



**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

April 18, 2007

\_\_\_\_\_  
By \_\_\_\_\_

Dear Ms. \_\_\_\_\_:

Attached is a copy of the findings of fact and conclusions of law on your hearing held April 16, 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 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 and benefit levels for the Title XIX MR/DD Home and Community Based Waiver 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 the 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).

The information which was submitted at the hearing revealed that, based on the documentation provided, your son 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,

Thomas M. Smith  
State Hearing Officer  
Member, State Board of Review

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

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

\_\_\_\_\_,

**Claimant,**

**v.**

**Action Number: 06-BOR-3214**

**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 April 16, 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 April 16, 2007 on a timely appeal, filed October 27, 2006. It should be noted that the hearing was originally scheduled for February 16, 2007 but was rescheduled at claimant's request.

It should be noted here that the claimant's benefits have been denied pending a hearing decision. It should also be noted that the hearing was convened as a telephone conference hearing at claimant's request.

**II. PROGRAM PURPOSE:**

The Program entitled Title XIX MR/DD Waiver 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. \_\_\_\_\_, Claimant's mother and representative.
2. Jon Sassi, Program Coordinator, BHHF.
3. Linda Workman, Psychologist Consultant, BMS.

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, Chapter 500.

### **VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:**

#### **Department's Exhibits:**

- D-1 Copy of regulations from Title XIX MR/DD Waiver Manual (6 pages).
- D-2 Copy of notification letter dated 7-24-06.
- D-3 Copy of Annual Medical Evaluation dated 5-31-06 (4 pages).
- D-4 Copy of Psychological Evaluation Addendum 6-22-06.
- D-5 Copy of Psychological Evaluation 3-23-06 (6 pages).
- D-6 Copy of Adaptive Behavior Scale (8 pages).
- D-7 Copy of Social History 3-23-06 (3 pages).
- D-8 Copy of Individual Education Plan 8-31-05 (7 pages).
- D-9 Copy of report from [REDACTED] 8-25-05 (3 pages).

(It should be noted that additional documents were submitted by the Department which were not used or entered as evidence. These documents are marked as "Not admitted" for identification purposes only.)

#### **Claimant's Exhibits:**

None.

### **VII. FINDINGS OF FACT:**

- 1) The claimant was an applicant for the Title XIX MR/DD Waiver Services Program when an application packet was submitted by [REDACTED] to the MR/DD Waiver Program in June, 2006 for consideration of medical eligibility (Exhibits #D-3 through #D-9).
- 2) The packet was reviewed and the claimant was denied for medical eligibility with notification issued on 7-24-06 (Exhibit #D-2) which stated that additional information was required including the Vineland Adaptive Behavior Scale score summary referenced in the DD-3, an evaluation from the psychologist to verify the ABS-S-2 score summary, and a report from [REDACTED] in November, 2006 which includes an assessment for Autism. The Department received the report from the [REDACTED] but did not receive the other two documents.
- 3) The claimant's hearing request was received by the Bureau for Medical Services (BMS) on 10-27-06, by the Board of Review on 11-14-06, and by the State Hearing Officer on 11-15-06 and the hearing was convened on 4-16-07 after being rescheduled at claimant's request from 2-16-07.
- 4) Mr. Sassi testified regarding the medical eligibility criteria listed in Chapter 500 (Exhibit #D-1).
- 5) Annual Medical Evaluation dated 5-31-06 (Exhibit #D-3) gives mental diagnosis as autism, states that claimant is ambulatory, not toilet trained, feeds self and needs to be fed, needs total care with personal hygiene, is alert but need close supervision, and certifies the case for ICF/MR level of care.
- 6) Comprehensive Psychological Evaluation dated 3-26-06 by [REDACTED] (Exhibit #D-5) states that the claimant's current diagnosis is Axis I: Autistic Disorder, Axis II diagnosis as Moderate Mental Retardation, states that the claimant eats with a spoon and wears diapers, that with language, there is no expressive language and receptive language is marginal, that no intellectual testing was done, that Vineland Adaptive Behavior Scale was used but was not referenced in the report, that a recommendation was made for ICF/MR level of care, that ABS-2 scores were submitted but it could not be determined if the psychologist saw the scores.
- 7) Report from [REDACTED] dated 8-5-05, which was submitted in November, 2006 after the denial letter was issued, gives a diagnosis of Autism and a score of 109 which confirmed that diagnostic criteria was met.
- 8) Social History (Exhibit #D-7) dated 3-23-06 states that the claimant is doing better since starting school, uses a spoon, likes the trampoline.
- 9) Testimony from Ms. Workman purported that the documentation showed that the claimant has a diagnosis of autism but it could not be determined if he met the MR criteria, that the denial letter was issued in order to obtain the three (3) documents needed to make a determination but only one (1) of the three (3) documents was received, that the narrative from the school was over a year old, that it was determined that the claimant met the criteria for a substantial limitations in the major life area of language and did not meet the criteria in the area of mobility, but it could not be determined whether he met the criteria in any of the remaining four (4) areas, that it is

possible that the claimant qualifies for the program but the documentation does not show it, and that the claimant needs to reapply with current documentation.

- 10) Testimony from Ms. \_\_\_\_\_ purported that she was told that \_\_\_\_\_ sent in everything for the determination and that she has been trying for a long time to get her son on the program.
- 11) Title XIX MR/DD Home and Community Based Waiver Program Revised Operations Manual, Chapter 500 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).

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 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."

- 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."

- 14) The area of dispute involves whether the claimant meets the criteria of substantial limitations in three (3) of the daily living areas of self-care, receptive or expressive language, learning, mobility, self-direction, and capacity for independent living. The State Hearing Officer finds that the documentation shows that the claimant met the criteria for substantial limitations in the area of language and that he does not meet the criteria for substantial limitations in the areas of mobility. The State Hearing Officer finds that the Department was correct to request additional information in order to make a medical eligibility decision and that [REDACTED] did not provide the requested information. The medical eligibility decision is based on the documentation provided by the agency which gathered the documentation and the documentation provided in this case did not clearly show that the claimant had substantial limitations in at least three (3) of the six (6) major life areas.. The documentation showed that the claimant met the criteria for substantial limitations in language but not in mobility. Whether the claimant met the eligibility criteria for any of the other four (4) areas could not be determined. The State Hearing Officer finds that the Department was correct in the determination that eligibility could not be established in at least three (3) major life areas based on the documentation provided.

## **VIII. CONCLUSIONS OF LAW:**

- 1) Regulations require that a diagnosis of MR or related condition exist which must be severe and chronic and have been manifested prior to age 22 and is likely to continue. The documentation showed that the claimant was diagnosed with autism and meets the diagnostic criteria for the program.



- 2) Regulations require that substantial limitations in functioning must exist in three (3) or more of the major life areas. The claimant did meet the criteria for substantial limitations in the major life area of language but did not meet the criteria for a substantial deficit in the area of mobility. The documentation also did not show that whether the claimant met the criteria for substantial limitations in self-care, self-direction, learning, or capacity for independent living.

**IX. DECISION:**

It is the decision of the State Hearing Officer to uphold the action of the Department to deny medical eligibility for 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 18th Day of April, 2007.**

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**Thomas M. Smith**  
**State Hearing Officer**