



**State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
P.O. Box 6165
Wheeling, WV 26003**

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

June 30, 2008

_____ for _____

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held June 23, 2008. 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 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, 11-1-04).

The information, which was submitted at the hearing, revealed that _____ 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,

Melissa Hastings
State Hearing Officer
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review
Makell Golden, BHMF
Linda Workman, BMS

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

_____,
Claimant,

Action Number: 08-BOR-1012

**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 June 23, 2008 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 23, 2008 on a timely appeal, filed March 17, 2008.

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

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 Father

_____, Claimant's Mother

Mekell Golden, BHHF (participating by speakerphone)

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

Presiding at the Hearing was Melissa Hastings, 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 (revised November 1, 2007)

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 MR/DD Waiver Services Manual Chapter 500 updated 11-01-07

D-2 Notice of Denial dated February 6, 2008

D-3 West Virginia Department of Health and Human Resources ICF/MR Level of Care
Evaluation dated December 26, 2007

D-4 West Virginia Department of Health and Human Resources Psychological Evaluation
dated January 16, 2008

D-5 Individualized Education Program Plan dated August 28, 2007

VII. FINDINGS OF FACT:

- 1) The claimant's parents filed an application on or about January 22, 2008 on behalf of the claimant for the Title XIX MR/DD Waiver Services Program. The Bureau of Behavioral Health reviewed the application packet in February and determined that the documentation provided did not support the presence of substantial adaptive deficits in three or more of the six major life areas identified for program eligibility.
- 2) A notice of denial (D2) was issued to the claimant on February 6, 2008 indicating the following:

Your Waiver application is hereby denied.

Your application was denied because:

Documentation submitted does not support the presence of substantial adaptive deficits in three or more of the six major life areas identified for Waiver eligibility. Specifically, the documentation failed to demonstrate substantial limitations in the following major life areas:

Learning

Self Direction

Receptive or Expressive Language

Mobility

Capacity for Independent Living

- 3) The Initial ICF/MR level of Care Evaluation (D3) completed by the claimant's physician listed a qualifying diagnosis of Autism. This diagnosis was entered on the form by the physician on December 18, 2007. On this same form the physician also acknowledges the claimant's need for the level of care and services provided in an Intermediate Care Facility. The physician notes that the claimant is continent and feeds himself. There is an indication that the claimant does need assistance with personal hygiene/self care and the physician recommends speech and occupational therapies.
- 4) The Psychological Evaluation (D4) completed January 16, 2008 notes that a diagnosis of pervasive developmental disorder, NOS was made by the [REDACTED] in March 2006.
- 5) The Psychological Evaluation (D4) reports the following current behaviors:

Psychomotor: Rate of motor movement is accelerated. Rate of speech is slow. Fine motor ability is reported as delayed but adequate for most tasks. Gross motor ability is adequate.

Self Help: Claimant eats independently with utensils but requires assistance with cutting foods. Needs some assistance in dressing. Toileting is achieved with some infrequent bed wetting. He bathes with some assistance.

Language: Claimant's main means of communication is verbalization. Verbal communication is understandable to the average observer. He is able to understand follow one step instructions but noted to require various cues and prompts at times as he is distractible.

Affective: mood was described as cheerful though he is easily frustrated and will yell and whine. Affect was normally variable and appropriate.

Mental Status: Claimant was oriented to person, but not to place nor time. Attention and concentration were poor, as he was easily distracted. He can attend for long periods of time to certain games and toys.

Other: Claimant enjoys watching games on PBS, likes mechanical things and likes to know how things work. Has good balance and often insists on doing things alone. He can ride a two-wheeler and recently “taught himself” the alphabet by using a hand held game. He prefers doing some things alone and is able to hyper-focus on certain activities.

- 6) The Psychological Evaluation (D4) indicates a Stanford-Binet Intelligence Scales- Fifth Edition was attempted for the claimant but because of his low level of responsiveness and distractibility his performance on the test was not considered an adequate representation of his abilities and was not interpretable.
- 7) The Psychological Evaluation (D4) indicates the Gilliam Autism Rating Scale was completed on the claimant. Claimant’s Autism Quotient of 80 was in the range of scores considered to be within the below average range for probability of Autism. Testimony received from the Department’s psychologist who reviewed the application indicates that a score of 115 to 130 would have been required for a diagnosis of Autism.
- 8) The Psychological Evaluation (D4) indicates the following Adaptive Behavior Scale scores which would relate to functioning abilities in the identified major life areas. These scores were claimant’s scores when compared to a Non MR population:

Independent Functioning	Percentile 25
Physical Development	Percentile 84
Economic Activity	Percentile 16
Language Development	Percentile 25
Numbers and Time	Percentile 50
Pre/Vocational Activity	Percentile 37
Self-Direction	Percentile 16
Responsibility	Percentile 9
Socialization	Percentile 5
Social Behavior	Percentile 25
Conformity	Percentile 2
Trustworthiness	Percentile 16
Stereotyped and Hyperactive	Percentile 5

Self-Abusive Behavior	Percentile 25
Social Engagement	Percentile 9
Disturbing Interpersonal Behavior	Percentile 5

- 9) Testimony received from the Department's Psychologist who reviewed the application packet submitted on behalf of the claimant indicates she found that claimant met the qualifications of having an eligible diagnosis based on the medical evaluation completed by the physician. However the documentation provided did not substantiate the presence of substantial adaptive deficits in three or more of the major life areas. The Adaptive Behavior scores listed on the psychological report were all higher than the program requirements in the areas of Self care, Language, Social behavior and Self Direction. Testimony from the department's psychologist indicates that since there was no intellectual testing completed for the claimant by the evaluating psychologist, she utilized the Individualized Education Program report (D5) and the Psychological Report (D4) in determining whether a deficit existed for Learning. The IEP indicates that claimant has shown steady progress in all classroom skills. He is able to recall familiar objects, repeat four-digit sequences, give three objects upon request, and identify source of common actions. The psychological report indicates claimant had taught himself the alphabet by using a hand held game. Based on these factors the department's psychologist determined that the claimant did not have a substantial deficit in the area of learning.
- 10) Testimony from the claimant's parents indicates that their son can be taught words and to say things but doesn't know the nuance of what he is saying. He can speak but you cannot have a meaningful conversation with him. He has had two years of occupational therapy to try to teach him to dress himself but still cannot do it. It is not that he is physically incapable of dressing but he cannot stay on task long enough to accomplish the task. The parents agree that their child does not have a deficit in the area of mobility. He is fully capable of moving from one place to another on his own. Can operate a two wheeler independently. They acknowledge he has good math skills and did teach himself the alphabet.
- 11) Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500, November 2007 states, in part:

"Medical Eligibility Criteria

The MR/DD State Waiver Office determines 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 monitoring, supervision, training, and supports.

- MR/DD State Waiver Office determines the level of care (medical eligibility) based on the Annual Medical Evaluation (DD-2A), Psychological Evaluation (DD-3), and verification if not indicated in the DD-2A and DD-3, that documents that the mental retardation and/or related conditions with associated concurrent adaptive deficits were manifested prior to the age of 22, and are likely to continue indefinitely. Other documents, if applicable and available, that can be utilized include the Social History IEP for school age children, Birth to Three assessments, and other related assessments..

The evaluations must demonstrate that the applicant has a diagnosis of mental retardation 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 not only by the relevant test scores, but also the narrative descriptions contained in the documentation. To be eligible, the member:

- * Must have a diagnosis of mental retardation, with concurrent 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 and requires services similar to those required for persons with mental retardation.
 - * Autism
 - * Traumatic brain injury
 - * Cerebral Palsy
 - * Spina Bifida
 - * Tuberous Sclerosis

Additionally, the member who has a diagnosis of mental retardation and/or related conditions with associated concurrent adaptive deficits must have the following:

- * Manifested prior to the age of 22, and
- * Likely to continue indefinitely

* Must have the presence of at least three (3) substantial deficits as that term is defined in Title 42, Chapter IV, Part 435.1009 of the Code of Federal Regulations or CFR.

Functionality

* Substantially limited functioning in three (3) or more of the following major life areas: (“Substantially limited” is defined on standardized measures of adaptive behavior scores three (3) standard deviations below the mean or less than one (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 not only by the relevant test scores, but also the narrative descriptions contained in the documentation submitted for review, i.e., psychological, the IEP, Occupational Therapy evaluation, etc.) Applicable categories regarding general functioning include:

- **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, leisure activities)
- For applicable major life functioning areas, refer to Code of Federal Regulation (CFR): 42 CFR 435.1009

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, maintain current level of 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 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 a diagnosis of MR or related condition exists which must be severe and chronic and have been manifested prior to age 22 and is likely to continue. There is some question as to whether the claimant meets the criteria. The claimant's physician indicates Autism as a diagnosis on the level of care evaluation but the psychological evaluation indicates a diagnostic impression of Pervasive Developmental Disorder, NOS and/or Attention Deficit Hyperactivity Disorder. The Gilliam Autism Rating Scale completed on the claimant indicates the claimant was in the below average range for the probability of Autism.
- 2) Regulations require that substantial limitations in functioning must exist in three (3) or more of the six (6) major life areas. These six (6) areas are Self Care, Receptive or expressive language (communication), Learning (functional academics), Mobility, Self Direction and Capacity for Independent Living. Regulations define substantially limited in terms of standardized measures of adaptive behavior scores as three (3) standard deviations below the mean or less than one (1) percentile when derived from non MR normative populations. Adaptive behavior testing was completed on the claimant and his scores in the areas of Self Care, Language and Self Direction were all well above one (1) percentile when compared to a Non MR population. The area of Learning was not evaluated using standardized testing due to claimant's unresponsiveness and distractibility during the attempt at testing. However the documentation provided in the form of the psychological testing report and the individualized educational program for the claimant all indicate an ability to learn and in some cases teach himself subjects such as the alphabet. The documentation and the parent's testimony all indicate that the claimant is not substantially limited in the area of Mobility. He can operate a two wheeler independently and can move about without limitation. The area of Capacity for Independent Living is difficult if not impossible to determine for a child of this age and was not considered in detail by the evaluating psychologist.

- 3) Documentation and testimony provided are clear that the claimant does not meet the program requirement of having substantial limitation in functioning in three (3) of the six (6) major life areas.

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 30th Day of June, 2008.

**Melissa Hastings
State Hearing Officer**