



**State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
P.O. Box 1736
Romney, WV 26757**

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

August 19, 2008

by _____

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your son's hearing held July 30, 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 Program for your son.

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).

The information, which was submitted at the hearing, did not support that your son exhibits substantial limitations in three of the major life areas due to a condition of mental retardation or related condition. The information does not support that he needs the level of care provided in an ICF/MR facility. He therefore, does not meet the medical criteria for 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,

Sharon K. Yoho
State Hearing Officer
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review
Steve Brady, BBHHF
Rick Workman, BBHHF

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

_____ by _____,

Claimant,

v.

Action Number: 08-BOR-1370

**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 August 18, 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 telephonic fair hearing was scheduled for and convened on July 30, 2008 on a timely request received May 14, 2008.

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:

Claimant's Witnesses:

_____, Claimant's mother

Department's Witnesses:

Mekell Golden, Bureau of Behavioral Health

Rick Workman, Psychologist Consultant, BMS

Presiding at the Hearing was Sharon K. Yoho, State Hearing Officer and a member of the State Board of Review.

All participants appeared by Speakerphone

IV. QUESTIONS TO BE DECIDED:

The question to be decided is whether the Department correctly determined that the claimant does not meet the medical eligibility 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

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 of denial dated April 18, 2008

D-3 DD-2A Level of Care Evaluation dated November 6, 2007

D-4 Psychological Evaluation dated January 31, 2008

D-5 IEP, [REDACTED] County Schools dated September 17, 2007

VII. FINDINGS OF FACT:

- 1) The Claimant's mother submitted documents to the Title XIX MR/DD Waiver program in April 2008 for an evaluation of the Claimant's medical condition to determine if he was medically eligible for the program. The Department completed their evaluation of the documents on April 18, 2008 and reached the decision that the claimant did not meet the medical criteria for the program. A notice of denial was mailed to the claimant on April 18, 2008. This notice advised that, "Documentation submitted does not support the presence of substantial adaptive deficits in three or more of the major life

areas identified for Waiver eligibility.” Substantial limitations were only identified in the area of Self Care.

- 2) The Level of Care Evaluation, Exhibit D-3, notes that the child is ambulatory and partially incontinent. It notes that the child feeds himself and needs assistance in personal hygiene. It indicates that the child has limited communication skills. This evaluator assigned an Axis II diagnosis of Pervasive Developmental Delay and Autism.
- 3) A Psychological dated January 31, 2008, Exhibit D-4, listed an Axis I diagnosis of Pervasive Developmental Disorder NOS and R/O Autistic Disorder. The Psychologist completing this evaluation reports that the child does have symptoms of autism however, he does not meet the requirements of this diagnosis. She indicates that he does have a pervasive developmental disorder. This Psychological was completed when the child was six years old. The evaluator notes that the child’s physical development is an age equivalent of 9 years of age. His self-help skills are rated at a less than three-year-old level. He needs help with toileting, has to be washed and dried by others, needs some assistance with dressing and can put his own Velcro shoes on and take them off. This evaluation notes that the child has adequate verbal skills. He prefers to play alone and likes playing with cars.
- 4) A Wechsler Preschool Intelligence Scale test was administered which produced a verbal IQ of 81, and a full scale IQ of 84. These scores fall in the low average range. An Adaptive Behavioral Scale (ABS) test was administered during the Psychological. It produced the following percentile scores.

Independent Functioning	1
Physical Development	50
Language Development	2
Numbers and Time	37
Pre-Vocational	16
Self-Direction	1
Responsibility	5
Socialization	1

The Department looks for scores of less than 1% for determining substantial limitations. The evaluator notes that the child was referred for the evaluation to aid in the determination of eligibility for Waiver services. The evaluator reports that the child’s percentile scores are below the 1st percentile as derived from non mental retardation norms in independent functioning, self-direction and socialization. The Department however notes that these three areas were scored at the 1% range rather than below.

Childhood Autism Rating Scale (CARS) testing yielded a total score of 30.5, which indicates very mild symptoms of autistic disorder. The Psychological noted that the cutoff score between non-autistic and mild autistic is a score of 30.

- 5) The Department agrees that the child exhibits substantial deficits in the area of self-care. In the area of self-direction, the Department did not determine that the child had substantial deficits. The Psychological notes that the child asked if he could play with a board game when the testing was over. He then occupied himself and played very

quietly. The Psychological notes that he likes to play with cars. The Department did not assess a substantial deficit in the area of capacity for independent living, which is where the socialization skills would relate. The child is reported to prefer to play alone. He ignores regulations and resists following requests of him. He is rebellious and misbehaves in group settings. He is destructive with his property, takes other's property and displays physical violence to himself. He has mood changes without apparent reason and seems to have no emotional control. He appears insecure and frightened in daily activities.

- 6) The IEP shows that the Claimant's son attends regular classroom 95% of the time and special education 5% of the time for primarily speech therapy. Documentation shows that his communication skills permit him to make his wants and needs known.
- 7) Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500, November 2005 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 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.

The MR/DD State Waiver Office determines the level of care based on the Annual Medical Evaluation (DD-2A), Psychological Evaluation (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 condition and associated concurrent adaptive deficits must have the following:

* were 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 (CFR). Refer to 503.1, Functionality section for a list of the major life areas.

Functionality

* Substantially limited functioning in three 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 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 and, leisure activities)

For applicable major life functioning, refer to Code of Federal Regulations (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 levels 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).

Conditions Ineligible

* Substantial deficits associated with a diagnosis other than mental retardation or a related diagnosis do not meet eligibility criteria.

* Additionally, any individual needing only personal care services does not meet the eligibility criteria.

* Individuals diagnosed with mental illness whose evaluations submitted for medical eligibility determination indicate no previous history of co-occurring mental retardation or developmental disability prior to age 22. The member's clinical evaluators must provide clinical verification through the appropriate eligibility documentation that their mental illness is not the primary cause of the substantial deficits and the mental retardation or developmental disability occurred prior to the age of twenty-two (22).

8) 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

9) 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 provide that along with an eligible diagnosis, the applicant must exhibit at least three substantial deficits associated with that diagnosis. Although there was question regarding diagnosis, the Department accepted Autism as an eligible diagnosis even though he was reported to have very mild symptoms for this diagnosis. Three substantial deficits in six of the major life areas are required for medical eligibility for the program and the Department determined that substantial deficits could only be determined in the area of self-care.
- (2) Narrative documentation and adaptive behavior test scores did not support that the Claimant's son is substantially limited in only the area of self-direction. The six-year-old was reported to enjoy playing alone with cars and he asked permission to play with a board game when the Psychological evaluation was complete. Along with his percentage score not being rated as less than one in self-direction, the documentation clearly indicates that the child has capacity for self-direction and is not substantially limited in that area. The child is substantially limited in the social skill area and his actions in regard to others in his community are unacceptable. He ignores regulations and resists when he is requested to do something. The low score of 1% along with narrative descriptions support a finding that this child will not as an adult have capacity for independent living without much intervention. This child should have been assessed with two substantial limitations in the major life areas with the addition of one assessed in the area of Capacity for Independent Living.
- (3) This child exhibits substantial deficits in only two of the major life areas and the evidence presented nor testimony support that this child requires the level of care and services provided in an ICF/MR facility, which is another requirement of the program. He therefore is not medically eligible for MR/DD waiver program services.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the action of the Department to deny medical eligibility for services under the Title XIX MRDD Waiver Services Program for this claimant.

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this 19th Day of August 2008.

**Sharon K. Yoho
State Hearing Officer**