



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
4190 Washington Street West
Charleston, WV 25313

Joe Manchin III
Governor
August 21, 2007

Martha Yeager Walker
Secretary

_____ on behalf of

Dear Mr. and Mrs. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held August 6, 2007. Your hearing request was based on the Department of Health and Human Resources' proposal to terminate services under the MR/DD Waiver 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 Waiver Program is based on current policy and regulations. Some of these regulations state in part:

The evaluations must demonstrate that a child has a diagnosis of a severe, chronic disability which - Substantially limits functions in three or more of the following areas of major life activities (a) Self Care; (b) Receptive or Expressive Language; (c) Learning; (d) Mobility; (e) Self Direction; (f) Capacity for Independent Living; and (g) Economic Self Sufficiency.

The information submitted at your hearing revealed: The documentation does not demonstrate that your son has a diagnosis of a severe, chronic disability which - Substantially limits functioning in three or more of the major life activities.

It is the decision of the State Hearing Officer to **UPHOLD** the **PROPOSAL** of the Department to terminate MR/DD Waiver Program services.

Sincerely,

Ray B. Woods, Jr., M.L.S.
State Hearing Officer
Member, State Board of Review

cc: State Board of Review
Steve Brady – Office of Behavioral Health and Health Facilities

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

_____,

Claimant,

v.

Action Numbers: 07-BOR-1704

**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 21, 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. The fair hearing was scheduled for August 6, 2007 on a timely appeal filed June 5, 2007.

It should be noted here that the Claimant was receiving MR/DD Waiver benefits at the time of the hearing. A pre-hearing conference was held between the parties prior to the hearing, and the Claimant was not represented by an attorney.

II. PROGRAM PURPOSE:

The Program entitled MR/DD 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.

III. PARTICIPANTS:

_____, Father of the Claimant

_____, Mother of the Claimant

Steve Brady, Program Operations Coordinator – Office of Behavioral Health and Health Facilities (OBH&HF)

Linda Workman, M. A., Psychologist – Bureau for Medical Services (BMS)

Presiding at the Hearing was, Ray B. Woods, Jr., M.L.S., State Hearing Officer and a member of the State Board of Review.

IV. QUESTIONS TO BE DECIDED:

The question(s) to be decided: Does _____ have substantially limited functioning in three or more of the major life areas?

V. APPLICABLE POLICY:

PROGRAM ELIGIBILITY CRITERIA FOR THE MR/DD WAIVER PROGRAM, Section 503 Medical Eligibility Criteria

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits

D-1 Chapter 500 – Covered Services, Limitations, and Exclusions, for MR/DD Waiver Services

D-2 Denial Letter dated 05/15/07

D-3 DD-2A (Annual Medical Evaluation) 12/28/06

D-4 DD-3 (Psychological Evaluation) dated 04/16/07

D-5 DD-3 (Psychological Evaluation Update) dated 07/02/07 & 07/09/07

D-6 IEP - _____ County Schools dated 04/20/07

Claimants' Exhibits:

C-1 Major Life Areas

VII. FINDINGS OF FACT:

- 1) PROGRAM ELIGIBILITY CRITERIA FOR THE MR/DD WAIVER PROGRAM Section 503.1 Application and Medical Eligibility (Exhibit D-1) states:

Medical Eligibility Criteria

The MR/DD State Waiver Office determines the medical eligibility for an applicant in the MR/DD Waiver Program. In order to be eligible 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 monitoring, supervision, training, and supports.
 - MR/DD State Waiver Office determines the level of care (medical eligibility) based on the Annual Medical Evaluation (DD-2A), the Psychological Evaluation (DD-3) and verification if not indicated in the DD-2A and DD-3, that documents that the mental retardation and/or related conditions with associated concurrent adaptive deficits were manifested prior to the age of 22, and are likely to continue indefinitely. Other documents, if applicable and available, that can be utilized include the Social History, IEP for school age children, Birth to Three assessments, and other related assessments.

The evaluations must demonstrate that an applicant has a diagnosis of mental retardation 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 not only by the relevant test scores, but also the narrative descriptions contained in the documentation.

- Must have a diagnosis of mental retardation, with concurrent 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, and requires services similar to those required for persons with mental retardation.

- Autism
- Traumatic brain injury
- Cerebral Palsy
- Spina Bifida
- Tuberous Sclerosis
- Additionally, mental retardation and/or related conditions with associated concurrent adaptive deficits:
 - Were manifested prior to the age of 22, and
 - Are likely to continue indefinitely.
- Must have the presence of a least three (3) substantial deficits as that term is defined in Title 42, Chapter IV, Part 435.1009 of the Code of Federal Regulations (CFR). Substantial deficits associated with a diagnosis other than mental retardation or a related diagnosis do not meet eligibility criteria. Additionally, any individual needing only personal care services does not meet the eligibility criteria. Individuals diagnosed with mental illness whose evaluations submitted for medical eligibility determination with no indication of a previous co-occurring history of mental retardation or developmental disability prior to age 22 must provide clinical verification through the appropriate eligibility documentation that their mental illness is not the primary cause of the substantial deficits and the mental retardation or developmental disability occurred prior to the age of twenty-two (22).

Functionality

- Substantially limited functioning in three (3) or more of the following major life areas; (“substantially limited” is defined on standardized measures of adaptive behavior scores as three (3) standard deviations below the mean or less than one (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 not only by the relevant test scores, but also the narrative descriptions contained in the documentation submitted for review, i.e., psychological, the IEP, Occupational Therapy evaluation, etc.). Applicable categories regarding general functioning include:
 - 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 and leisure activities).

Refer to Code of Federal Regulation (CFR): 42 CFR 435.1009.

Active Treatment

- Requires and would benefit from continuous active treatment.
Medical Eligibility Criteria: Level of Care

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, maintain current level of 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 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).

- 2) The primary issue in this particular matter is the proposed termination of services under the MR/DD Waiver Services Program. The Department does not believe the documentation supports the Claimant having “Substantially limited functioning in three or more of the major life activities.”
- 3) The Claimant has an eligible related condition of Autism.
- 4) The Claimant’s related condition was manifested prior to the age of 22, and is likely to continue indefinitely.
- 5) The Department reviewed the DD-2A (Medical Evaluation); two DD-3’s (Psychological Evaluation); and an Individualized Educational Plan (IEP) in determining the Claimant did not meet the medical eligibility criteria for continued services.
- 6) A Denial Letter dated May 15, 2007 was sent to the Claimant (Exhibit D-2). The letter stated in part,

Documentation submitted for re-certification does not support the presence of substantial adaptive deficits as defined for the Title XIX MR/DD Waiver eligibility in three or more of the six major life areas.

- 7) The Claimant's Parents requested a Fair Hearing on their son's behalf on June 5, 2007.
- 8) At the hearing, the Operations Coordinator reviewed the MR/DD Waiver policy. There were no questions from the participants.
- 9) The B. M. S. Psychologist has been a Licensed Psychologist since 1981, and is also a Licensed School Psychologist. She has performed thousands of evaluations on school age children, participated in IEP meetings and workshops for teachers. Her office did all of the psychological evaluations for ██████████ County Schools for seventeen years. She has also worked in five or six other counties.

The B. M. S. Psychologist's company, Psychological Consultation and Assessment, has been contracted by the Bureau for Medical Services which oversees the Title XIX MR/DD Waiver Services Program through the Office of Behavioral Health and Health Facilities, for approximately twenty years. One of her duties is to certify/determine eligibility for ICF/MR Group Homes. All of the group homes within the State of West Virginia are visited and recertified for their participation.

The MR/DD Waiver Program is an optional program in which the State may choose not to participate. The Federal Government allows States to serve people who would ordinarily be found in institutional settings within the community. The Federal Government establishes eligibility guidelines for use by the individual States. States may make the guidelines more restrictive if they choose but not less stringent. The Department refers to the Code of Federal Regulations to determine eligibility. In West Virginia, the Department has determined that in order to qualify, you need a level of mental retardation that would result in a need for institutional level of care.

There is a wide range of abilities associated with mental retardation. There are individuals diagnosed with mild mental retardation and some with severe and profound. The differences between the two individuals are very profound. Individuals with mild mental retardation often have driver's licenses, work, and raise families. Those individuals with profound mental retardation are not able to attain such things. They require twenty-four hour supervision and training.

A diagnosis of mental retardation does not necessarily guarantee eligibility for this program, only to the point that MR requires an ICF/MR level of care. This is defined as an IQ of 55 which is three standard deviations below the mean which is 100. An average IQ is 100. A standard deviation is fifteen on a measure of intelligence such as the Wechsler Scale. The Department has determined based on documents provided and error of measurements that is the level of disability to be considered. Eligible scores would fall in the range of 55 and below.

In the area of substantial adaptive deficits, if a person in West Virginia is diagnosed with mental retardation, they are compared with a sample population across the country that also has mental retardation. The Department is looking to see if the individual's

functional abilities are similar to other people identified with mental retardation requiring this level of care.

When looking at non mental retardation norms, the Department is looking at scores below the first percentile. That is out of the mild range. In reviewing the Adaptive Behavior Scores, the Department is looking for less than one percent in the percentile column, and scores of one and two in the standard scores columns.

- 10) The B. M. S. Psychologist proceeded to address the documents used to determine the Claimant was not eligible for continued services under the MR/DD Waiver Program.
- 11) The DD-2A dated December 28, 2006, (Exhibit D-3), provided the following information:
 - The Claimant was born on August 24, 1994.
 - All Physical Characteristics were Normal with the exception of Moles on Skin.
 - The Neurological Characteristics were Normal.
 - Ambulatory; Continent; Feeds Self; Needs Assistance with Personal Hygiene/Self Care.
 - Mental and Behavioral Difficulties were not marked.
 - Occupational and Physical Therapy is recommended.
 - Diagnoses: Axis I - Autism
 - Prognosis – Guarded.
 - The Physician certifies that the Claimant requires the level of care and services provided in an “Intermediate Care Facility” for individuals with mental retardation and/or related conditions.
- 12) The DD-3 was completed by the Licensed Psychologist on April 16, 2007, (Exhibit D-4). It provided the following highlights:

Prior Hospitalizations/Institutionalizations:

- All developmental milestones were on target until age 18 months of age. It was at this time that the mother recognized echolalia and lack of speech.
- At two years of age the Claimant was evaluated and diagnosed with Autism.
- At 2 ½ - 3 years old Claimant began speech therapy.
- Fully toilet trained at 4 – 5 years old.
- Never been institutionalized.

Prior Psychological Testing:

- Evaluated on April 12, 2006 and given the following diagnoses: Autistic Disorder and Attention Deficit Hyperactivity Disorder; Combined Type.

Behavioral History:

- Claimant is a twelve year old Caucasian male that resides with his biological parents.
- Maintains frequent contact with his maternal and paternal families.
- Unable to cook, wash hair, or bathe independently.

- Verbal and displays a lot of repetitive speech and perseverates on subjects for extended periods of time.
- Ambulatory but displays fine and gross motor deficits.
- Attends middle school and is the sixth grade.
- Attends the resource room for Reading, English, and Mathematics.
- Attends the regular education room for all other subjects, with the help of an autism mentor.
- Does not receive any therapy at this time.

Physical/Sensory Deficits:

- Has previous diagnoses of vision loss, seasonal allergies, low muscle tone and Attention Deficit Hyperactivity Disorder, Combined Type.
- Currently wears glasses to correct vision.
- Maintains a good appetite but is a picky eater.
- Evaluated by Orthopedist and wears inserts for flat feet.
- Previously diagnosed with ADHD and placed on Dexedrine BID. He had a bad reaction and was taken off the medication.
- Later prescribed Ritalin and became paranoid and cried frequently. He was taken off medication and is not currently being treated with any medications.

Psychomotor:

- Fine motor skills are slightly delayed.
- Ambulatory independently. Walks, runs, climbs, and maneuvers stairs

Self-help:

- Unable to complete daily living skills like: Washing hair, brushing teeth, brushing hair, picking out clothes, fixing a snack, and bathing himself without hand over hand assistance and supervision.
- Able to feed himself with a spoon and fork, drink from a cup, dress himself, order his own meals in public, and pick out items in a store.
- Able to complete household chores like: walking the dogs, sweeping the floors, dusting, making his bed, carrying laundry, taking out the garbage, cleaning his table area, and picking up his toys with verbal prompting and supervision.
- Knows how to count change, but is working on how to make a purchase with money.
- Continent of bowel and bladder.

Language:

- Verbal and communicates in complete sentences.
- Displays some echolalia and frequently perseverates on topics for extended periods of time.

Affective:

- Displays self-stimulating behaviors like spinning, hand flapping, stereotypical finger movements, rocking, bouncing up and down and twirling toys.
- Will produce verbal stimulations.
- The behavior does not occur at school but occurs at home frequently.
- Must be supervised while eating due to the rapid pace he eats, and because he will continue to eat until he is sick.
- Very routine oriented and will become upset or anxious if interrupted.
- Does not enjoy school.

Social Interaction, Use of Time, Leisure Activities:

- Enjoys being involved in activities with his family.
- Does not enjoy being in activities with same aged peers, with the exception of his cousins.
- If an activity is pushed on him, he becomes very anxious.
- Very attached to his mother and does not like to participate in activities without her.
- Not aware of many environmental dangers or the appropriate way to interact with others.

Instruments Used:

- The Claimant was given the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV). The Department is looking for scores of 55 and below in the following IQ/Index. The B. M. S. Psychologist considers the following information invalid and suppressed representation of the Claimant’s potential for learning as appropriate Motivation and Concentration were not exhibited during testing procedures.

<u>IQ/Index</u>	<u>Score</u>	<u>Descriptor of Performance</u>
Verbal Comprehension Index	77	Borderline
Perceptual Organization Index	77	Borderline
Working Memory Index	91	Average
Processing Speed Index	68	Extremely Low
Full Scale IQ	72	Borderline

- A Wide Range Achievement Test – III (WRAT) was administered to measure Reading, Spelling, and Math. The MR/DD Waiver is looking for scores of 55 and below. The following scores do not meet the program criteria:

<u>Subject</u>	<u>Standard Score</u>	<u>Grade Score</u>
Reading	87	4 th
Spelling	100	6 th
Arithmetic	89	5 th

- The Service Coordinator from [REDACTED] completed the AMAR Adaptive Behavior Scale-School, Second Edition, on March 14, 2007. The Department is looking for scores less than 1 percentile using non MR norms. The only eligible

score would be Economic Activity which is a segment of Capacity for Independent Living.

- The Claimant received the following scores:

<u>Subtest</u>	<u>Percentile</u>	<u>Standard Score</u>
Independent Functioning	2	4
Physical Development	37	9
Economic Activity	1	2
Language Development	25	8
Numbers and Time	63	11
Pre/Vocational Activities	9	6
Self-Direction	2	4
Responsibility	37	9
Socialization	5	5

Developmental Findings/Conclusions:

- The Claimant is unable to complete many of the activities necessary for daily living without hand over hand assistance and supervision.
- Displays fine and gross motor deficits.
- Unaware of many environmental dangers and needs 24 hour supervision to ensure his health and safety.

Diagnoses:

- Axis I – 299.00 Autistic Disorder; and 314.01 Attention Deficit Hyperactivity Disorder, Combined Type.

Placement Recommendations:

- The Licensed Psychologist recommended an ICF/MR level of care with 24-hour support, training, and supervision. The services are needed to preserve the Claimant's present level of functioning and to prevent institutionalization.
- 13)** An Updated DD-3 dated July 2, 2007 and July 9, 2007 (Exhibit D-5), and an Individual Education Program Plan (IEP) dated April 20, 2007 (Exhibit D-6) were submitted to the Bureau for Medical Services.
- 14)** The Updated DD-3 had the following additions:

Behavioral History:

- The Claimant does not receive any therapies at this time.

Physical/Sensory Deficits:

- Trying new foods, but that is only after lots of verbal prompting.

- Not currently being treated with any stimulant medications.

Affective:

- Begun displaying sexually inappropriate behaviors by touching himself in public.

Evaluations:

- The Claimant scored 40.0 on an Autism Rating Scale, which places him in the severely autistic range. This meets the definition of a “Related Condition.”
- A Vineland –II Adaptive Behavior Scales was completed by an interview with the Claimant’s mother. The Department is looking for scores of 55 and below. None of the following scores meet the Department’s eligibility criteria:

<u>Domain</u>	<u>Standard Score</u>	<u>Percentile Rank</u>
Communication	62	1
Daily Living Skills	61	<1
Socialization	57	<1
Motor Skills	61	<1
Adaptive Behavior Composite	59	<1

- The Licensed Psychologist completed the AMAR Adaptive Behavior Scale-School, Second Edition, during an interview with the mother. The Licensed Psychologist states, “The scores reported are significantly lower than the ones reported in the previous evaluation because the mother was confused on how to answer the questions correctly. Therefore his abilities were overestimated. The Department is looking for scores of less than 1 percentile using non MR norms. The only eligible score would be Economic Activity which is a segment of Capacity for Independent Living.

The Claimant received the following scores:

<u>Subtest</u>	<u>Percentile</u>	<u>Standard Score</u>
Independent Functioning	1	2
Physical Development	16	7
Economic Activity	1	3
Language Development	9	6
Numbers and Time	63	11
Pre/Vocational Activities	5	5
Self-Direction	1	3
Responsibility	9	6
Socialization	5	5

Diagnoses:

- Addition of 300.00 Anxiety Disorder NOS on Axis I

15) The IEP provided the following highlights:

Reading Skills:

- The Claimant has excellent word skills at age/grade level – recognition, pronunciation, part of speech, and use in a sentence.
- Answers questions with short phrases.
- Dependent upon mentor to explain directions, however he does quite well recalling the information.
- Inconsistent when spelling words that have difficult spellings or unusual usage.
- Knows how to use verbs, pronouns, nouns correctly in a sentence.

Math Skills:

- Can work in the math book independently.
- Solves single number multiplication and division problems with no remainder.

Adaptive Skills:

- Completes most of his classroom work with various levels of prompting and fading.
- Performing household chores such as emptying the dishwasher and taking trash out.
- Parents feel Claimant is making progress in his adaptive behaviors.

Social Skills:

- Gradually improving social interactions with more confidence.
- Likes to be with others, but does not know how to effectively communicate.
- Gets anxious, shy, and embarrassed easily.
- Participates in band as a drummer.
- Dismissed from speech therapy at this time.

Placement:

- Spends 83% of time in Regular Education and 17% of time in Special Education.

16) The B. M. S. Psychologist defined “Active Treatment” as individuals who are very inactive and requiring to learn the basic living skills. Individuals may sit in a chair or sofa unless someone physically takes them by the hand and leads them to a particular activity. The only area the Claimant would qualify would be in the area of Self-Care.

17) The Program Operations Coordinator described his experiences as a Manager of a group home. Individuals were programmed from the time they awakened to the time they went

to bed. Some of the training for example, involved feeding without resistance. This is something that could take years to accomplish.

- 18) The Claimant's Parents are concerned with his future if terminated from the MR/DD Waiver program. He does not have any friends and does not communicate with members of the band. He will not be in the band next year because they travel and he becomes panicky.
- 19) The Claimant's Parents submitted their concerns in writing, as it relates to "substantially limiting functioning in the six major life areas."
- 20) The written comments submitted by the parents are not supported by documentation contained within the DD-3's and the IEP.
- 21) The Service Coordinator testified that parent's have a tendency to promote their children in a more positive light. She further testified that the Claimant has even exhibited inappropriate behavior toward her.
- 22) The Licensed Psychologist did not offer any relevant testimony.

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. Documentation presented at this hearing shows that the Claimant has a diagnosis of Autism, and was manifested prior to age 22.
- 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. Functionality – stipulates that substantial limits are defined on standardized measures of adaptive behavior scores. The presence of substantial deficits must be supported not only by the relevant test scores, but also the narrative descriptions contained in the documentation submitted for review, i.e., psychological, the IEP, Occupational Therapy evaluation, etc.).
- 3) The documentation supports only deficits in the area of Self Care.
- 4) The submitted evidence fails to demonstrate that the Claimant has substantial adaptive deficits in three (3) or more of the major life areas. The Claimant requires prompting and supervision in some areas of functionality, but he does not require the level of care and active treatment provided in an ICF/MR facility.
- 5) Based on the evidence, eligibility for continued services under the MR/DD Waiver Program cannot be established.

IX. DECISION:

It is the decision of this State Hearing Officer to **UPHOLD** the **PROPOSAL** of the Department to deny MR/DD Waiver Program Services.

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this 21st Day of August, 2007.

Ray B. Woods, Jr., M.L.S.
State Hearing Officer