



**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

February 17, 2006

By: _____

Dear Mr. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held February 13, 2006. Your hearing request was based on the Department of Health and Human Resources' proposed action to discontinue 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, June 1, 2001).

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 discontinue services under 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
Susan Hall, BHHF
Linda Workman, BMS

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

_____ by: _____,

Claimant,

v.

Action Number: 05-BOR-6742

**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 February 13, 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 February 13, 2006 on a timely appeal, filed October 4, 2005.

II. PROGRAM PURPOSE:

The program entitled MR/DD Home and Community-Based Waiver 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 mother
[REDACTED]

Susan Hall, Program Manager, Bureau of Behavior Health (participating by phone)

Linda Workman, Psychologist Consultant, BMS (participating by phone)

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 (June 1, 2001)

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 MR/DD Waiver Services Manual Chapter 500, (June 1, 2001)
- D-2 Annual Medical Evaluation dated August 24, 2004
- D-3 Psychological Evaluation dated September 24, 2004
- D-4 Individualized Education Program dated March 10, 2005
- D-5 Notice of denial dated September 1, 2005

VII. FINDINGS OF FACT:

- 1) The Department processed a reevaluation in September of 2005 on Mr. _____'s MR/DD waiver case. This evaluation was to determine if Mr. _____ continues to qualify for services under the Title XIX MR/DD Waiver Services Program. The Bureau of Behavioral Health reviewed the documents submitted and determined that based on the information made available to them that Mr. _____ no longer met the medical criteria for the program.
- 2) The Department sent a denial notice on September 1, 2005 advising that, "Documentation submitted for re-certification review does not support the presence of an eligible diagnosis or the presence of substantial cognitive nor

adaptive deficits which result in the need for an ICF/MR institutional level of care”.

- 3) The Annual Medical Evaluation (DD-2A) of August 24, 2004 had originally listed diagnosis of Pervasive Development Disorder (PDD), Autism, ADHD and Asperger's Syndrome. On March 21, 2005, this DD-2A had PDD and Asperger's Syndrome marked out.
- 4) Psychologist, [REDACTED] in the September 2004 Psychological Update, identified Mr. [REDACTED]'s diagnosis as Asperger's Disorder, Attention Deficit/Hyperactivity Disorder by history, Obsessive-Compulsive Disorder and Mild Mental Retardation.
- 5) Dr. [REDACTED] notes that a diagnosis of Autistic Disorder had been given in a Comprehensive Evaluation of September 2003 and Mr. [REDACTED] scored at that time a full scale IQ of 70 on a WISC-III test. Dr. [REDACTED] also noted that an evaluation completed through the [REDACTED] Public Schools February 2001 yielded a full scale IQ of 76 on a WISC-III and the results of a 2001 Childhood Autism Rating Scale did not yield scores that fell in the Autistic range. Dr. [REDACTED] also referred to a 1998 Neurological Evaluation completed at [REDACTED] which reflected diagnostic impressions consistent with High Functioning Autism.
- 6) Ms. Workman testified that the DSM IV Diagnostic Criteria Guide states that, with Asperger's Disorder, “there are no clinically significant delays in cognitive development or in the development of age-appropriate self-help skills and adaptive behavior (other than in social interaction)”. She also testified that in the past it was common for a diagnosis of High Functioning Autism to be diagnosed when the actual condition was Asperger's Disorder.
- 7) The Annual Medical of August 24, 2004 reported Mr. [REDACTED] to be fully ambulatory, continent except for occasional nighttime problems and to be able to feed himself. It reported him to be independent in self-care. The physician reported Mr. [REDACTED] to require the level of care and services provided in an Intermediate Care Facility for Individuals with Mental Retardation and/or Related Conditions (ICFMR).
- 8) In the Psychological Evaluation completed on September 24, 2004, Psychologist [REDACTED] reports Mr. [REDACTED] to be fully ambulatory with adequate gross and fine motor skills. He reports him to be independent in basic self-care activities including eating and dressing. It reported him to use the toilet on his own and to require prompting to assure adequate bathing and hygiene. The Evaluation reports him to possess expressive, receptive and written language skills and that he is able to communicate his basic needs and wants.
- 9) Mr. [REDACTED]'s social interaction skills are reported to not be as developed as most other skills. The Psychological reports, “He engages in excessive perseveration. He strictly adheres to routines. [REDACTED]'s interaction with others

is often inappropriate. He invades others' personal space and has poor stranger awareness".

- 10) Mr. _____'s Adaptive Behavior Scores did not produce any standard scores at one (1) or below in the Part I Domain. His lowest score was a six (6) in Pre-vocational activity. He also had a score of eight (8) in Economic Activity.
- 11) Ms. Workman testified that had it been clear that Mr. _____ had a qualifying diagnosis, the Department would have identified only one substantial deficit in the area of Capacity for Independent Living. Self-Direction was addressed by the claimant's witnesses. Mr. _____ is reported to be obsessed with video games and will sit for hours playing video games if not directed towards something else. He scored a standard score of ten (10) in self-direction and the Psychological reports him to show interest in the activities of others and consideration for group activities.
- 12) The IEP notes that Mr. _____ is reading on the 4.2 Grade Equivalents. In math he knows place value, he can round numbers and compare numbers. He can add and subtract 3+ whole numbers. He needs to improve his application skills and decimal operations including money. The IEP re-evaluation determination plan reports the student to have a WISC-III intelligence in the low-average range. It reports his educational performance to be making good progress.
- 13) Mr. _____ attends 9th grade at [REDACTED] School. He was academically ready to move on to High School, but the school system and parent believed he was not socially prepared for such a change.
- 14) Eligibility Criteria for the MR/DD Waiver Program are outlined in Chapter 1 of the Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual. The level of care criteria for medical eligibility is listed in Section I within this chapter and reads as follows:
 - 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 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).

An Intermediate Care Facility is defined as one that provides services in an institutional setting for persons with mental retardation or related conditions. The primary purpose of the institution is to provide 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. 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 (DD-2A, DD-3, and DD-4)
- 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.

15) 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

16) 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. Mr. _____'s exact diagnosis remains questionable. He has however been diagnosed with Asperger's Disorder by a Psychologist. The physician, who completed the annual medical evaluation, first issued four (4) different diagnoses, and then was reported to have marked through two of them. An Autism diagnosis is questionable due to high IQ scores. Asperger's Disorder is known to have no clinically significant delays in cognitive development or in the development of age-appropriate self-help skills and adaptive behavior. The Department 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 major life areas. Testimony and evidence did not support that Mr. _____ has substantial limitations in three (3) of the major life areas. Had there been a qualifying diagnosis, the Department could have justified an assessment for one (1) substantial limitation. This would be in the area of Capacity for Independent Living, due to his impairments in social interactions.
- (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 Mr. _____ needs such level of services as is provided in an Institutional setting. Adaptive Behavior Scale scores and Intellectual/Cognitive scores do not support the need for such intensive care and services as is provided in an ICF/MR facility. Testimony and information included in the Annual Medical, Psychological and IEP do not support the need for ICF/MR level of care.

IX. DECISION:

It is the decision of the State Hearing Officer to uphold the action of the Department to discontinue 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 17th Day of February, 2006.

**Sharon K. Yoho
State Hearing Officer**