



**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

October 19, 2005

Dear Mr.____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held October 17, 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 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 and benefit levels for the Title XIX MR/DD Home and Community Based Waiver 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 the 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 you do not meet the medical criteria to be eligible for the Title XIX MR/DD Waiver Services Program.

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

Sincerely,

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

cc: Erika H. Young, Chairman, Board of Review
Susan Hall, BHMF
Linda Workman, BMS

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

____,

Claimant,

v.

Action Number: _____

**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 October 17, 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 October 17, 2005 on a timely appeal, filed July 19, 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 Department's representatives testified by speaker phone from Charleston, WV on agreement of claimant.

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. _____, Claimant's mother.
2. _____, Claimant's father.
3. Susan Hall, Program Coordinator, BHHF (participating by speaker phone).
4. Linda Workman, Psychologist Consultant, BMS (participating by speaker 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.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 Copy of notification letter dated 5-11-05.
- D-2 Copy of Chapter 500 regulations (10 pages).
- D-3 Copy of MR/DD Waiver Application Packet Cover Sheet (3 pages).
- D-4 Copy of Annual Medical Evaluation 1-7-05 (4 pages).
- D-5 Copy of Psychological Evaluation 2-27-05 (5 pages).
- D-6 Copy of Initial Social History (3 pages).
- D-7 Copy of Individual Program Plan (8 pages).
- D-8 Copy of Cost Estimate Worksheet.
- D-9 Copy of Informed Consent (2 pages).

Claimant's Exhibits:

- CI-1 Copy of CDCSP hearing decision issued 5-18-05 (9 pages)
- CI-2 Copy of Psychological Evaluation 10-9-04 (5 pages).
- CI-3 Copy of Occupational Therapy Assessment (4 pages).
- CI-4 Copy of Individualized Education Program 6-3-05 (10 pages).
- CI-5 Copy of Careplan for Anaphylaxis.
- CI-6 Copy of Careplan for Asthma (2 pages).
- CI-7 Copy of In School Management for Asthma.
- CI-8 Copy of Classroom Observation Report.

VII. FINDINGS OF FACT:

- 1) The claimant was an initial applicant for the Title XIX MR/DD Waiver Services Program when an application packet was sent by [REDACTED] to the MR/DD Waiver Program on 3-25-05 for consideration of medical eligibility (Exhibits #D-3 through #D-9).
- 2) The packet was reviewed and the claimant was denied for medical eligibility with notification issued on 5-11-05 (Exhibit #D-1).
- 3) The claimant's hearing request was received by the Bureau for Medical Services (BMS) on 7-21-05 and by the Board of Review on 7-19-05 and the hearing was convened on 10-17-05.
- 4) Ms. Hall testified regarding the medical eligibility criteria listed in Chapter 500 (Exhibit #D-2).
- 5) Ms. Workman testified that the claimant met the diagnostic criteria of having a related condition (Autism) as evidenced by the diagnosis on the Psychological Evaluation (Exhibit #D-5) but the packet was denied as the claimant did not have substantial limitations in at least three (3) of the major life areas and the packet did not include an IEP, that the Annual Medical Evaluation (DD-2A) showed no physical problems, that the claimant is over alert and has difficulty sleeping, that he has delayed speech and poor motor planning and certifies the need for ICF/MR level of care, that the Psychological Evaluation (DD-3) was conducted when he was 3 years 2 months old and showed that he walks independently, that he has some fine motor skill deficits but does not meet a deficit in mobility, that he can use a spoon and is not toilet trained, that he has a delay in ability to communicate with others, that the Stanford-Benet Intelligence Scale showed a Verbal Reasoning score of 87 and Abstract/Visual Reasoning score of 94 and they are looking for scores which are three (3) standard deviations from the mean which would be 55 or lower, that the ABS scores are 68 in Communication, 58 in Daily Living Skills, 68 in Motor Skills, 56 in Adaptive Behavior Composite, and 52 in Socialization, that the score in Socialization is the only eligible score, that the Peabody Picture Vocabulary Test showed a score of 82 which is in the low average range, that he received a score of 46.5 out of 60 on the Childhood Autism Rating Scale which placed him in the Severely Autistic range, that the Axis I diagnosis is Autistic Disorder and the Psychologist recommended ICF/MR level of care, that the social history was completed at 3 years and 4 months and showed poor sleep, forms of aggression, that he has his own form of language, that he cannot button things or tie his shoes, that the IEP was reviewed and showed that he was interactive with adults, that he takes part in activities, can spell his name, matches colors, shapes and letters, that the documentation showed that the claimant did not meet the criteria for self-care as he had a score of 58 on the Vineland, that he did not meet the criteria for mobility as he had a score of 68, that he did not qualify in language as he had a score of 68 in Communication and 82 on Peabody and 87 on verbal on the Standard-Benet, that it is not known if there are deficits in learning yet due to his age, that he does not meet the criteria for self-direction as he is active and is able to maintain an active lifestyle, that capacity for independent living cannot be determined due to his age, that there is no way to predict economic self-sufficiency due to his age, and that he did not meet the criteria for the MR/DD Program.

- 6) Mrs.____ testified that her son has sensory integration disorder, that he had a CDCSP hearing in May, 2005, that he does not have expressive language to show his needs, that he has sensory issues which affect learning, self-help, and communication, that he uses one or two word phrases and has significant delays in communicating with others, that he requires assistance with self-help in all tasks of personal care, that he eats one meal a day and is not toilet trained, that he wipes poop on things and thinks it is funny, that he has psychomotor delays as he cannot pedal a riding toy, that he shuts down at times and has no recognition of others around him, that he has to keep a strict routine, that he has to pick up a rock before getting into a car, that he requires training in the areas of mobility, self-help, communication, and social skills, that the doors have to be kept deadbolted to keep him from leaving, that safety and well-being is a problem, that he does not understand danger, that the Classroom Observation Report (Exhibit #C1-8) shows that he did not follow one-step directions, that he has fine motor deficit, that gross motor is a strength, that weaknesses include adaptive behavior, fine motor and communication, that the IEP (Exhibit #C1-4) showed he needed to increase social skills, that goals included being able to play games, follow rules and demonstrate communication technique, transition and demonstrate self-control and appropriate behaviors, that matching colors, shapes and letters was an objective, that he attempts to string beads, complete peg boards and puzzles but cannot do independently, that he can walk independently but makes laps, that he needs help with all phases of self-care, that he prefers not to wear clothes, that feeding has decreased, that he is up three (3) times a night, that he has delays in communication, that he is out of control at times, that he is not responsive to his environment and tunes everyone out, that the social history showed that he cannot express himself on a regular basis, that short-term recall is not good, that a certain skill may not be seen again, that he sometimes takes his clothes off, that he brushes his hair and teeth very hard, that he cannot take a bath by himself, that he cannot express his wants, and that he is in Autism Pre-School.
- 7) Mr.____ testified that due to his wife having training in Special Education, they got early intervention for their son and that the seven (7) major life areas are abstract and could be taken and made worse or better.
- 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) 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, learning, mobility, self-direction, and capacity for independent living. Ms. Workman testified that the claimant's scores from the Stanford-Benet Intelligence Scale, ABS, and Peabody Picture Vocabulary Test and the documentation did not meet the criteria in any of the daily living areas. Under the Functionality criteria in Chapter 500 of the MR/DD Waiver Manual, substantial limitations are defined as 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. The ABS scores for the claimant were derived from non-MR normative population and showed only one (1) score which was three (3) standard deviations below the mean and that was in the area of socialization. While daily living skills and adaptive behavior composite were close to the 55 score (58 and 56 respectively), they were not eligible scores. The documentation showed that the claimant has deficits in self-care but the score of 58 in daily living does not meet the criteria for substantial limitations in self-care. The documentation showed that the claimant had limitations in expressive communication and scored a 68 in Communication on the ABS scores. Thus, while there are delays in expressive language, such delays do not meet the criteria for substantial limitation for the MR/DD Program. Due to the claimant's young age, it is unknown whether there are any deficits in learning (functional academics) but his ability to match colors and shapes does not indicate substantial deficits in learning. While the claimant has some fine motor skill deficits, the documentation showed that he does not have substantial limitations in the area of mobility. In the area of self-direction, the low ABS score of 58 in daily living skills and the testimony of Mrs. _____ regarding the safety issue and the documentation show that the claimant has substantial deficits in the area of self-direction and the State Hearing Officer finds that he meets the criteria for substantial limitations in that major life area. In the area of capacity for independent living, the claimant's socialization score of 52 is an eligible score but some of the other factors included in that category (including employment, safety, and community use) are not factors which can be given consideration due to the young age of the claimant. Therefore, it cannot be determined that the claimant meets the criteria for substantial deficit in the area of capacity for independent living. While the claimant does meet the criteria for limitations in the area of self-direction, he does not meet the severity level in any other major life area to qualify for substantial limitations and does not meet the criteria for medical eligibility for the Title XIX MR/DD Program.

VIII. CONCLUSIONS OF LAW:

- 1) Regulations require that a diagnosis of MR or related condition exist which must be severe and chronic and have been manifested prior to age 22 and is likely to continue. The claimant meets this criteria as he has a diagnosis of Autism which manifested prior to age 22 and is likely to continue.
- 2) Regulations require that substantial limitations in functioning must exist in three (3) or more of the major life areas. The claimant meets the criteria for substantial limitations in self-direction but does not meet the criteria for substantial limitations in the major life areas of self-care, receptive or expressive language, learning, mobility, or capacity for independent living.

IX. DECISION:

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

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this 19th Day of October, 2005.

Thomas M. Smith
State Hearing Officer