



**State of West Virginia**  
**DEPARTMENT OF HEALTH AND HUMAN RESOURCES**  
**Office of Inspector General**  
**Board of Review**  
**P.O. Box 1736**  
**Romney, WV 26757**

**Joe Manchin III**  
**Governor**

**Martha Yeager Walker**  
**Secretary**

August 23, 2006

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

Dear Mr. \_\_\_\_\_:

Attached is a copy of the findings of fact and conclusions of law on your son's hearing held August 17, 2006. Your hearing request was based on the Department of Health and Human Resources' action to deny eligibility for services under the Title XIX MR/DD Waiver Services 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 Home and Community-Based Waiver 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 a diagnosis of mental retardation and or related condition. A related condition would be any condition, other than mental illness, found to be closely related to mental retardation if this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons. The condition must be severe and chronic with concurrent substantial deficits that require the level of care and services provided in an Intermediate Care Facility for the Mentally Retarded (ICF/MR facility). (Chapter 500 of Title XIX MR/DD Home and Community Based Waiver Program Revised Operations Manual, November 2005).

The information, which was submitted at the hearing, did not substantiate that your son met 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,

Sharon K. Yoho  
State Hearing Officer  
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review  
Stephen Brady, BHMF  
Linda Workman, BMS

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

\_\_\_\_\_ by: \_\_\_\_\_,

**Claimant,**

**v.**

**Action Number: 06-BOR-1757**

**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 August 17, 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. This fair hearing was convened on August 17, 2006 on a timely appeal, filed April 28, 2006.

**II. PROGRAM PURPOSE:**

The program entitled MR/DD Home and Community-Based Wavier is 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.

West Virginia's MR/DD Waiver Program provides for individuals who require an 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.

### **III. PARTICIPANTS:**

Claimant's Witnesses:

\_\_\_\_\_, Claimant's father  
\_\_\_\_\_, Claimant's mother

Department's Witnesses:

Steve Brady, Bureau of Behavioral Health & Health Facilities (participating by speakerphone)  
Linda Workman, Psychologist Consultant, BMS (participating by speakerphone)

Presiding at the Hearing was Sharon K. Yoho, 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,  
Chapter 500 (November, 2005)  
The Code of Federal Regulations – 42 CFR 435.1009 and 42 CFR 483.440

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

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

- D-1 Annual Medical Evaluation dated January 25, 2005
- D-2 Psychological Evaluation dated February 1, 2006
- D-3 Social History dated January 30, 2006
- D-4 Individual Program Plan (IPP) dated April 11, 2005
- D-5 Letter from \_\_\_\_\_ dated December 5, 2005
- D-6 Records from \_\_\_\_\_ dated February 23, 2006
- D-7 Denial notice dated March 20, 2006
- D-8 Title XIX MR/DD Waiver Program Revised Manual Chapter 500

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

- C-1 Updated Annual Medical dated June 6, 2006
- C-2 Updated letter from \_\_\_\_\_ dated June 6, 2006
- C-3 Letter from Social Security Administration date July 1, 2006

## **VII. FINDINGS OF FACT:**

- 1) The parents of \_\_\_\_\_ submitted an application packet to the Bureau of Behavioral Health in March 2006 to determine if \_\_\_\_\_ would qualify for services under the Title XIX MR/DD Waiver Program. The Bureau of Behavioral Health reviewed the documents submitted and determined that based on the information made available to them that \_\_\_\_\_ did not meet the medical criteria for the program.
- 2) The Department sent a denial notice on March 20, 2006 advising that the application had been denied because \_\_\_\_\_ did not have the presence of substantial deficits in three or more of the six major life areas as defined for Waiver eligibility. In addition, the letter stated that the documentation did not confirm the presence of an eligible diagnosis of mental retardation or related condition.
- 3) At the time of the application, \_\_\_\_\_ was near five-years old. An Annual Medical Evaluation dated January 25, 2005 identified diagnosis of Attention Deficit Hyperactivity Disorder, Autism Spectrum Disorder and Developmental Language Disorder. A Psychological Evaluation dated February 1, 2006 lists Axis I diagnosis as Asperger's Disorder (which is in the Autism Spectrum), Attention Deficit/Hyperactive Disorder and Obsessive-Compulsive Disorder. His Axis II diagnosis was reported to be Borderline Intellectual Functioning.
- 4) The Annual Medical Evaluation notes that the child is ambulatory, not toilet trained, and that he can feed his self. It indicates that he needs total care for hygiene needs.
- 5) The Psychological Evaluation reports results from a Wechsler Pre-School Intelligence test of March 2005. \_\_\_\_\_ had scored a full scale IQ of 77 and notes that his scores place him in the Borderline (slow-learner) range of intellectual functioning. The Department looks for scores of 55 or below for the MR/DD Waiver program. The evaluation reports scores from a Wechsler Preschool and Primary Scale of Intelligence test. These score results were: Verbal IQ - 80, Performance IQ - 77, Full Scale IQ - 75. He also achieved standard scores of 99 for Reading, which is at pre-school level, and 72 for Math, which is at pre-school level. The Department looks for scores at 55 or below for the MR/DD program.
- 6) \_\_\_\_\_'s Adaptive Behavior Scores (ABS) were provided with the Psychological. His score in Independent Functioning was the only score that was close to the level looked at by the Department for eligibility. His score in this area was a standard score of 1. The Department looks for scores of <1 for eligibility purposes. \_\_\_\_\_'s score for Socialization was a score of 2, Language Development was a 3 and Self-Direction was a 3 all of which are within the rating of Very Poor along with the Independent Functioning score.
- 7) \_\_\_\_\_ does exhibit concerning behaviors such as rocking and banging his head. He exhibits severe temper outbursts, which he gets over quickly. His Pre-K teacher reported that his distractibility and hyperactivity made learning difficult.
- 8) The Psychological reports that \_\_\_\_\_ is toilet trained but has some accidents and needs assistance with using toilet tissue. He needs full assistance for dressing and

bathing. He has considerable spilling when eating and drinking. \_\_\_\_\_'s Social History (Exhibit D-3) reports \_\_\_\_\_ to be able to run without falling, hop, catch and throw a ball and to have effective use of all four extremities. It reports some maladaptive behaviors such as biting himself, pulling his hair, clawing his face hitting his head on wall, rocking and pulling his testicles. It also reports that he can make needs known.

- 9) The DSM IV Diagnostic Criteria Guide, under the heading "Asperger's Disorder states:

"Asperger's Disorder is not diagnosed if criteria are met for another Pervasive Developmental Disorder or for Schizophrenia (Criterion F). The essential features of Asperger's Disorder are severe and sustained impairment in social interaction (Criterion A) and the development of restricted, repetitive patterns of behavior, interests, and activities (Criterion B). The disturbance must cause clinically significant impairment in social, occupational, or other important areas of functioning (Criterion C). In contrast to Autistic Disorder, there are no clinically significant delays in language (Criterion D). In addition, there are no clinically significant delays in cognitive development or in the development of age-appropriate self-help skills, adaptive behavior (other than in social interaction) and curiosity about the environment in childhood (Criterion E)"

- 10) Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500, November 2005 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 support.

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**

- \* 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 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).

#### **11) 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 mean 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

12) 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.

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

- (1) Regulations require that a diagnosis of Mental Retardation or related condition exists which must be severe and chronic and have been manifested prior to age 22 and is likely to continue. \_\_\_\_\_ has not been diagnosed with Mental Retardation. He has however been diagnosed with Asperger's Disorder. It is not proven that Asperger's Disorder is associated with Mental Retardation. The DSM IV describes Asperger's Disorder to be a condition that for the most part produces symptoms of severe and



sustained impairment in social interaction. The Disorder is reported to produce no clinically significant delays in cognitive development, age-appropriate self-help skills or in adaptive behavior. The Department therefore, takes the position that Asperger's Disorder is not an eligible diagnosis due to its lack of corresponding cognitive deficiencies and lack of adaptive deficiencies.

- (2) Regulations require that along with a qualifying diagnosis substantial limitations in functioning must exist in three (3) or more of the six (6) major life areas. Testimony and evidence did not support that \_\_\_\_\_ has substantial limitations in three (3) of the major life areas. This child's Intelligence Scores and Adaptive Behavioral Scores indicate that had there been a qualifying diagnosis, the Department may have been able to justify an assessment for substantial limitations in the area of Self Care.
- (3) Regulations require that evaluations of the applicant must demonstrate a need for the same level of care and services that is provided in an ICF/MR facility. Evidence does not support the belief that \_\_\_\_\_ needs such level of services as is provided in an Institutional setting.

**IX. DECISION:**

It is the decision of the State Hearing Officer to **uphold** the action of the Department to deny services under 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 23rd Day of August, 2006.**

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**Sharon K. Yoho**  
**State Hearing Officer**