



**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

April 6, 2006

\_\_\_\_\_ for \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dear Ms. \_\_\_\_\_:

Attached is a copy of the findings of fact and conclusions of law on your hearing held March 29, 2006. 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, BHHF  
Richard Workman, BMS

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

\_\_\_\_\_,  
**Claimant,**

**v.**

**Action Number: 05-BOR-7095**

**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 April 5, 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 March 29, 2006 on a timely appeal filed December 9, 2005. It should be noted that the hearing was originally scheduled for February 10, 2006 but was rescheduled by the State Hearing Officer.

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's representative.

**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 & representative.
2. Susan Hall, Program Coordinator, BHHF (participating by speaker phone).
3. Richard 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 10-28-05.
- D-2 Copy of Annual Medical Evaluation 7-8-05 (4 pages).
- D-3 Copy of Initial Psychological Evaluation 7-20-05 & 7-25-05 (11 pages).
- D-4 Copy of Special Modified IEP Transportation Request 7-26-04.

(It should be noted that the remaining documents in the Department's packet were not entered as evidence in the hearing.)

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

- CI-1 Copy of letter from [REDACTED] M.D. 1-31-06.
- CI-2 Copy of letter from [REDACTED] special needs teacher.
- C-3 Copy of report from Dr. [REDACTED] 11-11-05 (3 pages).
- CI-4 Copy of discharge summary 12-13-05 (2 pages).
- CI-5 Copy of report from Dr. [REDACTED] 5-12-05 (3 pages).
- CI-6 Copy of MRI 6-22-05.
- CI-7 Copy of IEP 3-9-06 (28 pages).
- CI-8 Copy of previous IEP's (39 pages).
- CI-9 Copy of report from [REDACTED] 7-11-05 (2 pages).

### **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 submitted by [REDACTED] on 9-27-05 for consideration of medical eligibility (Exhibits #D-2 through #D-4).
- 2) The packet was reviewed and the claimant was denied for medical eligibility with notification issued on 10-28-05 which stated that documentation submitted for review does not support the presence of substantial adaptive deficits in three or more of the six major life areas identified for Title XIX MR/DD Waiver eligibility (Exhibit #D-1).
- 3) The claimant's hearing request was received by the Bureau for Medical Services (BMS) on 12-9-05, by the Board of Review on 12-21-05, and by the State Hearing Officer on 12-29-05 and the hearing was convened on 3-29-06.
- 4) Ms. Hall testified regarding the medical eligibility criteria listed in Chapter 500.
- 5) Annual Medical Evaluation (Exhibit #D-2) completed 7-8-05 indicates delayed speech, short attention span, delayed speech, that the claimant is ambulatory, needs some toilet training, feeds self, needs assistance with hygiene, has irrational behavior and needs close supervision, recommends speech, physical and occupational therapy, and gives a mental diagnosis of pervasive developmental traits.
- 6) Psychological Evaluation completed by [REDACTED] on 7-20-05 and 7-25-05 (Exhibit #D-3) gives an Axis I diagnosis of Pervasive Developmental Disorder, NOS and Axis II as Deferred, R/O Mental Retardation and recommends ICF/MR level of care. The report also gave ABS scores based on non-MR norms and showed only one (1) eligible score of less than 1% in the area of Independent Functioning. A score of 1% was given for Socialization and a score of 2% for Language Development but these were not eligible scores. A score of less than 1% was also assigned to Community Self-Sufficiency. A score of 5% was given for Self-Direction and 63% for Physical Development. The only eligible score in the six (6) major life areas was in Independent Functioning (Capacity for Independent Living) as the scores did not indicate substantial deficits mobility, self-care, self-direction, language, or learning (academics).
- 7) Report of Special/Modified E/IEP Data Transportation Request 7-26-04 lists Visually Impaired under special needs and does not mark verbal or non-verbal, ambulatory, mentally disabled, or medically fragile (Exhibit #D-4).
- 8) Testimony from Mr. Workman indicated that the claimant has no substantial deficits in the major life activities of self-care, receptive or expressive language, mobility, learning and self-direction. Mr. Workman testified that the claimant had an eligible score in capacity for independent living but did not have substantial deficits in at least three (3) major life areas and did not require ICF/MR level of care.
- 9) Testimony from Ms. \_\_\_\_\_ indicated that the claimant receives intensive therapy five (5) days a week, that he is not potty trained as he needs reminders, that he is dependent for bathing, that his language is mostly echolalic and is not able to respond to questions, that he can express his wants and needs, that he knows some sign language but 50 would be a stretch, that his language seems to be digressing, that he is careless when he walks, that he needs prompting with self-direction and gets agitated and then head-bangs, that he needs 24 hour care and is totally dependent, that he knows no danger

when crossing the road and around water and electric sockets, that he has an aide at school and needs constant care.

- 10) Ms. \_\_\_\_\_ provided a packet of documents (marked Exhibits #CI-1 through #CI-9) during the hearing and the State Hearing Officer forwarded a copy of the evidence to Ms. Hall and Mr. Workman to be reviewed prior to issuance of the hearing decision. Mr. Workman requested until 4-9-06 to review the documents and his request was granted. On 4-5-06, the State Hearing Officer received an e-mail from Ms. Hall indicating that while delays were noted, the additional documentation did not refute the ABS scores and did not support that substantial delays exist which would meet eligibility criteria. The State Hearing Officer proceeded with the hearing decision.
- 11) 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).

- 12) 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."

13) 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."

14) The areas of dispute involve whether the claimant meets the criteria of functionality (substantial limitations) in five (5) of the six (6) major life areas of self-care, receptive or expressive language, learning, mobility, and self-direction. The documentation clearly shows that the claimant has no substantial limitations in the areas of mobility and learning. In the area of receptive or expressive language, the documentation shows that the claimant has some deficits in expressive language but can express his wants and needs and is able to communicate and does not meet the criteria for a substantial deficit in the area of receptive or expressive language. In the area of self-care, the claimant requires assistance with toileting but is able to dress himself with some assistance and can feed himself and drink from a cup. The claimant does not meet the criteria for a substantial deficit in the major life area of self-care. In the area of self-direction, the claimant scored a 5% on the ABS scores which was an average score. The claimant does not meet the criteria for substantial deficits in the area of self-direction. The preponderance of the evidence and testimony show that the claimant does not meet the criteria for substantial deficits in five (5) of the six (6) major life areas.



## **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 has a diagnosis of Pervasive Developmental Disorder, NOS and 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 in order to show that an individual requires ICF/MR level of care. The claimant did not meet the criteria for substantial limitations in the major life areas of self-care, receptive or expressive language, learning, mobility, or self-direction. The claimant met the criteria for substantial limitations in the major life area of capacity for independent living. The claimant does not require ICF/MR level of care and does not meet the medical eligibility requirements for the Title XIX MR/DD Waiver Services Program.

## **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 Day of April 6, 2006.**

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**Thomas M. Smith**  
**State Hearing Officer**