



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 30, 2005

Dear Mr. [redacted]:

Attached is a copy of the findings of fact and conclusions of law on your hearing held November 28, 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 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 and benefit levels for the Title XIX MR/DD Waiver Services Program are determined based on current regulations. One of these regulations is the individual must have both a diagnosis of mental retardation and/or a related condition and require a level of care and services provided in an ICF/MR facility (Chapter 500 of Title XIX MR/DD Home and Community Based Waiver Program Revised Operations Manual, 11-1-04).

The information which was submitted at the hearing revealed that Brannon meets the medical criteria to be eligible for the Title XIX MR/DD Waiver 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 Title XIX MR/DD Waiver Services Program.

Sincerely,

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

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

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

**Claimant,**

v.

**Action Number: 05-BOR-6168**

**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 28, 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 November 28, 2005 on a timely appeal, filed July 13, 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 hearing was originally scheduled for October 12, 2005 but was rescheduled at claimant's request.

**II. PROGRAM PURPOSE:**

The Program entitled Title XIX MR/DD Wavier Services is set up cooperatively between the Federal and State governments and administered by the West Virginia Department of Health & Human Resources.

Under Section 2176 of the Omnibus Budget Reconciliation Act of 1981, states were allowed to request a waiver. 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.

**III. PARTICIPANTS:**



1. [REDACTED], Claimant's father.
2. [REDACTED], Claimant's mother.
3. Susan Hall, Program Manager, BHHF (participating by speaker phone).
4. Linda Workman, Psychologist Consultant, BMS (participating by 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 Title XIX MR/DD Waiver Services Program.

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

Title XIX MR/DD Home and Community Based Waiver Program Revised Operations Manual  
November 1, 2004  
Common Chapters Manual Section 780 D.

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

##### **Department's Exhibits:**

- D-1 Copy of denial notification letter dated 6-28-05.
- D-2 Copy of regulations from Chapter 500 MR/DD Waiver Program (10 pages).
- D-3 Copy of Application Packet Cover Sheet (4 pages).
- D-4 Copy of Annual Medical Evaluation (4 pages).
- D-5 Copy of Psychological Evaluation 3-10-05 (12 pages).
- D-6 Copy of Initial Social History (7 pages).
- D-7 Copy of Individual Program Plan (11 pages).
- D-8 Copy of Individualized Education Program (20 pages).
- D-9 Copy of Cost Estimate Worksheet (2 pages).
- D-10 Copy of Informed Consent (2 pages).
- D-11 Copy of Educational Occupational Therapy Initial Evaluation (5 pages).
- D-12 Copy of Speech and Language Evaluation (7 pages).

##### **Claimant's Exhibits:**

- Cl-1 Copy denial notification letter dated 11-4-05.
- Cl-2 Copy of Individualized Education Program (15 pages).
- Cl-3 Copy of Psychological Evaluation Update 10-20-05 (5 pages).
- Cl-4 Copy of letter from [REDACTED] 10-14-05 (2 pages).
- Cl-5 Copy of letter from [REDACTED] 10-27-05 (2 pages).
- Cl-6 Copy of letter from [REDACTED] M. D. 10-12-05.



## **√II. FINDINGS OF FACT:**

- 1) The claimant was an initial applicant for the Title XIX MR/DD Waiver Service Program when an application packet was sent by Autism Services Center to the State MR/DD Program for consideration of medical eligibility (Exhibits #D-3 through #D-12).
- 2) The packet was reviewed and the claimant was denied for medical eligibility with notification issued on 6-28-05 (Exhibit #D-1).
- 3) The claimant's hearing request was received by the by the Board of Review on 7-13-05 and the hearing was convened on 11-28-05 after the claimant requested a continuance in order to provide a second Psychological Evaluation which was provided to the MR/DD Waiver Office and was reviewed with a decision issued on 11-4-05 denying medical eligibility for the Title XIX MR/DD Waiver Program.
- 4) Testimony from Ms. Hall 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, that the seven (7) major life areas consist of Self-care, Receptive or Expressive Language, Learning, Mobility, Self-direction, Capacity for Independent Living, and Economic Self-sufficiency.
- 5) Testimony from Ms. Workman indicated that the claimant had a related condition (Pervasive Developmental Disorder-NOS) but it was not severe enough to require ICF/MR level of care, that the Annual Medical Evaluation (DD-2 Exhibit #D-4) showed no problems related to neurological examination, that he was incontinent and not toilet trained, that the Psychological Evaluation (DD-3) 3-10-05 (Exhibit #D-5) showed ABS scores in self-care of 4 (Standard) and 82 (Vineland), that learning was not assessed but he could play with numbers and letter games, that mobility was not a problem with scores of 4 (Standard) and 79 (Vineland), that capacity for independent living showed leisure skills and community access and a personal self-sufficiency score of 84 on the Vineland, that he had an active lifestyle and a standard score of 3 in Self-direction, that economic self-sufficiency is difficult to evaluate for a child but pre-vocational score was 11 (standard), that they are looking for standard scores of 1 and Vineland scores of 55 to meet the medical criteria for the MR/DD Program, that substantial deficits did not exist in three (3) of the seven (7) major life areas, that additional information was received including a Psychological Evaluation dated 10-20-05 (Exhibit #C1-3) but the scores were inconsistent with the other documentation, that the new Psychological showed a score of 46 in Communication compared to the score of 79 on the previous Psychological, that Daily Living was 48 compared to 82, Socialization was 45 compared to 75, Composite was 41 compared to 81, Motor Skills was 40 compared to an average score on the previous Psychological, that the new Psychological could not be reconciled with the previous one, that they requested a new IEP and Psychoeducational assessment, that the IEP was received and was not consistent with the new Psychological, that he is independent with toileting, participates in activities, that the score in Motor Skills seems particularly inconsistent, that there is no substantial deficit in learning, that he has an extensive vocabulary but has an articulation problem which does not mean he has substantial deficits in receptive or expressive communication, that he has problems with language and socialization but scores are not high enough to be substantial deficits, that the most recent Psychological diagnosed him with Autism but



Autism testing was not completed, that the active treatment checklist is more geared to adults, that she is still wrestling with the score of 40 in mobility, that he has deficits in only one (1) area and that is communication, that she does not dispute the diagnosis but he does not require active treatment.

- 6) Testimony from Mr. [REDACTED] showed that the first Psychological Evaluation was for school purposes, that [REDACTED] had just turned three (3) years old, that it was an update from three (3) previous ones in September and October, 2004, that the answers given by his wife were answers which reflected the good and not the bad, that the scoring was inflated because they did not want to admit to the severity of the problem, that the Psychological dated 10-20-05 shows that he is not able to take care of most personal needs, that he is not able to communicate basic needs and wants, that he is not able to learn new skills without aggressive and consistent training, that he is not able to demonstrate behavior appropriate to the time, situation, or place without direct supervision, that he demonstrates severe maladaptive behavior which places people in jeopardy, that he cannot make informed decisions without extreme difficulty, that he requires ICF/MR level of care, that both Psychologicals showed the same answers to these questions, that he bites his hands, that Autistic Disorder was diagnosed and current GAF was 19, that [REDACTED] Speech-Language Pathologist, stated in Exhibit #C1-4 that he has severe speech deficit, severe receptive language deficit, severe expressive language deficit, severe pragmatic deficit, that she sees [REDACTED] now four (4) days a week and he must be strapped into a highchair to maintain attention, that he engages in biting and scratching himself and a Chewy Tube is used to prevent this, that the letters from Ms. [REDACTED] and Ms. [REDACTED] (Exhibit #C1-5) are more in sync with [REDACTED]'s actual condition and the more recent documentation should be used, that he meets the diagnostic criteria with the diagnosis of Autism, that he does require ICF/MR level of care, that he meets the criteria in six (6) of the seven (7) areas, that in self-care, he is total assist with ADL's, with dressing, grooming, and toileting, that he can put on shoes but does not put them on the right feet, that he has no safety awareness and had a score of 48 on the latest Psychological, that in receptive/expressive language, he uses 2 and 3 word phrases and the language evaluation stated that he had severe deficits in receptive-expressive language and he had a score of 48, that in learning, the letter from Ms. [REDACTED] showed that he requires intensive intervention and the Psychological Evaluation 10-20-05 states that he is not able to learn new skills without intensive training, that he has severe learning deficits since he has to be strapped into a high chair to maintain attention, that in self-direction, he has no fear of danger, that he must be supervised at all times, that he is at risk of running off, that in capacity for independent living, he has no interaction with others and the same things in self-care and self-direction apply, that he had a score of 45 in Socialization, that in economic self-sufficiency, his limitations would preclude any employment in the future, and that he was recently approved for the CDCSP Program with basically the same criteria.
- 7) Mrs. [REDACTED] testified that [REDACTED] takes prompting to do everything, that he likes the routine and consistent things, that he is now 4 and ½ years old and darts off and does not realize danger, that he tries to get away and run off.
- 8) Title XIX MR/DD Home and Community Based Waiver Program Revised Operations Manual, Chapter 500, October 1, 2003 states, in part:

## **“Medical Eligibility Criteria**

BMS and OBHS determine the medical eligibility for an applicant in the MR/DD Waiver Program. In order to be eligible and to receive MR/DD Waiver Program Services, an applicant must meet the following medical eligibility criteria:

- \* Have a diagnosis of mental retardation and/or a related condition
- \* Require the level of care and services provided in an ICF/MR (Intermediate Care Facility for the Mentally Retarded) as evidenced by required evaluations and corroborated by narrative descriptions of functioning and reported history. An ICF/MR provides services in an institutional setting for persons with mental retardation or related condition. An ICF/MR facility provides 24 hour supervision, training, and supports.

OBHS and BMS determine the level of care based on the Annual Medical Evaluation (DD-2A), Psychological Evaluation (DD-3), and Social History (DD-4) Evaluation, and other documents as requested.

The evaluations must demonstrate that the applicant has a diagnosis of mental retardation which must be severe and chronic, and/or a related developmental condition, which constitutes a severe and chronic disability. For this program, individuals must meet the diagnostic criteria for medical eligibility.

### **Medical Eligibility Criteria: Diagnosis**

#### **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

\* Tubercous Sclerosis

Additionally, mental retardation and/or related condition 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).

- 9) 42 CFR 435.1009 states, in part:

"Active Treatment in intermediate care facilities for the mentally retarded means treatment that meets the requirements specified in the standard concerning active treatment for intermediate care facilities for persons with mental retardation under 483.440(a) of this subchapter.....

Institution for the mentally retarded or persons with related conditions means an institution (or distinct part of an institution) that--

(a) Is primarily for the diagnosis, treatment, or rehabilitation of the mentally retarded or persons with related conditions; and

(b) Provides, in a protected residential setting, ongoing evaluation, planning, 24-hour supervision, coordination, and integration of health or rehabilitative services to help each individual function at his greatest ability.....

Persons with related conditions means individuals who have a severe, chronic disability that meets all of the following conditions:

(a) It is attributable to--

(1) Cerebral palsy or epilepsy; or

(2) Any other condition, other than mental illness, found to be closely related to mental retardation because this condition results in impairment of general intellectual functioning of adaptive behavior similar to that of mentally retarded persons, and requires treatment or services similar to those required for these persons.

(b) It is manifested before the person reaches age 22.

(c) It is likely to continue indefinitely.

(d) It results in substantial functional limitations in three or more of the following areas of major life activity:

(1) Self-care.

(2) Understanding and use of language.

(3) Learning.

(4) Mobility.

(5) Self-direction.

(6) Capacity for independent living."

- 10) 42 CFR 483.440(a) states, in part:



"(a) Standard: Active treatment. (1) Each client must receive a continuous active treatment program, which includes aggressive, consistent implementation of a program of specialized and generic training, treatment, health services and related services described in this subpart, that is directed toward--

- (i) The acquisition of the behaviors necessary for the client to function with as much self determination and independence as possible; and
- (ii) The prevention or deceleration of regression or loss of current optimal functional status.

(2) Active treatment does not include services to maintain generally independent clients who are able to function with little supervision or in the absence of a continuous active treatment program."

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

"D. 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 UPHOLD

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

- 12) The areas of dispute involve whether the claimant meets the criteria of functionality including substantial limitations in the daily living areas of self-care, receptive or expressive language (communication), learning (functional academics), self-direction, capacity for independent living, and economic self-sufficiency. The Department determined, based on the initial documentation (Exhibits #D-3 through #D-12) that the claimant did not meet the criteria for substantial deficits in any of the areas of daily living although he was close in the area of receptive/expressive language. The Department contended that the additional documentation (the Psychological Evaluation completed 10-20-05 (Exhibit #C1-3)) conflicted with the previous Psychological Evaluations and other documentation and was questionable in the ABS scores, in particular in the area of mobility. The Psychological Evaluation completed 3-10-05 (Exhibit #D-5) which was an update of previous evaluations conducted on 9-13-04, 9-30-04, and 10-7-04, were conducted when the claimant was three (3) years old and was based on information provided primarily by Mrs. [redacted] while the Psychological Evaluation completed on 10-20-05 was conducted when the claimant was 4 and ½ years old. The State Hearing Officer agrees with Mr. [redacted] argument that the more recent

documentation should be used as the child is older and the parents have gained more experience in determining his needs and being able to explain more thoroughly to the evaluator the information which is needed to arrive at an appropriate and accurate evaluation. While the ABS score on mobility is puzzling, considering that there is no evidence of a mobility deficit, the State Hearing Officer finds that the Psychological Evaluation conducted on 10-20-05 and the documentation from Ms. [REDACTED] and Ms. [REDACTED] clearly substantiate that the claimant has substantial deficits in the areas of self-care, receptive-expressive language, and self-direction. 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 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, and in the area of receptive-expressive language based on the score of 46 and Ms. [REDACTED] letter (Exhibit #C1-4 which clearly states that the claimant has severe deficits in expressive and receptive language. 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 Title XIX MR/DD Waiver Manual Eligibility Criteria require that the applicant have a diagnosis of MR or a related condition, that it be manifested prior to age 22, that it is likely to continue indefinitely, that it substantially limits functioning in three (3) or more major life areas, and that active treatment is required in an ICF/MR facility. The claimant has an eligible diagnosis of PDD-NOS and Autism, the condition manifested prior to age 22, the condition is likely to continue, the condition substantially limits functioning in three (3) major life areas, including self-care, receptive and expressive language, and self-direction, and the claimant requires ICF/MR level of care. The claimant meets the medical criteria for the Title XIX MR/DD Waiver Services 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 Title XIX MR/DD Waiver Services Program.

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

See Attachment

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

The Claimant's Recourse to Hearing Decision

Form IG-BR-29



**ENTERED this 30th Day of November, 2005**

A handwritten signature in dark ink, appearing to read "Thomas M. Smith", written over a horizontal line.

**Thomas M. Smith  
State Hearing Officer**