



**State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
P.O. Box 1736
Romney, WV 26757**

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

October 29, 2007

by _____

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your son's hearing held October 22, 2007. 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 Hearings Officer is governed by the Public Welfare Laws of West Virginia and the rules and regulations established by the Department of Health and Human Resources. These same laws and regulations are used in all cases to assure that all persons are treated alike.

Eligibility for the MR/DD Home and Community-Based Waiver Program is based on current policy and regulations. Policy states that in order to be eligible for the Title XIX MR/DD Home & Community-Based Waiver Program, an individual must have a diagnosis of mental retardation and or related condition. A related condition would be any condition, other than mental illness, found to be closely related to mental retardation if this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons. The condition must be severe and chronic with concurrent substantial deficits that require the level of care and services provided in an Intermediate Care Facility for the Mentally Retarded (ICF/MR facility). (Chapter 500 of Title XIX MR/DD Home and Community Based Waiver Program Revised Operations Manual, November 2005).

The information, which was submitted at the hearing, did not support that your son's condition has, at this stage, caused substantial deficits in three of the six major life areas. He therefore, does 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,

Sharon K. Yoho
State Hearing Officer
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review
John Sassi, BHHF
Linda Workman, BMS

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

_____ by: _____,

Claimant,

v.

Action Number: 07-BOR-1935

**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 October 22, 2007 for [REDACTED]. 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 October 22, 2007 on a timely appeal, filed July 18, 2007.

II. PROGRAM PURPOSE:

The program entitled MR/DD Home and Community-Based Waiver is set up cooperatively between the Federal and State governments and administered by the West Virginia Department of Health & Human Resources.

The *Medicaid Home and Community-Based MR/DD Waiver* (authorized under Title XIX, Section 1915(c) of the Social Security Act) provides an alternative to services available in Intermediate Care Facilities for individuals with Mental Retardation or related conditions (ICF/MR). The primary purpose of an ICF/MR facility is to provide health and rehabilitative services. An ICF/MR facility provides services to persons who are in need of and who are receiving active treatment.

West Virginia's MR/DD Waiver Program provides for individuals who require an ICF/MR level of care, and who are otherwise eligible for participation in the program, to receive certain services in a home and/or community-based setting for the purpose of attaining independence, personal growth, and community inclusion.

III. PARTICIPANTS:

Claimant's Witnesses:

_____, Claimant's mother (participating by speakerphone)

Department's Witnesses:

John Sassi, Bureau of Behavioral Health & Health Facilities (participating by speakerphone)

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

Presiding at the Hearing was Sharon K. Yoho, State Hearing Officer and a member of the State Board of Review.

IV. QUESTIONS TO BE DECIDED:

The question to be decided is whether the claimant meets the medical requirements of the Title XIX MR/DD Waiver Services Program.

V. APPLICABLE POLICY:

Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500 (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 of denial mailed June 7, 2007
- D-3 DD-2A Level of Care Evaluation dated May 11, 2007
- D-4 Psychological Evaluation dated March 27, 2007
- D-5 Vineland II report and scores dated February 14, 2007
- D-6 Social History dated May 3, 2007
- D-7 Summary of 22q13.3 Deletion Syndrome
- D-8 Individualized Education Program report dated April 20, 2007
- D-9 WV Birth To Three Summary Updated dated April 18, 2007

VII. FINDINGS OF FACT:

- 1) The claimant's mother submitted an application packet to the Bureau of Behavioral Health in May 2007 to determine if he would qualify for services under the Title XIX MR/DD Waiver Program. The Bureau of Behavioral Health reviewed the documents submitted and determined that claimant did not meet the medical criteria for the program.
- 2) The Department mailed a notice of denial on June 7, 2007 stating in part: "Documentation submitted for review does not reflect substantial delays in three of the

six major life areas identified for eligibility. Scores must fall at less than one percentile or at a standard score of 55 or below and the Vineland ABS results do not reflect scores in the eligible range.

- 3) The claimant is currently a three-year-old male who resides with his biological father and mother. He has been receiving services under the Birth to Three program.
- 4) He has a diagnosis of 22Q Chromosomal deletion 13/3. Disease characteristics offered in (Exhibit D-7) include normal to accelerated growth, absent to severely delayed speech, global developmental delay and minor dysmorphic facial features. Behavior characteristics include mouthing or chewing non-food items, increased tolerance to pain, and autistic-like affect. The DD-2a listed in the diagnostic section an Axis I diagnosis of Chromosome 22 abnormality. No Axis II diagnosis was noted. The Comprehensive Psychological Evaluation listed an Axis III diagnosis of 22Q Chromosomal deletion 13/3. No Axis II diagnosis was noted.
- 5) The DD-2a, medical assessment dated April 26, 2007 (Exhibit D-3) reports that the child is ambulatory, it reports that he is incontinent, needs to be fed, needs total care and close supervision. It reports that he has limited communication. The Physician indicates that the child needs the level of care offered in an ICF/MR facility.
- 6) The Psychological Evaluation dated March 27, 2007 notes current behaviors. Under Psychomotor, it reports child to be ambulatory with fine and gross motor skills slightly delayed. He is able to scoot on his knees, pull himself up to stand, climb and walk very short distances. He can maneuver stairs by scooting or hopping. He cannot snap, Velcro, button, tie or zip independently. Under Self-Help, it reports he is unable to complete skills like dressing, washing hands, washing hair, brushing hair, brushing teeth and bathing without hands on assistance and supervision. He can feed self large finger food and can drink from a sippy cup. He is not toilet trained and shows no interest. In the category of Language, the psychological reports that he is primarily non-verbal. He babbles and will occasionally say mom, dad and good. He has digressed from saying a word to not saying it again. He does not communicate his wants and needs.
- 7) The psychologist, completing the psychological, notes that the child requires an ICF/MR level of care with 24-hour support, training, and supervision.
- 8) The Vineland II tests (Exhibit D-5) reports an Adaptive Behavior Composite score of 78. This score is classified as moderately low and is higher than over 7% of similarly aged individuals in the Vineland II norm sample. With a standard score of 86, his adaptive functioning within the Communication domain was noted to be adequate for his age group. His standard score in the area of Daily Living Skills was 64. This score represents a low level of adaptive functioning. His standard score of 89 in the Socialization domain is reported to be adequate for his age group. In the area of Motor Skills, he scored 85, which is in the moderately low level of adaptive functioning for his age group.

- 9) The Score Profile graph shown on the last page of the Vineland II test report shows that only two areas were charted below the Moderately Low range. These were in the areas of Daily Living Skills and Fine Motor Skills. These scores however were above the Three Standard Deviation (3SD) range of 55.
- 10) The claimant's mother wants to ensure that her son does not fall behind once he is dropped from the Birth To Three program. She hopes to get the most intervention as early as possible and would like his therapy to be received in his own environment instead of outside of the home.
- 11) 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

* Substantial deficits associated with a diagnosis other than mental retardation or a related diagnosis do not meet 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 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 mean individuals who have a severe, chronic disability that meets all of the following conditions:

- (a) It is attributable to--
 - (1) Cerebral palsy or epilepsy; or

(2) Any other condition, other than mental illness, found to be closely related to mental retardation because this condition results in impairment of general intellectual functioning of adaptive behavior similar to that of mentally retarded persons, and requires treatment or services similar to those required for these persons.

(b) It is manifested before the person reaches age 22.

(c) It is likely to continue indefinitely.

(d) It results in substantial functional limitations in three or more of the following areas of major life activity:

- (1) Self-care
- (2) Understanding and use of language
- (3) Learning
- (4) Mobility
- (5) Self-direction
- (6) Capacity for independent living

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.

VIII. CONCLUSIONS OF LAW:

- (1) Regulations require that substantial limited functioning be defined on standardized measures of adaptive behavior scores as three (3) standard deviations below the mean. The claimant's standard scores on the Vineland II fell above this range in all categories.
- (2) The Department denied eligibility due to substantial limits in functioning was not met however; an eligible diagnosis was also an issue. Neither the Physician who completed the Medical evaluation nor the Psychologist who completed the Psychological listed a diagnosis of Mental Retardation on Axis II. The child's diagnosis was not proven to be an eligible diagnosis which is closely related to Mental Retardation.

- (3) At this young age, the claimant does not show substantial limitations when compared to others his age. Although both the Claimant's Physician and Psychologist noted that he needs the level of care provided in an ICF/MR facility, the Department was correct to deny medical eligibility for the MR/DD program.

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 29th Day of October 2007.

Sharon K. Yoho
State Hearing Officer