



**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

August 13, 2007

Dear Mr. _____,

Attached is a copy of the findings of fact and conclusions of law on your hearing held June 6, 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 continue to meet 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 reverse 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

[REDACTED]

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

Claimant,

v.

Action Number: 06-BOR-2700

**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 July 25, 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 June 6, 2007 in the [REDACTED] County DHHR office with Department representatives participating by speaker phone on a timely appeal, filed August 16, 2006.

It should be noted here that the claimant's benefits have been continued pending a hearing decision. It should also be noted that the hearing was originally scheduled for November 3, 2006, January 3, 2007, and March 9, 2007 but was rescheduled initially at claimant's request, then at Department's request, and finally at claimant's request.

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. [REDACTED], Claimant's mother.
2. [REDACTED] Psychologist.
3. [REDACTED] Claimant's Attorney.
4. [REDACTED]
5. Stephen Brady, Program Manager, BHHF (participating by speaker phone).
6. Richard Workman, Psychologist Consultant, BMS (participating by speaker phone).
7. Nisar Kalwar, 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 (it should be noted that a copy of the regulations was not provided by the Department prior to the hearing and that Mr. Kalwar stated that he would fax a copy to the State Hearing Officer after the hearing but a copy was never received by the State Hearing Officer).
- D-2 Copy of Memorandum from [REDACTED] 6-14-06.
- D-3 Copy of denial letter dated 8-4-06.
- D-4 Copy of Annual Medical Evaluation dated 5-26-06 (4 pages).
- D-5 Copy of Psychological Evaluation 8-12-05 (12 pages).
- D-6 Copy of Psychological Evaluation 8-2-06 (12 pages).
- D-7 Copy of Individualized Education Program 4-7-06 (25 pages).
- D-8 Copy of Psychological Evaluation Report 9-30-05 (8 pages).
- D-9 Copy of Department's written arguments received on 7-26-07 (13 pages).

Claimant's Exhibits:

- CI-1 Copy of Individualized Waiver Assessment from APS Healthcare 11-16-06 (6 pages).
(It should be noted that the document was presented as evidence during the hearing and the Department's attorney objected as he had no opportunity to view the document prior to the hearing and did not know if the author was a licensed psychologist. The State

Hearing Officer ruled that the document would be faxed to the Department's attorney and that the Department Psychologist Consultant would be allowed seven (7) days to review the document and notify the State Hearing Officer and claimant's attorney if the document provided information which would change the Department's decision. The State Hearing Officer was notified on 6-6-07 that the document did not change the Department's decision).

CI-2 Copy of claimant's written arguments received 7-26-07 (6 pages).

VII. FINDINGS OF FACT:

- 1) The claimant was a recipient of benefits under the Title XIX MR/DD Waiver Service Program when a reevaluation packet was sent by [REDACTED] in June, 2006 and the Department issued a request for a current IEP and copy of most recent psycho-educational evaluation (Exhibit #D-2).
- 2) The packet was reviewed and the claimant was denied for medical eligibility with notification issued on 8-4-06 stating that documentation submitted for re-certification review does not support the presence of substantial adaptive deficits as defined for Title XIX MR/DD Waiver in three or more of the six major life areas.
- 3) The claimant's hearing request was received by the Bureau for Medical Services on 8-16-06, by the Board of Review on 8-24-06, and by the State Hearing Officer on 8-28-06 and the hearing was convened on 6-6-07 after being originally scheduled on 11-3-06, 1-3-07, and 3-9-07.
- 4) Mr. Brady testified about the regulations.
- 5) Testimony from the Department's Psychologist Consultant purported that the claimant does not have three or more deficits in the six major life areas.

The Department's Psychologist Consultant testified about the following documents:

Annual Medical Evaluation (DD-3) (Exhibit #D-4) states the claimant is ambulatory, continent, feeds self, and has mental diagnosis of autism, and certifies for ICF/MR care.

Psychological Evaluation 8-12-05 by [REDACTED] (Exhibit #D-5) states the claimant has significant behavioral difficulties, limited safety skills, likes hot water, that the claimant meets the criteria for a substantial deficit in the area of self-care and capacity for independent living but not in a third major life area, that he has good receptive language skills and does not meet the criteria in language, that he has no learning deficits, that he does enjoy school and shows ability for self-direction, that the WISC-IV showed scores in Verbal Comprehension of 91, Perceptual Reasoning of 88, Working Memory of 54, Processing Speed of 73, and Full-Scale of 74 which is not MR, that non-MR norms should be used and the Independent Functioning score of 59 allows a deficit in self-care, and that he was certified for ICF/ MR level of care.

Psychological Evaluation 8-2-06 by [REDACTED] (Exhibit #D-6) used non-MR norms and showed a score of 64 with Independent Functioning and shows that he meets the criteria in self-care and capacity for independent living, that the language score of

16 did not meet the criteria, that self-direction scored a 2% and did not meet the criteria, that the Personal Self-Sufficiency score of 104 shows higher functioning.

Individualized Education Program 4-7-06 (Exhibit #D-7) shows that he received special education, that he is bright, creative, talkative, and has many interests, that his annual goals are at a high level, that he is making progress, that he is at 6th grade level, and that he is in regular education classes 78% of the time.

Psychological Evaluation Report from ██████████ County Board of Education completed 9-30-05 (Exhibit #D-8) states that a composite score of 63 was determined on the Stanford Binet Intelligence Scale in 1999, that he scored a 93 in Math, that he has academic skills, that conversational efficiency appeared typical, that the WISC-IV showed 93 as general ability index, that the Vineland ABS showed scores of 94 in Communication, 79 in Daily Living Skills, 103 in Socialization, and 90 for Adaptive Behavior Composite.

Testimony from the Department's Psychologist Consultant also indicated that the MR/DD Waiver Manual does not state that MR norms cannot be used to determine medical criteria and that the denial letter does not state that the claimant does not meet ICF/MR level of care.

- 6) Testimony from Ms. ██████████ indicated that she completed the Psychological Evaluation dated 8-20-06, that he can read and write and has good language skills, that he cannot make good functional conversation, that he cannot consistently answer direct questions, that he would burn himself in hot water, that he has obsessive tendencies with figurines, that he becomes enraged if he thinks someone moves or steals them, that this interferes with self-direction.
- 7) Testimony from claimant's mother indicated that the autism teacher checks the claimant's papers before they go to other teachers, that he gets agitated at school and shows inappropriate behavior, that he talks over others, that he does not have to do the same level of work as others, that he becomes aggressive with other children, that he has safety issues, that he is aggressive with his younger brother, that he bites himself and picks at his skin, that he drinks water and shampoo, that he bolts from the room, that he receives special transportation services with an aide, that he has obsessive compulsive tendencies, that he has received MRDD services since 1999.
- 8) It should be noted that claimant's attorney offered a document (marked Exhibit #C1-1) which the Department's attorney objected to as the Department had not had an opportunity to review the document. The State Hearing Officer faxed a copy to the Department immediately after the hearing was adjourned and allowed one (1) week for review. The Psychologist Consultant for the Department reviewed the document and sent an e-mail on the same day (6-6-07) indicating that the document did not provide an additional eligible major life area.
- 9) It should be noted that both parties were allowed until 7-25-07 to provide written arguments and the State Hearing Officer received the written arguments of both parties on 7-26-07 and proceeded with the hearing decision.

- 10) 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).

11) 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."

12) 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."

13). 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.@

14) The areas of dispute involve whether the claimant meets the criteria of functionality including substantial limitations in the daily living areas of receptive or expressive language, self-direction, and functional academics. The Department acknowledged that the claimant met the criteria for substantial limitations in self-care and capacity for independent living and there was no dispute that the claimant did not meet the criteria in the area of mobility. The Department failed to enter the regulations as evidence during the hearing and failed to provide a copy of such after the hearing by fax as the Department's attorney stated he would do. However, the State Hearing Officer takes judicial notice of the regulations for which the hearing decision is based. In that regard, the primary issue is whether the documentation shows that medical criteria is met in at least one of the major life areas in dispute (receptive or expressive language, self-direction, or learning). The claimant's attorney argued that the ABS scores showed that the claimant met the criteria in all three (3)

areas using MR norms. The Department's Psychologist Consultant testified that non-MR norms should be used in assessing the ABS scores as the claimant did not show evidence of MR. However, under cross-examination, the Department's Psychologist Consultant testified that the regulations do not preclude the use of MR norms. The claimant's attorney argued that MR norms can be used due to the claimant having an MR-related condition and the absence of the regulations precluding the use of MR norms. The State Hearing Officer finds that the regulations state that "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 population or in the average range or equal to or below the 75th percentile when derived from MR normative populations". These regulations simply state what values are used when using non-MR or MR norms and do not clearly state which norms are to be used and do not preclude the use of MR norms for MR related conditions. Thus, the State Hearing Officer finds that the Psychological Evaluation Report from the ██████████ County Board of Education (Exhibit #D-8) showed that a Standard Benet Intelligence Scale showed a Composite IQ of 63 in 1999 which is within the MR range. In addition, the Psychological Evaluation completed by ██████████ on 8-12-05 (Exhibit #D-5) showed a Full Scale IQ of 74 on the WISC-IV which is borderline MR. The State Hearing Officer finds that since there is evidence of MR, the ABS scores from the MR norm can be used to determine medical eligibility criteria. As such, the State Hearing Officer finds that the claimant's ABS score of 37% rank combined with the scores of 16% rank in responsibility and socialization show that the claimant meets the medical eligibility criteria in the area of self-direction. In addition, the score of 2% rank for self-direction from the non-MR norm in the area of self-direction, while not an eligible score as it is not under 1%, shows that the claimant is substantially limited in self-direction. Since the State Hearing Officer finds that the claimant meets the criteria in a third major life area, the State Hearing Officer finds that the claimant meets the medical eligibility criteria for the Title XIX MRDD Waiver Services Program. The State Hearing Officer is not addressing the final two (2) areas of receptive or expressive language or learning as a determination in those areas is no longer necessary.

VIII. CONCLUSIONS OF LAW:

Regulations in the Title XIX MR/DD Waiver Manual Eligibility Criteria require that the applicant have a diagnosis of MR or a related condition, that it be manifested prior to age 22, that it is likely to continue indefinitely, that it substantially limits functioning in three (3) or more major life areas, and that active treatment is required in an ICF/MR facility. The claimant has an eligible diagnosis of Autism, the condition manifested prior to age 22, the condition is likely to continue, the condition substantially limits functioning in three (3) major life areas, including self-care, capacity for independent living, and self-direction, and the claimant requires ICF/MR level of care. The claimant meets the medical criteria for the Title XIX MR/DD Waiver Services Program.

IX. DECISION:

It is the decision of the State Hearing Officer to reverse 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 13th Day of August, 2007

Thomas M. Smith
State Hearing Officer