



**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**

September 14, 2007

Dear _____,

Attached is a copy of the findings of fact and conclusions of law on your hearing held August 29, 2007. 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 you do not meet the medical criteria to be eligible for the Title XIX MR/DD Waiver Services Program as the documentation does not show that you have a chronic and severe condition and that you do not have substantial limitations in at least three (3) of the six (6) major life areas.

It is the decision of the State Hearing 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: Board of Review
Steve Brady, BHHF
Richard Workman, BMS
Alva Page, III, Dept.'s Attorney
[REDACTED]

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

Claimant,

v.

Action Number: 07-BOR-1435

**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 September 12, 2007 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 29, 2007 in the [REDACTED] County DHHR office with Department representatives participating by speaker phone on a timely appeal, filed May 21, 2007.

It should be noted here that the claimant's benefits have been denied pending a hearing decision.

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. _____
3. _____ Psychologist.
4. Steve Brady, Program Manager, BHHF (participating by speaker phone).
5. Richard Workman, Psychologist Consultant, BMS (participating by speaker phone).
6. Alva Page, III, Department's Attorney, (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
October 1, 2003
Common Chapters Manual Section 780 D.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 Copy of regulations from Chapter 500 (7 pages).
- D-2 Copy of ICF/MR Level of Care Evaluation (DD-2A) dated 3-23-07 (3 pages).
- D-3 Copy of Psychological Evaluation dated 3-30-07 (14 pages).
- D-4 Copy of Closing Argument of Respondent 9-10-07 (10 pages).

Claimant's Exhibits:

- CI-1 Copy of Memorandum in Support of Claimant 9-10-07 (23 pages).

(It should be noted that other documentation provided by the Department prior to the hearing was not entered into evidence by the Department's Attorney or contained duplicates of evidence entered and were marked as "Not Admitted".)

VII. 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 _____ on 4-5-07 to the state MR/DD Program for consideration of medical eligibility.
- 2) The packet was reviewed and the claimant was denied for medical eligibility with notification issued on 4-18-07 which stated that documentation is inconsistent with regard to the severity of Autism but overall does not support the presence of severe

Autism which is a requirement for diagnostic eligibility in the case of a related condition and documentation does not support the presence of substantial adaptive eligibility in three or more of the six major life areas and the psychologist has not indicated that the claimant requires an ICF/MR level of care.

- 3) The claimant's hearing request was received by the Bureau for Medical Services on 5-21-07, by the Board of Review on 6-5-07 and by the State Hearing Officer on 6-8-07 and the hearing was convened on 8-29-07.
- 4) Testimony from Department's Psychologist Consultant indicated that the DD-2A (Exhibit #D-2) and Psychological Evaluation (Exhibit #D-3) were reviewed, that Exhibit #D-2 was checked normal in all areas except for attention span and speech, that the claimant was marked as ambulatory and did not have substantial limitations in mobility, that Autism Spectrum Disorder was the diagnosis and ICF/MR level of care was recommended, that the Psychological Evaluation (Exhibit #D-3) showed that speech was delayed, that the claimant was healthy and walks smoothly, that physical aggression was a current area of concern, that the claimant was developing expressive vocabulary, that no substantial delays were noted in self-help, that the Childhood Rating Scale showed a score 34 which is in the moderate range of autism, that the GARS score of 78 showed possible range of autism spectrum disorder, that there was no diagnosis under Axis II, that the score of 1% in Independent Functioning was in the range but language score of 2% was not, that self-direction was 1%, that the Vineland scores showed 69% in Communication, 81% in Daily Living Skills, 74% in Socialization, 81% in Motor Skills, and a Composite score of 73%, that on the Score Profile, none of the dots fall three (3) standard deviations from the mean, that the Psychologist (Ms. [REDACTED]) recommended intense communication skills training but the remainder of the recommendations were typical for a three (3) year old, that Ms. [REDACTED] indicated that he would benefit from an ICF/MR setting but did not state that it was required, that the claimant's autism was determined not to be severe enough to cause substantial deficits, that he did not evaluate the claimant personally, and that the related condition must be chronic and severe.
- 5) Testimony from the evaluating Psychologist (Ms. [REDACTED]) indicated that she evaluated the claimant on 3-30-07, that he was having a meltdown at the time and was hitting and biting and shrieking loudly, that he can pick up a toothbrush and brush teeth but fights doing it, that he engages in self-injury and is aggressive and communicates inappropriately, that he knows words but does not use them in the correct manner, that he does not answer direct questions and has significant deficits in communication, that with self-help, he can do some things but is inconsistent, that with socialization and recreation, he focuses on certain toys and is indifferent to others, that he does not have a lot of physical deficits, that he has mood swings, that the CARS rating scale was done by her and the GARS by the parents, that the ABS-II was done by her and the Vineland by the parents, that the lower scores were on behavior issues, that she did answer yes on the last page of her evaluation to ICF/MR level of care, that the GAF score 30 on Axis V is pretty low as normal would be 70, that her opinion is that he needs to be in the program, that the claimant scored a 34 on the CARS and 37 and higher is in the severe range, that his score is not in the severe range, that none of the scores on the Vineland were three (3) standard deviations below the mean.

- 6) Testimony from the claimant's mother indicated that the claimant has self-injury behavior, that she has observed this, the he does have communication difficulty, that he is physically aggressive, that he does have obsessive tendencies, that he will bang his head against the wall when he gets upset and will bite himself and throws himself in the floor, that he bites, kicks, head-butts, pinches and scratches, that he cannot answer yes or no appropriately and cannot communicate his wants and needs, that he won't change when he makes his mind up about food choices, toys, games and routine.
- 7) It should be noted that both parties requested to issue written arguments and agreed to a date of 9-10-07 for submission of such arguments. The State Hearing Officer received the claimant's written arguments on 9-11-07 and the Department's on 9-12-07.
- 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:

AD. 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 UPHELD

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 MR or a related condition which constitutes a chronic and severe condition, whether the claimant meets the criteria of functionality including substantial limitations in five (5) of the six (6) daily living areas of self-care, receptive or expressive language (communication), learning (functional academics), self-direction, and capacity for independent living, and whether the Psychologist recommended ICF/MR level of care. The Department determined based on the documentation (Exhibits #D-2 and #D-3) that the claimant did not have a diagnosis of MR or a related condition which constituted a severe and chronic condition. The Department agreed that the claimant has a related condition of autism but argued that the condition was not severe. The GARS test showed a score of 34 which the Psychologist (Ms. [REDACTED]) testified was not in the severe range as a score of 37 is considered severe. In addition, a score of 78 was indicated on the GARS test and Ms. [REDACTED] indicated that this score reflected that the claimant falls into the “possible” range of probability for Autism Spectrum Disorder. While the claimant’s attorney argued that his witnesses, including Ms. [REDACTED] indicated that the claimant required ICF/MR level of care, he did not sufficiently rebut the argument of the Department that the documentation did not support a conclusion that the claimant’s autism was chronic and severe. The State Hearing Officer finds that the evidence and testimony do not show the claimant’s condition to be chronic and severe. In regard to the question of whether the claimant has substantial limitations in five (5) of the six (6) daily living areas (excluding mobility), the State Hearing Officer finds that the scores on the ABS-II did not reflect the required criteria of three (3) standard deviations below the mean. While the claimant’s attorney argued that Ms. [REDACTED] indicated that the claimant could not communicate basic wants and needs, could not take care of most personal needs, was not able to learn new skills without aggressive and consistent training, etc., the test scores do not reflect that the claimant meets the criteria for substantial deficits in any of the six (6) major life areas. In regard to whether the Psychologist recommended ICF/MR level of care, while a recommendation was not indicated in the usual section of the psychological evaluation, Ms. [REDACTED] did recommend training which necessitates the availability of trained MR personnel 24 hours a day, which essentially is a recommendation for ICF/MR level of care. However, the claimant did not meet the criteria of having substantial deficits in at least three (3) major life areas or the criteria of a related condition which constitutes a chronic and severe condition and does not meet the medical criteria for the Title XIX MR/DD Waiver Program.

VIII. CONCLUSIONS OF LAW:

- (1) Regulations in the Title XIX MR/DD Waiver Manual require that the applicant have a diagnosis of MR or a related condition which constitutes a chronic and severe condition. The claimant has a diagnosis of autism but it does not constitute a chronic and severe condition.
- (2) Regulations in the Title XIX MR/DD Waiver Manual require that a diagnosis of MR or a related condition be manifested prior to age 22. Claimant’s autism was established prior to age 22.

- (3) Regulations in the Title XIX MR/DD Waiver Manual require that the condition is likely to continue indefinitely. Claimant's condition is likely to continue indefinitely.
- (4) Regulations in the Title XIX MR/DD Waiver Manual require that the individual is substantially limited in functioning in three (3) or more major life areas. The claimant is not substantially limited in functioning in at least three (3) of the six (6) major life areas.
- (5) Regulations in the Title XIX MR/DD Waiver Manual require that active treatment is required in an ICF/MR facility. The claimant does not require active treatment in an ICF/MR facility.
- (6) The claimant does not meet the medical criteria 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 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 14th Day of September, 2007

Thomas M. Smith
State Hearing Officer