



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

July 24, 2007

By _____

Dear _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held July 18, 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
Steve Brady, BHHF
Richard Workman, BMS

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

_____,

Claimant,

v.

Action Number: 07-BOR-543

**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 18, 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 July 18, 2007 on a timely appeal, filed December 26, 2006. It should be noted that the hearing was originally scheduled for March 14, 2007 and June 4, 2007 but was rescheduled both times at claimant's request.

It should be noted here that the claimant's benefits have been continued pending a hearing decision.

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.
2. _____, Claimant's Specialized Care Provider.
3. _____, Claimant's Specialized Care Provider.
4. _____

9. Stephen Brady, Program Coordinator, BHHF (participating by speaker phone).
10. Richard Workman, Psychologist Consultant, BMS (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, Chapter 500.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 Copy of regulations from Title XIX MR/DD Waiver Manual (3 pages).
- D-2 Copy of notification letter dated 12-20-06.
- D-3 Copy of Annual Medical Evaluation dated 7-11-06 (4 pages).
- D-4 Copy of Psychological Evaluation Update 7-17-06 (8 pages).
- D-5 Copy of Social History 6-21-06 (4 pages).
- D-6 Copy of Individual Education Plan 9-13-06 (20 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 a recipient of services under the Title XIX MR/DD Waiver Services Program when a reevaluation packet was submitted by [REDACTED] to the MR/DD Waiver Program in August, 2006 for consideration of medical eligibility (Exhibits #D-3 through #D-6).
- 2) The packet was reviewed and the claimant was denied for medical eligibility with notification issued on 12-20-06 (Exhibit #D-2) which stated that documentation submitted for re-certification does not support the presence of substantial delays in three of the six major life areas and Mr. [REDACTED] was previously diagnosed with moderate mental retardation and he no longer has that diagnostic distinction noted.
- 3) The claimant's hearing request was received by the Bureau for Medical Services (BMS) on 12-26-06, by the Board of Review on 1-11-07, and by the State Hearing Officer on 1-16-07 and the hearing was convened on 7-18-07 after being rescheduled at claimant's request from 3-14-07 and 6-4-07.
- 4) Mr. Brady testified regarding the medical eligibility criteria listed in Chapter 500 (Exhibit #D-1).
- 5) Annual Medical Evaluation dated 7-11-06 (Exhibit #D-3) gives mental diagnosis as Autistic, Mild MR, states that claimant is ambulatory, is continent, feeds self, is self-care with personal hygiene, is alert, and certifies the case for ICF/MR level of care.
- 6) Comprehensive Psychological Evaluation Update dated 7-17-06 by [REDACTED] Licensed Psychologist (Exhibit #D-4) states that the claimant's current diagnosis is Axis I: Autistic Disorder, Axis II: no diagnosis, states that the claimant scored a standard score of 87 on the TONI3, with 77 in Reading, 93 in Spelling, and 78 in Arithmetic on the WRAT3, states that he is ambulatory, brushes his teeth, requires verbal prompting to properly bathe, requires assistance with completing hygiene after bowel movement, can dress himself but cannot choose appropriate clothing, is continent, and is able to make simple purchases, that he is able to answer simple, direct questions, speaks in simple sentences, and is able to read and write, enjoys playing basketball, computer games, and likes to be around others, gives ABS scores under non-MR norms including percentage rank and standard scores of 2 and 4 for Independent Functioning, 9 and 6 for Language, and 9 and 6 for Self-Direction, gives no measure of severity for the autism, and recommends ICF-MR level of care.
- 7) Social History dated 6-21-06 (Exhibit #D-5) states that the claimant has activities and interests and that he is aware of dangers around the house but not out in the community.
- 8) IEP (Exhibit #D-6) dated 9-13-06 states that the claimant is Mentally Impaired but does not show Autism, shows a full-scale IQ of 62 with Communication as 81, Daily Living as 66, Socialization as 75, and Composite of 68.
- 9) Testimony from Mr. Workman purported that the documentation showed that the claimant has a diagnosis of autism while previously being diagnosed as moderate MR but the denial was due to not having substantial delays in 3 or 6 major life areas, that the claimant clearly did not have limitations in mobility, that he did not meet the criteria in

language, learning, or self-direction, that he may have met criteria in capacity for independent living, and that self-care may have been overestimated by the documentation but he did not meet the criteria in that area.

- 10) Testimony from Mr. [REDACTED] purported that the claimant did play basketball and baseball but has weakness in communication, that he could not live on his own without the MRDD Program, and that the parents have worked hard to help him.
- 11) Testimony from [REDACTED] purported that the claimant did not go to extended school because she did not want him picking up behavior problems from other students, that they work with him at home, that he does not understand things, that his reasoning is low.
- 12) Testimony from [REDACTED] purported that the claimant played in minor league baseball which was for players younger than him and that reasoning is a problem with him.
- 13) Testimony from Ms. [REDACTED] purported that the claimant has self-care deficits but can do with prompting, that he is hesitant to talk at times, that at times he cannot make the correct choice, that he is not capable of independent living as he is not aware of danger, that he needs constant supervision, that he does not understand sportsmanship, that he is mentally impaired, and that he could never self-medicate.
- 14) Testimony from Ms. [REDACTED] purported that the [REDACTED] have worked hard to mainstream the claimant, that he is not able to make it on his own, and that he needs a lot of one on one attention.
- 15) 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).

- 16) 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."

17) 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."

18) 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 does not meet the criteria in the area of self-care as the scores on the ABS show 2% ranking and standard score of 4. In addition, the documentation shows that the claimant has self-care skills but needs prompting. In the area of receptive or expressive language, the State Hearing Officer finds that the documentation shows that the claimant does not have substantial limitations in this area as the ABS shows 9% ranking and standard score of 6 and the documentation shows that he can express himself. In the area of learning, the State Hearing Officer finds that the documentation shows that the claimant does not have substantial limitations in the area of academics and therefore does not meet the criteria for substantial limitations in the area of learning. In the area of mobility, the documentation shows that the claimant does not meet the criteria for substantial limitations in the area of mobility. The State Hearing Officer finds that the documentation shows that the claimant does not meet the criteria for substantial limitations in the area of self-direction as the ABS scores showed 9% ranking and 6 standard score. The State Hearing Officer finds that the claimant does have limitations in the area of capacity for independent living due largely to his age and inability to be aware of danger. However, 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 only in the area of capacity for independent living. The State Hearing Officer finds that the Department was correct in the determination that eligibility was not 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 capacity for independent living but did not meet the criteria for a substantial deficits in the areas of self-care, language, learning, mobility or self-direction.

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 24th Day of July, 2007.

Thomas M. Smith
State Hearing Officer