State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
150 Maplewood Avenue
Lewisburg, WV 24901

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

January 3, 2007

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_____
_____

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your son's hearing held November 29, 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 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 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 meets the medical criteria to be eligible for the Title XIX MR/DD Waiver Services Program.

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,

Margaret M. Mann
State Hearing Officer
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review
Stephen Brady, BBHHF
[redacted]

WEST VIRGINIA DEPARTMENT OF HEALTH & HUMAN RESOURCES
BOARD OF REVIEW

_____ _____ by: _____,

Claimant,

v. **Action Number: 06-BOR-1838**

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 November 29, 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 November 29, 2006 on a timely appeal, filed January 30, 2006. It should be noted that this hearing was originally scheduled for August 7, 2006. It was rescheduled at the request of the claimant for November 29, 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 Mother & Representative
[redacted]

Department's Witnesses:
Susan Hall, Bureau of Behavioral Health & Health Facilities (By telephone)
Richard Workman, Psychologist Consultant, BMS (By telephone)

Observing:
Nisar Kalwar, Assistant Attorney General, Bureau for Medical Services (By telephone)

Presiding at the Hearing was Margaret M. Mann, 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 Title XIX MR/DD Waiver Program Revised Manual Chapter 500
D-2 Notification Letter dated 10/31/2005
D-3 Notification Letter dated 11/01/2006
D-4 Annual Medical Evaluation dated 10/03/2005
D-5 Annual Medical Evaluation dated 10/04/2006
D-6 Letter from [redacted] ACSW, [redacted] dated 06/28/2006
D-7 Letter from [redacted] D.O., dated 02/11/2006
D-8 Report from [redacted] Ph.D., BCBA dated 02/23/2006
D-9 Quarterly Treatment Plan Review dated 09/28/2006
D-10 Speech and Language Consultation dated 03/24/2005
D-11 Psychological Evaluation dated 09/25/2006
D-12 Addendum to Psychological Evaluation dated 08/16/2005
D-13 [redacted] County Preschool Special Needs Report dated 05/06/2005
D-14 Individualized Education Program dated 09/07/2006
D-15 Individual Program Plan dated 10/03/2006

Claimant's Exhibit:
C-1 Child's Mastered Items

VII. FINDINGS OF FACT:

1) An application packet was submitted in order to determine if the child would qualify for services under the Title XIX MR/DD Waiver Program. The Bureau of Behavioral Health reviewed the documents submitted and determined that he did not qualify medically for the program. The child's birth date is [redacted]2002.

2) The Department sent a notification letter dated October 31, 2005 (Exhibit D-2) stating, "Your Waiver Application is hereby denied. Additional documentation is requested. Please submit a measure of adaptive behavior which yields standard scores such as the ABS-S:2 or Vineland ABS and a complete IEP."

3) Additional information was submitted and reviewed. The Department sent a notification letter dated November 1, 2006 (Exhibit D-3) stating, "Your Waiver Application is hereby denied. Documentation submitted to date does not support the presence of substantial adaptive delays as defined for Title XIX MR/DD Waiver eligibility in three or more of the six major life areas."

4) The Annual Medical Evaluation dated October 3, 2005 (Exhibit D-4) lists diagnoses of Pervasive Developmental Disorder, NOS and Sensory Integration Disorder. Problems Requiring Special Care: Mobility: Nothing listed; Continence Status: Not Toilet Trained; Feeding: Feeds Self; Personal Hygiene: Needs Total Care; and Mental and Behavioral Difficulties: Needs Close Supervision. There was a recommendation for ICF Level of Care.

5) The Annual Medical Evaluation dated October 4, 2006 (Exhibit D-5) lists diagnoses of Pervasive Developmental Disorder, Disruptive Behavior, Autism, and Mixed Developmental Delay. Problems Requiring Special Care: Mobility: Ambulatory; Continence Status: Incontinent; Feeding: Feeds Self; Personal Hygiene: Needs Total Care; Mental and Behavioral Difficulties: Needs Close Supervision. There was a recommendation for ICF Level of Care. Testimony revealed that later information confirmed the child was potty trained.

6) The child does have an eligible diagnosis of Pervasive Developmental Disorder.

7) The letter from Dr[redacted] dated 02/11/2006 (Exhibit D-7) reads in part that the child's "daily living and motor skills are impaired, being worse than 98% of children at his age. His social skills are worse than 95% of children his age and his communication skills are worse than 67% of children his age. On the Mullen's scales, his skills are 16-21 months below his chronological age, including visual receptive, fine motor, receptive language and expressive language."

8) The letter from Dr.[redacted] dated 02/23/2006 (Exhibit D-8) reads in part that the child has no sense of danger and goes on to describe examples of this. The Department's consulting psychologist agreed that the child does have a substantial limitation in the area of capacity for independent living.

9) Quarterly Treatment Plan Review dated 09/28/06 (Exhibit D-9) shows the previous diagnosis as Disruptive Behavior Disorder, NOS and Autism Spectrum Disorder. The working diagnosis is listed as Disruptive Behavior Disorder. There is no diagnosis under Axis II – Personality Disorders and Mental Retardation. The report was signed by Dr. [redacted] The report lists certain goals which have been met. Some goals listed include coloring, dressing skills, cutting, and tying shoes. Testimony from the Department's consulting psychologist revealed that while these are skills that are not expected of all children age 4 years, seven months, these are high levels for a child needing institutionalized care. It does appear from this report he is learning not below 99% of his peer group.

10) Speech and Language Consultation (Exhibit D-10) reads in part that the child "is an energetic 37-month old boy who presented with a moderate social communication disorder which at this time appears to be secondary to a severe sensory integration disorder which includes difficulties with auditory processing, vestibular processing, tactile processing, and motor planning. He presented with significant delays in the areas of behavioral regulation, play, receptive language and expressive communication skills. While child's developmental profile does include many red flags for autism spectrum disorder with pervasive developmental delay, his social engagement skills are a relative strength. I strongly feel that the majority of child's difficulties are a direct result of a severe sensory integration disorder with a motor planning component."

11) The Psychological Evaluation dated 09/25/06 (Exhibit D-11) reads in part that the Vineland Adaptive Behavior Scale was administered 5-26-06 and the child's composite score was 79 with an overall age equivalency of 38 months. The Department's consulting psychologist noted that this score was well above scores needed to meet program criteria. The evaluation reads that the child walked at 15 months but never learned to crawl like other children. The child ambulates independently but does not alternate feet on stairs. He can feed self finger foods and use a spoon. He does not do well with a fork at this time. He drinks from a cup while at the table but uses a sippy cup at other times. He cooperates with dressing and undressing. He is able to take off his socks and pants independently according to his mother. He has recently become potty trained. He cooperates with personal hygiene tasks. The claimant is unable to organize leisure activities. He enjoys being outdoors. He likes to play with toy animals. He likes to wrestle in the evenings with his father. He likes to run and jump.

12) The Psychological Evaluation dated 09/25/06 (Exhibit D-11) shows a standard score of 62 under communication. The Department is looking for a standard score of 55 or below. The motor skills are assessed at a standard score of 25. The Department's consulting psychologist noted that this score is puzzling as it is known that the child ambulates. Gross: Skills equivalent to 44 months. Fine: Skills equivalent to 32 months. Receptive communication skills equivalent to 22 months. Expressive communication skills are equivalent to 18 months. The diagnosis listed is Pervasive Developmental Disorder. Prognosis: The child's prognosis for substantial gains is good with consistent and aggressive training. Without daily training however, the child would likely lose many skills and revert to his previous behavior problems.

13) The 01/30/06 Addendum to Psychological Evaluation dated 08/16/05 (Exhibit D-12) shows the Vineland Adaptive Behavior Scale – II scores. The child had a Standard Score of 83 (moderately low) under communication; 55 (low) in the Daily Living Skills

Domain; 61 (low) under Socialization Domain; 51 (low) under Motor Skills Domain; and 60 (low) under Adaptive Behavior Composite. Testimony from the Department's consulting psychologist revealed that the scores under daily living skills domain and motor skills domain is not supported by the narrative.

14) The [redacted] County Preschool Special Needs report dated 05/06/05 (Exhibit D-13) shows scores from Developmental Profile II. Area: Academic the rate of development is 79%; Physical the rate of development is 58%; Self-Help rate of development is 58%. He does qualify for speech services.

15) The Individualized Education Program (IEP) dated 09/07/06 (Exhibit D-14) reads in part that the child "has made great progress in all areas of communication during the last year due to intense training using the ABA program. He is using 5, 6 and 7 word sentences and has a vocabulary of approximately 1500 words. The child is beginning to initiate conversation, hold eye contact and seek interaction with peers instead of all parallel play. He follows simple one and two step directions, knows body parts and is beginning to use various pronouns…….He exhibits very little self stim. Activities. His strength is still his receptive language. Articulation errors are noticeable but speech is very intelligible. The report goes on to read that "He has done really well and picked up on a lot of skills with 30-40 hours a week of intense one on one assistance, covering such areas such as dressing, fine motor skills, gross motor skills….He demonstrates and uses of common objects and is developing make believe play skills. He asks for desired items using words, phrases, sentences and gestures. He is beginning to be able to categorize. He can meet many of his own needs such as feeding himself. He plays appropriately most of the time."

16) The Individual Program Plan (IPP) dated 10/03/06 (Exhibit D-15) shows the child's strengths as ambulatory, very active, verbal communication is increasing with ABA, imitates words and phrases, responds to name, starting to recognize peer names, follows simple one step commands, uses spoon and glass sporadically, removes socks and pants independently, recognizes when he needs changed, and can feed self finger foods. It is the Department's position that he does not have the degree of delays and the severity level to meet MRDD criteria.

17) Testimony from the child's mother revealed that her son has been diagnosed with Pervasive Developmental Disorder which is a form of autism. Before intervention, her child knew fifty words. Since intensive therapy, his vocabulary has increased. Her goal is to push him off of the spectrum. The doctor writes in the report dated 02/11/06 (Exhibit D-7) that her son's "daily living and motor skills, being worse than 98% of children at his age". In her opinion, the individual who completed the report from Milestones "Speech & Language Consultation" dated 03/24/05 (Exhibit D-10) was not qualified. She feels the discrepancies in the Vineland scores can be explained. The first one was completed by a student at [redacted] who had never completed the test and did not observe her son. The second was completed by [redacted] with her input. She believes the second one is more accurate. Her son still does not alternate his feet going up the stairs unless he is reminded or they make him do it. He does feed himself but he always overstuffs. He does not cooperate with dressing, although he can do it.

18) Testimony from the child's mother revealed that she has kept a log of how long it takes her son to learn to do certain things such as dressing, coloring, pedaling, etc. (Exhibit C-1) For example, coloring he started 02/28/06 and worked on it every day until 08/21/06 to learn to color within the lines. It took over 300 trials to master this. Potty training took from 02/22/05 until 07/06 and he still has accidents. Taking his shirt off took from 04/21/06 to 05/23/06. It looks like he is high-functioning. Everything they have taught him he can answer. If you ask him something he has not been taught, he cannot answer. She is glad he can run and jump. They are seeing less of him throwing himself on the ground although he still does this. They try to encourage good behavior. His communication scores are up because they have taught him every word he knows. It is the same with his daily living skills. Self-direction – they had to teach him how to play. He cannot learn on his own without extreme intervention.

19) Testimony from the social worker at [redacted] revealed that it is the because of the level of intervention the child is receiving that he is making progress.

20) 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).

21) **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 serve, 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

22) **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. Documentation presented at this hearing includes a diagnosis of Pervasive Developmental Disorder.

(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. Policy (#20) Functionality – stipulates that substantial limits are defined on standardized measures of adaptive behavior scores. Policy further states that the presence of substantial deficits must be supported by the documentation submitted for review, i.e., the IEP, Occupational Therapy evaluation, narrative descriptions, etc.

(3) The evidence presented at the hearing does not support that the child has substantial limitations in functioning in three or more of the six major life areas. The Department agreed that the child does have a substantial limitation in the major life area of **Capacity for Independent Living**. In the major life area of **Self -Care**, it is noted that the child can feed self finger foods and drink from a cup at the table and a sippy cup other times. He does not cooperate with dressing and undressing although he can do it. He cooperates with personal hygiene tasks. In the major life area of **Receptive or expressive language**, it is noted that he is making progress in communication skills with aggressive training. In the major life area of **Learning**, it is noted that the child is capable of learning, however it takes a lot of one on one intervention. In the major life area of **Mobility**, it is noted in the documentation provided that the child is mobile. In the major life area of **Self-Direction**, documentation finds that the child does play, run and jump.

(4) It is evident that this child does exhibit delays resulting from his Pervasive Developmental Delay diagnosis. At this time, the documentation supports that this child does not exhibit the level of delay, which is required for medical eligibility for the MR/DD Program. 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 presented at the hearing does not support this requirement.

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 3rd Day of January, 2007.

_____

Margaret M. Mann
State Hearing Officer