



**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**

October 14, 2008

\_\_\_\_\_ for \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

Dear \_\_\_\_\_:

Attached is a copy of the findings of fact and conclusions of law on your hearing held September 29, 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  
Steve Brady, BHMF  
Linda Workman, BMS

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

\_\_\_\_\_,

**Claimant,**

**v.**

**Action Number: 08-BOR-1755**

**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 September 29, 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 September 29, 2008 on a timely appeal, filed August 4, 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 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 Mother  
Steve Brady, BHHF  
Linda Workman, Psychologist Consultant, BMS

Presiding at the Hearing was Melissa Hastings, State Hearing Officer and a member of the State Board of Review.

All parties appeared telephonically.

### **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
- D-2 Notice of Denial dated June 30, 2008
- D-3 West Virginia Department of Health and Human Resources ICF/MR Level of Care Evaluation dated April 14, 2008
- D-4 Initial Comprehensive Psychological Evaluation from [REDACTED]
- D-5 Report of Psychoeducational Assessment for \_\_\_\_\_ Schools dated February 7, 2008
- D-6 Individualized Education Program \_\_\_\_\_ Schools dated March 18, 2008

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

None

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

- 1) The claimant's mother filed an application on or about June 16, 2008 under the Title XIX MR/DD Waiver Services Program on behalf of the claimant. The Bureau of Behavioral Health reviewed the application packet and determined that the

documentation provided did not provide a definitive qualifying diagnosis nor did it 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 June 30, 2008 indicating the following:

Your Waiver application is hereby denied.

Your application was denied because:

There are differing diagnostic considerations being offered by the physicians and evaluating psychologist. While the physician on the DD-2A has diagnosed Autism and mental retardation, mental retardation is not supported by the psychometric data submitted. The psychologist does not offer Autism, but rather Asperger's Disorder which is not considered to be a related condition. The IEP indicates that Mr. [REDACTED] is being served in the school system as a learned disabled student and not for Autism. Please clarify MR.

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:

Self Care

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 diagnosis of Autism and Mild Mental Retardation. This diagnosis was entered on the form by the physician on April 14, 2008. 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 ambulatory, continent, feeds self, needs assistance for personal hygiene/self care and has limited communication. The report makes no additional recommendations. The physician indicates the child's prognosis is Poor. Claimant is 9 years old.
- 4) The Psychological Evaluation (D4) completed April 21, 2008 notes a previous diagnosis of Autism, Attention Deficit/Hyperactivity Disorder, Combined Type and Tourette's Disorder made by Dr. [REDACTED] a psychiatrist. The Claimant is currently

receiving outpatient psychiatric services from Dr. [REDACTED] and has been diagnosed with Asperger's Disorder.

5) The Psychological Evaluation (D4) reports the following current behaviors:

**Psychomotor:** Claimant is ambulatory and has effective use of all four extremities. Does not appear to have any visual, auditory, or olfactory difficulties. Has a high pain tolerance and sensitivity to loud sounds. He gags easily when trying to complete oral hygiene. Gross motor skills appear to be adequate. Types his school assignments on a computer due to poor handwriting.

**Self Help:** Claimant is totally dependent upon others for care of personal belongings, decision-making in all areas, daily living tasks and financial support and management, and accessing and using community resources. He can feed himself but with considerable spillage due to eating too fast and filling his mouth full before swallowing. Drinks independently from a cup or glass. Can order simple meals from a restaurant. Independently toilets but has accidents approximately 4 times per week at night. Requires supervision, prompting and assistance to complete personal and oral hygiene. He is able to dress himself but requires assistance for fastening and choosing appropriate clothing. He is unaware of dangerous objects and situations and requires constant supervision to insure his safety. He does not know how to administer simple first aid or how to obtain the help of a medical professional. He is unable to use money or a telephone. He can count 10 or more objects and can tell time. Has difficulty with simple math. He can complete simple work tasks, but needs constant encouragement in order to complete tasks. He is unable to organize a task, becomes easily discouraged, fails to carry out the task, and will jump from one task to another.

**Language:** Claimant has adequate receptive and expressive language skills. His speech at times is hurried, accelerated or pushed and with poor articulation, it makes him difficult to understand. On occasion he will talk very loudly or yell at others, makes growling, humming or other unpleasant noises and repeats a word or phrase over and over again. He is able to understand instructions involving a series of steps, carries on conversations with others, can be reasoned with and responds when spoken to. His reading abilities appear to be commensurate to his age.

**Affective:** Claimant is able to express a full range of emotions, but it is usually restricted. He appears to change mood without apparent reason, cries for no apparent reason and seems to have no emotional control

**Mental Status:** Claimant is of average height and weight for his age. He was oriented to person, place, time and grossly to situation. Immediate, recent, and remote memory appears to be intact. Attention and concentration appear to be mildly impaired

**Other:** Claimant will interact with others for a brief period of time, will help others if asked, but is not considerate of others' feelings, does not always recognize social boundaries with people and will do anything to make friends with others. He often prefers to be alone. He does exhibit physical aggression towards others and is gullible. Likes playing video games however they tend to trigger symptoms of the Tourette's Disorder.

A Kaufman Brief Intelligence Test, Second Edition was given to the Claimant with the following results:

	Scaled Score	90% Confidence Interval
Verbal IQ	84	77-92
Nonverbal IQ	87	80-96
IQ Composite	83	77-91

An ABS I and II AAMR Adaptive Behavior Scale with standard scores and ratings based on comparisons with non-mentally retarded individuals of similar age was also give to the Claimant with the following results:

Part One Domain Scores	Standard Score	Rating
Independent Functioning	3	very poor
Physical Development	12	average
Economic Activity	2	very poor
Language Development	8	average
Numbers and Time	10	average
Prevocational/Vocational Activity	5	poor
Self-Direction	6	below average
Responsibility	5	poor
Socialization	4	poor

Part Two Domain Scores	Standard Score	Rating
Social Behavior	8	average
Conformity	3	very poor
Trustworthiness	1	very poor
Stereotyped and Hyperactive Behavior	1	very poor
Self-Abusive Behavior	4	poor
Social Engagement	5	poor

Disturbing Interpersonal Behavior	4	poor
Part One Factors	Standard Score	Rating
Personal Self-Sufficiency	82	below average
Community Self-Sufficiency	67	very poor
Personal-Social Responsibility	67	very poor

Part Two Factors	Standard Score	Rating
Social Adjustment	58	very poor
Personal Adjustment	58	very poor

A Gilliam Autism Rating Scale – Second Edition was also given to the Claimant during this evaluation with the following results:

Subscale	Standard Score	Percentile
Stereotyped Behaviors	11	63
Communication	11	63
Social Interaction	10	50
Autism Index	104	61

It is noted that these results indicate that the Claimant demonstrates significant amounts of autistic behavior and is it very likely that he meets the diagnostic criteria for Autism.

The diagnosis section of the report indicates an Axis 1 diagnosis of Asperger's Disorder and Attention Deficit/Hyperactivity Disorder, Combined Type.

A placement recommendation was made by the psychologist completing the report that the Claimant's level of impairment, adaptive behavior and the level of supervision necessary for his daily functioning would require a 24 hour IFC/MR level of care.

- 6) The Psychoeducation Assessment (D5) revealed that a Weschsler Intelligence Scale for Children was given to the Claimant. The results of this test indicate that Claimant has a full scale IQ of 88. Scores between 90 and 110 are considered average. Claimant's score is considered to be low average ability level. His verbal reasoning skills were determined to be more highly developed than his nonverbal reasoning skills. He has difficulty attending to orally presented information, however. He is more adept at attending to visual stimuli and speed of processing visual information is average. As a result it was recommended that Claimant be given directions and instructional materials in written form in addition to verbal presentation.

- 7) The Individualized Education Program (D6) indicates that the school is providing services to the Claimant as a learning disabled student rather than a mentally impaired student.
- 8) Testimony received from the Department's Psychologist who reviewed the application packet submitted on behalf of the claimant indicates she could not find a definitive qualifying diagnosis of mental retardation and/or a related condition. There were conflicting diagnoses given by the physician and psychologist. In addition, her testimony indicates she could not find substantially limited functioning in three or more of the major life areas that are considered in determining eligibility for the program. Her testimony regarding her evaluation of the claimant in these six areas was as follows:

Self-Care - The medical report completed by the physician indicates that claimant needs some assistance with personal hygiene/self care but he is able to feed himself, to toilet himself and dress himself with some assistance.

Receptive or expressive language (communication) – The medical report completed by the physician indicates limited communication. The psychological report however indicates he has adequate receptive and expressive language skills. He is able to understand instructions and carry on conversations. Can order simple meals at a restaurant. Can definitely make his wants and needs known.

Learning (functional academics) – The psychological report indicates a Kaufmann IQ composite score of 83 which places claimant in the below average range of intellectual functioning. A score of 69 would be considered at MR level. The Weschler IQ score completed by the school on the Claimant was an 88 which indicates a low average ability level. Both IQ scores are similar in result and higher levels than the program requires.

Mobility – Both the medical and psychological exam indicate that the Claimant has no problems in the area of mobility. Has full use of all of his limbs and can move about without difficulty.

Self-direction - The psychological report indicates that an ABS evaluation was completed on the Claimant. In the area of self direction the claimant's score was a 6 which is below average but higher than program requirements of being 1 or less.

Capacity for Independent Living - This category is determined by evaluating the Claimant's abilities in the areas of home living, social skills, employment, health and safety and community and leisure activities. The psychological ABS scores were utilized. For employment the Prevocational/Vocation Activity score was utilized. The score was a 5 which was poor but higher than the score of 1 that is required. The department's psychologist indicated she felt the claimant appeared to meet the criteria in the area of health and safety. In the area of social skills, the ABS scores were once again reviewed and the scores in social behavior, social engagement and socialization were all higher than the program requirements of being 1 or less. The areas of home living and community and leisure activities while not evaluated by the ABS scores were reflected in the narrative portions of the psychological report and the school reports. The department's psychologist believes these narratives show that claimant



demonstrates the ability to select his leisure activities and participate in them and functions in his home with supervision.

- 9) Testimony received from the Claimant's mother indicates that at 3 years old her son was diagnosed with Asperger's disorder. However recently her son was evaluated by a new psychiatrist who has diagnosed Autism instead of Asperger's. The mother's testimony indicates that as her son has aged it is becoming more and more difficult to manage him. She indicates he cannot select appropriate clothing for the type of weather conditions. Cannot turn on water properly in a shower and must be told what to wash in order to accomplish a proper bath. As for academics, he has severe problems with math but is also receiving failing grades in other subjects. Can do very simple math like  $1 + 1$  but cannot comprehend math when it gets past single digits. He can read but does not comprehend what he has read. Her biggest concern has to do with his violent behavior. He is restricted in gym class at school to self activities as he cannot participate in group activities without hitting others. He is very hard to keep under control. She cannot take him to a store by herself or to a park. When he engages other children in play he ends up hitting/hurting the other children.
- 10) 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 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.

- \* 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, 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

- \* 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). 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 with no indication of a previous co-occurring history of mental retardation or developmental disability prior to age 22 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).

### **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 use, leisure)
- 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).

- 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 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

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.

### **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 are conflicting diagnoses presented in the claimant's application. The physician's diagnosis is autism with mild mental retardation. The psychologist's diagnosis is Asperger's Disorder and Attention Deficit/Hyperactivity Disorder. Autism is listed as a possible related condition within policy but it must be severe and chronic in nature. The fact that the physician indicates mild mental retardation as one diagnosis brings into question whether the autism would meet the severe and chronic nature required. In addition, Claimant's intelligence testing scores do not meet the levels of mental retardation. Due to the disparity in the diagnosis between the physician and psychologist there is no conclusive qualifying diagnosis
- 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. Based on the various intelligence and behavioral test scores and the narratives provided in the reports it is clear that the Claimant does not have the necessary substantial limited functioning in three (3) of the six (6) major life areas required by policy.

### **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 14th Day of October, 2008.**

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**Melissa Hastings  
State Hearing Officer**