



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

November 16, 2007

_____ for _____

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held November 7, 2007. Your hearing request was based on the Department of Health and Human Resources' action to deny services under 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 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 services under 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

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

_____ for _____,

Claimant,

v.

Action Number: 07-BOR-2080

**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 7, 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 November 7, 2007 on a timely appeal, filed September 10, 2007.

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:

It should be noted that this hearing was held telephonically.

_____ for _____, Claimant

Stephen Brady, Bureau of Behavioral Health & Health Facilities

Richard Workman, Psychologist Consultant, BMS

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 08/08/2007
- D-3 Annual Medical Evaluation dated 05/24/2007
- D-4 Psychological Evaluation dated 07/06/2007 & 07/09/2007
- D-5 Psychological Assessment Report dated 09/29/2006
- D-6 Social History dated 06/01/2007

VII. FINDINGS OF FACT:

- 1) The Claimant was an applicant for services under the Title XIX MR/DD Waiver Program. The Bureau of Behavioral Health reviewed the documents submitted for evaluation and determined that he did not qualify medically for the program.
- 2) The Department sent a notification letter dated August 8, 2007 (Exhibit D-2) stating, "Your Waiver application is hereby denied. Documentation submitted does not support the presence of substantial adaptive deficits in three or more of the major life areas identified for Waiver eligibility. Specifically, the documentation failed to demonstrate substantial limitations in the following major life areas: Self Care, Learning, Self-Direction, Mobility, and Capacity for Independent Living."

- 3) The Claimant's birth date is 09/10/2004.
- 4) The Annual Medical Evaluation dated May 24, 2007 (Exhibit D-3) lists a diagnosis of autism disorder. Under Problems Requiring Special Care: Mobility: Ambulatory; Continence Status: Not Toilet Trained; Feeding: Needs Assistance; Personal Hygiene: Needs Total Care; and Mental and Behavioral Difficulties: Needs close supervision, unable to communicate and limited communication. There is certification for ICF/MR level of care.
- 5) The psychological evaluation dated 07/2007 (Exhibit D-4) reads in part under psychomotor – Claimant demonstrates elevation in motor behavior with attention from his mother but otherwise a range of motor accelerant not inconsistent with his age. Self-Help: He cooperates with feeding, drinks from a “sippy cup” or with a straw and will finger feed but does not use a spoon. He has some food preferences but cannot communicate same. Affective: He took obvious enjoyment in the proximity of and physical contact with his mother, often climbing on her lap or shoulder, hugging and smiling and making pleasurable noises. She reports he will be affectionate to others well known to him but not to strangers. Testimony from the Psychologist Consultant revealed that this demonstrates some self-direction. The Vineland scores demonstrated that the Claimant has a substantial delay only in the area of communication. Developmental Findings/Conclusions: Differential diagnosis is difficult in a child so young. However, mental retardation typically presents itself as a “flat” profile and delays are noticeable relatively soon after birth. He has a history of early development apparently within normal limits that arrested at about 18 months. Another indication is the absence of observed orienting reflex or startle reflex to loud unanticipated noise despite intact hearing. He does not exhibit the rigidity with physical contact seen in some forms of autism. Diagnosis: Axis II: Unspecified Mental Retardation (estimated mild to moderate range), Provisional. Axis I: Pervasive Developmental Disorder NOS. There is a recommendation that the Claimant be involved in an ICF/MR level program.
- 6) The Psychological Assessment Report dated 09/29/2006 reads in part that the Claimant received a score of 30 on the Childhood Autism Rating Scale (CARS) which indicates Mild-Moderate Autism. (Exhibit D-5) The Department's Psychologist Consultant testified that for this program, they are looking for a diagnosis of severe autism.
- 7) The Department did find that the Claimant has substantial limitations in the major life area of Receptive or Expressive Language.
- 8) Testimony from the Claimant's representative revealed that different doctors give different opinions about her son's condition.
- 9) 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).

10) 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

11) **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 shows that the Claimant has a possible diagnosis of mild/moderate autism.
- (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 #12 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 and testimony presented at the hearing does not support that the Claimant has substantial limitations in functioning in three or more of the six major life areas. It was determined that the Claimant does have substantial limitations in the major life area of expressive/receptive language. Documentation does not support substantial limitations in the major life areas of self-care, mobility, learning, self-direction and capacity for independent living.
- (4) Regulations also 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 16th Day of November, 2007.

**Margaret M. Mann
State Hearing Officer**