



**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 2, 2008

_____ for _____

Dear _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held September 4, 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-1777

**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 4, 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 4, 2008 on a timely appeal, filed August 7, 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 July 3, 2008
- D-3 West Virginia Department of Health and Human Resources ICF/MR Level of Care Evaluation dated April 22, 2008
- D-4 Section IV of a Psychological Evaluation dated May 20, 2008
- D-5 Comprehensive Psychological Evaluation dated May 20, 2008 from [REDACTED]

Claimant's Exhibits:

- C-1 Summary of Progress-Physical Therapy dated February 6, 2008
- C-2 WV Birth to Three Intervention Activity Notes dated May 23, 2008 through July 16, 2008

VII. FINDINGS OF FACT:

- 1) The claimant's mother filed an application on or about June 24, 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 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 July 3, 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 Downs Syndrome with developmental delays. This diagnosis was entered on the form by the physician on April 22, 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 incontinent, needs assistance to feed himself, is ambulatory with human help, needs total care for personal hygiene/self care and has limited communication. The report also indicates a recommendation for speech, occupational and physical therapies. Claimant is 2 ½ years old.

- 4) The Psychological Evaluation (D5) completed May 20, 2008 notes that a diagnosis of Downs Syndrome has been made.

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

Psychomotor: Claimant is just learning to walk. Falls to knees and crawls when he tires. Does not feed himself as he does not chew his food up well. Does drink from a bottle. Has a brace on the left foot and is going to receive a brace up to the knee on the right side. Utilizing vibrating tools to encourage chewing.

Self Help: Claimant cannot eat independently due to chewing difficulties. Cannot suck from a straw. Can indicate if his diaper is wet but is not toilet trained. Cannot zip

zippers, button buttons or fasten snaps. Cannot put on shoes himself. Requires complete care to achieve bathing.

Language: Claimant uses few words. Main mode of communication is grunting but can say Mama, Da. Utilizes sign language for “eat” and “more”. Responds to simple commands such as “come eat” and “get in the high chair”.

Affective: Mood was described as happy. Becomes fussy with unexpected changes. There is difficulty getting him to sleep.

Mental Status: The psychologist described claimant as friendly, moving freely around the room and not staying in one spot very long. A formal mental status exam could not be completed based on his age, nonverbal communication and other impairments.

Other: Claimant enjoys playing with this sister, looking at books, playing with cars and watching “Baby Einstein” videos. Likes to walk outside. Likes older children and is very affectionate.

The Psychological Evaluation (D5) indicates that no cognitive testing was done due to his age and communication deficits. A Vineland Adaptive Behaviors Scales was completed with the following results:

Domain	Standard Score	Percentile Rank	Age Equivalent
Communication	60	0.4	0-11
Daily Living Skills	52	0.1	0-5
Socialization	68	2.0	1-2
Motor Skills	57	0.2	1-2
Adaptive Behavior Comp.	54	0.1	0-11

The psychological report provides a diagnosis of mental retardation, severity unspecified – likely mild to moderate range along with a diagnosis of Down Syndrome. The psychologist provides a placement recommendation of a Title XIX Home and Community Based MR/DD Waiver Service.

- 6) The Summary of Progress for Physical Therapy (C1) completed in February 2008 indicates that the claimant is pulling himself up and navigating by holding onto furniture. Primarily scoots along the floor however. Bends his left leg with sitting but keeps his right leg stiff. The physical therapist completing the report indicates that his gross motor skills approximate those of a child 11 to 12 months old. At time of the evaluation the claimant was 2 years and 3 months old.

- 7) The Intervention Activity Notes from the WV Birth to Three Program (C2) indicate various therapies being provided to the claimant to encourage him to develop motor skills. These notes show a marked progression in the claimant's ability to walk and stand on his own as well as grasp objects, turn pages in a book and engage in various kinds of play activities.
- 8) 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 and the psychologist. However when reviewing the documentation submitted for the presence of at least three substantial deficits from the six eligible deficits for the program, she could not substantiate the required deficits. A determination was made that the claimant meets the criteria to award a substantial deficit in the area of Self Care. In the other qualifying areas for substantial deficit determination the Department's Psychologist's testimony indicates the following:

Receptive or Expressive Language – The Vineland Adaptive Behavior communication score was 60. To qualify for a deficit, the score should be 55 or lower. The psychological report indicates that claimant can make his wants and needs known through sign language, grunts and some words.

Mobility – The Vineland Adaptive Behavior score in this area was 57. To qualify for a deficit the score should be 55 or lower. The psychological report indicates the claimant was able to move about the room during the evaluation and likes to walk outside.

Learning – Due to the Claimant's age no testing was completed by the psychologist. There are indications of the Claimant's ability to learn as shown by the language skills he has acquired, his play activities, etc. The psychological report diagnosis indicates mental retardation in the mild to moderate range.

Self-Direction – The psychological evaluation indicates an interest in playing with his sister, looking at books, playing with cars and watching videos therefore he demonstrates self-direction in choosing these activities.

Capacity for Independent Living - Due to the age of the claimant the Department's Psychologist readily admits that this area is difficult to determine. The areas looked at in making a determination for this deficit are home living, social skills, employment, health and safety, community and leisure activities. The Department's Psychologist's testimony indicates that claimant does participate in community and leisure activities through his shopping experiences and play activity inside and outside the home. The other areas could not be adequately evaluated due to his age.

- 9) 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).

10) 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

11) 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 no question the Claimant meets this criteria as shown by the physician's and the psychologist's report. In addition the regulations require a level of care and services provided in an ICF/MR facility be indicated by required evaluations and corroborated by narrative descriptions. Both the physician's and the psychologist's reports meet this criteria.
- 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. Claimant was appropriately assigned one deficit in the area of self care.

- 3) Adaptive behavior testing was completed on the claimant and his scores in the areas of Language and Mobility were above the requirements.
- 4) The remaining three areas for eligibility determination are learning, self direction and capacity for independent living. The area of Learning was not evaluated using standardized testing due to claimant's age. However the documentation provided in the form of the psychological testing report and the WV Birth to Three Program show that the claimant does demonstrate an ability to learn. The psychological report's diagnosis of mental retardation within the mild to moderate range indicates a capacity for learning. The area of Self Direction is best determined by the claimant's ability and willingness to engage in activities of his own choosing. The psychological report clearly indicates that the Claimant has the ability to select activities for himself and readily participates in play activities with family members and health care professionals. The area of Capacity for Independent Living is difficult if not impossible to determine for a child of this age. While it is clear that the Claimant does possess leisure skills which is one of the components of this deficit, it is not clear that he meets any of the other components of this deficit.
- 5) 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. While it could be argued that he should receive a deficit in the Capacity for Independent Living area this would only allot him two (2) deficits and would not meet the program requirements.

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 2nd Day of October, 2008.

**Melissa Hastings
State Hearing Officer**