that no evaluation was done and it was not fair, that there were 9 categories on the ABS scores and _____ was in the bottom 2% in 1/3 of them, that the decision was based on information that was not done correctly, that not all information was received, that a social worker was used who was never talked to, that _____ was a joke, that when he reads the MR/DD Waiver

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Program Manual, it looks like it is a match for his son, that he cannot tie his shoes and cannot write his name, and that they are trying to help him now so that he can grow and develop into a normal person later.

5. Mrs. _____ testified that her son can walk and get up and down steps, that they are trying to get him help now so that he can later be economically self-sufficient.

6. It should be noted that Ms. Workman reviewed the additional information provided on behalf of the claimant during the hearing but testified that nothing in the documents changed the original decision to deny medical eligibility.

7. Medical eligibility for the Title XIX MR/DD Waiver Services Program is determined by an evaluation of the documentation provided (Exhibits #2 through #15) and any additional documentation provided at the hearing (Exhibits #C1-1 through #C1-4). The documentation provided in the packet (Exhibits #2 through #15) did not show that the claimant had substantial deficits in three (3) or more major life areas. In addition, the documentation provided on behalf of the claimant during the hearing was considered by the State Hearing Officer (even though it was not provided by the February 24, 2005 cutoff date for evidence as noted on the appointment letter sent January 25, 2005). Exhibit #C1-1 contained a Psychology Evaluation which showed no scores under 1% or under the 50-55 score for moderate to profound MR. The Communication Evaluation showed a language delay but was inconsistent with other documentation. The State Hearing Officer find that the claimant does not have an eligible diagnosis and that he does not meet the criteria for a substantial deficit in the areas of Self-Care, Learning, Mobility, Receptive and/or Expressive Language, or Self-Direction and that the areas of Capacity for Independent Living and Economic Self-Sufficiency cannot be determined at this time.

CONCLUSIONS OF LAW

1. Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, June 1, 2001 Introduction states, in part:

"The Medicaid Home and Community-Based MR/DD Waiver (authorized under Title XIX 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). Th 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.....

West Virginia's MR/DD Waiver Program provides individuals who require ICF/MR level of care, and who are otherwise eligible for participation in the program, to receive certain services in a home and/or community-based setting for the purpose of attaining independence, personal growth, and community inclusion. West Virginia supports an individual's freedom of choice of providers for MR/DD Waiver Program services.

ELIGIBILITY

Medical eligibility for this program is determined at the state level by the Bureau for Medical Services (BMS) and the Officer of Behavioral Health Services (OBHS). To be programmatically (medically) eligible, an individual must have **mental retardation or a related condition which requires intensity of training and support and that is received in an ICF/MR setting**. HCFA defines this as a need for "active treatment". The medical eligibility determination is based on assessments performed by a physician, a licensed psychologist and a licenses social worker. **All persons who are certified eligible to be in an ICF/MR setting are eligible to participate in the MR/DD Waiver Program."**

2. Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, June 1, 2001, Chapter I states, in part:

I. LEVEL OF CARE CRITERIA FOR MEDICAL ELIGIBILITY

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A. In order to be eligible for the Title XIX MR/DD Home and 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).

Definition

An Intermediate Care Facility provides services in an institutional setting for persons with mental retardation or related conditions. The primary purpose of the institution is to provide health and rehabilitative services. The institution provides services to individuals who are in need of and who are receiving active treatment.

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. Tubercous 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 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

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."

II. CRITERIA FOR FINANCIAL ELIGIBILITY

A. INCOME

1. The individual's monthly income may **not** exceed 300% of the current maximum Supplemental Security Income (SSI) monthly payment.....

B. ASSETS

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1. An individual's assets may **not** exceed \$2,000 in order to be Medicaid eligible for the MR/DD Waiver services (**excluding residence and furnishings**).....

C. APPLICATION

1. The application for financial eligibility is completed at the county DHHR office by the applicant, a family member, or legal representative.

2. It is the responsibility of the Service Coordinator to ensure the application for financial eligibility is completed at the county DHHR office.....

III. EFFECTIVE DATES OF SERVICE

A. The initial effective date of the Medical Card for an applicant who has not previously acquired one will be the latest of the following two (2) dates:

1. The participant's application date for financial eligibility at the county DHHR office, **or**

2. The date of the psychological evaluation (DD-3) which is included as part of the full application packet."

3. Title XIX MR/DD Home & Community-Based Waiver Program Revised Operations Manual, June 1, 2001, Chapter II, Sections I and II state, in part:

"I. APPLICATION PROCESS

A. Where can the application receive an "Application (DD-14) information Packet"?

1. Local Behavioral Health Centers
2. Local/County Department of Health and Human Resources (DHHR) Office
3. State MR/DD Waiver Office

B. The contents of the "Application Information Packet" include

1. An **Application** (DD-14) form;
2. Instructions for completing the application (DD-14);
3. The Statement of Rights (which includes the Notice of Decision form and the Request for Hearing form);
4. Brochure for the MR/DD Waiver Program; and
5. Reference Guide to West Virginia Service Coordination Agencies.

C. What is the difference between an Application and a Statement of Interest?

1. Persons can apply for MR/DD Waiver services or submit a "Statement of Interest" using a single form: the Application (DD-14) form. The State MR/DD Waiver Program combined these into one form to simplify the process. The only difference between an Application and Statement of Interest is when the applicant requires MR/DD Waiver Program Services. There are two (2) distinct time frames from which the applicant may choose between on the Application (DD-14).

a. If the applicant requests an **Application** (DD-14) for MR/DD Waiver Program Services, this indicates the individual requires services in 0-90 days.

b. If the applicant requests a "**Statement of Interest**" (DD-14) for MR/DD Waiver Program services, this indicates the individual requires services in 91 days or greater.

2. The Application (DD-14) is a one page form which has two (2) duplicate copies. The original "white copy" is for the State MR/DD Waiver office, the "yellow copy" is for the applicant and the "pink copy" is for the selected

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Service Coordination agency.

D. What is the process for applicants who require MR/DD Waiver Program services in 0-90 days?

All applicants who require MR/DD Waiver Program services within 0-90 days have a right to a full eligibility determination within 90 days.

1. The applicant receives an Application (DD-14) Information Packet at one of the following locations:

- a. Local Behavioral Health Centers;
- b. Local/County Department of Health and Human Resources Office; or
- c. State MR/DD Waiver office.

2. The applicant and/or their legal representative are to fully complete the application. **If assistance is needed to complete the application form, the applicant and/or legal representative may receive assistance at no cost from any of the three (3) location sites.**

3. The Application must be fully completed with a Service Coordination Agency selected by the applicant and/or legal representative to ensure processing without delay.

4. The applicant and/or legal representative will submit the completed Application to one of the above-mentioned locations (1a - 1c).

5. **If the Application is submitted to the local/county Department of Health and Human Resources office, there are four (4) responsibilities of that local/county DHHR office:**

a. Entering the date the Application was received on the appropriate space provided at the bottom of the form;

b. Providing the applicant and/or legal representative with the "yellow" copy of the Application for the applicant's records on the day the application is submitted;

c. Sending the original "white" copy to the State MR/DD Waiver office; **and**

d. Sending the "pink" copy to the selected Service Coordination agency within one (1) working day once the application is submitted.

6. If the application is submitted to a local behavioral health center, there are four (4) responsibilities of the local behavioral health center:

a. Entering the date the Application was received on the appropriate space provided at the bottom of the form;

b. Providing the applicant and/or legal representative with the "yellow" copy of the application for the applicant's records on the day the application is submitted;

c. Sending the "white" original to the State MR/DD Waiver office within one (1) working day once the application is submitted; **and**

d. Sending or maintaining the "pink" copy of the completed Application. If the local behavioral health center was not chosen as the Service Coordination agency, they are responsible for sending the "pink" copy of the application to the selected Service Coordination agency within one (1) working day once the application is submitted.

7. Once the State MR/DD Waiver office receives the Application, they will verify that the selected Service Coordination agency has received a copy of the Application.

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8. Once the selected Service Coordination agency has received the completed Application, they will complete the full application packet. The full application packet must be completed and submitted to the State MR/DD Waiver Office within 45 days of receipt of the completed application.

9. Once the State MR/DD Waiver office receives the full application packet from the selected Service Coordination agency, the State MR/DD Waiver office will make a final eligibility determination within 45 days.

10. If an allocation is immediately available, the eligible applicant will be placed on the MR/DD Wavier Program. If an allocation is not available, the applicant will be placed on the "wait list", which is maintained by the State MR/DD Waiver office. The eligible applicant shall not be on a "wait list" longer than 90 days following the final eligibility determination.....

II. DUE PROCESS RIGHTS

Important Information

The Statement of Rights is available at the State MR/DD Waiver office, local behavioral health agencies, and local Department of Health & Human Resources offices. **The Statement of Rights** is a detailed description of your right to apply for MR/DD Waiver services, to receive a timely response, and to be informed of your appeal rights. This document is included in the "Application Information Packet". **Appendix D** contains a copy of the **Statement of Rights**. **The Statement of Rights** was developed pursuant to the Benjamin H. vs. Secretary Joan Ohl class action suit.

A. The following outlines the due process rights which are entitled to all applicants under the MR/DD Waiver Program.

1. If an applicant is denied by the State MR/DD Waiver office, a "Notice of Decision" and a "Request for Hearing" form will be issued to the applicant. The decision/denial may be appealed through the fair hearing process.
2. If the MR/DD Waiver services are terminated or reduced by the State, the individual will receive a "Notice of Decision" and a "Request for Hearing" form. The termination and/or reduction of services may be appealed through the fair hearing process.
3. If MR/DD Waiver services are delayed by the State, the applicant may request a fair hearing.
4. Ninety (90) days shall be afforded to request a hearing after a "Notice of Decision" has been received. Any applicant, recipient, or authorized representative may request a fair hearing and must do so either by a written request or by using the "Request for Hearing" form.
5. If services are terminated by the State, they may continue until the hearing is held. If an applicant/participant wishes to appeal a decision, they must submit the request for a hearing or pre-hearing conference within 13 days of the date of the "Notice of Decision" to continue to receive services in the interim.
6. Any applicant who requests a fair hearing shall be entitled to final administrative action within ninety (90) days of the date of the request for hearing, unless the applicant waives his or her request for a final administrative action within ninety (90) days.
7. If the applicant is denied MR/DD Waiver Program services, the applicant shall have the right to a second medical examination at the expense of the West Virginia Department of Health and Human Resources.
8. The applicant shall have the right to access their file, and copies shall be provided free of charge."

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VIII. DECISION

Based upon the evidence and testimony presented, I must uphold the action of the Department to determine that the claimant does not meet the medical eligibility criteria for the Title XIX MR/DD Waiver Services Program. The evidence and testimony presented showed that the claimant did not have an eligible diagnosis for the Title XIX MR/DD Waiver Services Program and that he did not have substantial deficits in three (3) or more major life areas. While the claimant does have limitations in certain areas, he does not have substantial limitations in at least three (3) areas of major life activities, including the areas of self-care, learning, mobility, receptive and/or expressive language, and self-direction. The claimant is too young to evaluate under the areas of capacity for independent living and economic self-sufficiency. Since the State Hearing Officer finds that the documentation does not show that the claimant has substantial deficits in three (3) or more areas of major life activities, the action to deny medical eligibility for the MR/DD Waiver Services Program must be being upheld.

IX. RIGHT OF APPEAL

See Attachment.

X. ATTACHMENTS

The Claimant's Recourse to Hearing Decision.

Form IG-BR-29.

