



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
1400 Virginia Street
Oak Hill, WV 25901

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

May 16, 2008

_____ for _____

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held May 5, 2008. Your hearing request was based on the Department of Health and Human Resources' decision to deny Title XIX MR/DD Waiver services for _____.

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 Waiver program is based on current policy and regulations. Some of these regulations state as follows: 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 a related condition. 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 individuals with Mental Retardation and /or related conditions (ICF/MR Facility) (West Virginia Title XIX MR/DD Waiver Home & Community-Based Policy Manual, Chapter 502.1).

The information which was submitted at your hearing revealed that the documentation submitted failed to demonstrate substantial deficits in three of the six major life areas. Therefore, the medical criteria to be eligible for the Title XIX MR/DD Waiver Services Program were not met.

It is the decision of the State Hearings Officer to **uphold** the decision of the Department to deny services under the MR/DD Waiver program.

Sincerely,

Kristi Logan
State Hearings Officer
Member, State Board of Review

Cc: Erika H. Young, Chairman, Board of Review
Steve Brady, Operations Coordinator, MR/DD Waiver

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

_____,
Claimant,

v.

Action Number: 07-BOR-2507

**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 May 5, 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 May 5, 2008 on a timely appeal, filed November 26, 2007.

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
_____, Claimant's Mother
_____, Program Manager for _____

Steve Brady, Operations Coordinator, MR/DD Waiver Program (participated by phone)
Linda Workman, Psychologist Consultant, BMS (participated by phone)

Presiding at the Hearing was Kristi Logan, State Hearing Officer and a member of the State Board of Review.

IV. QUESTIONS TO BE DECIDED:

The question(s) to be decided is whether the Department's decision to deny Claimant services under the MR/DD Waiver Program is correct.

V. APPLICABLE POLICY:

Title XIX MR/DD Home and Community-Based Waiver Program 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 Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500-8
- D-2 Notification Letter date November 2, 2007
- D-3 DD 2-A-Level of Care Evaluation dated July 18, 2007
- D-4 Psychological Evaluation dated July 23, 2007
- D-5 Narrative of Psychological Evaluation dated July 23, 2007
- D-6 Social History from _____ dated July 23, 2007
- D-7 Adaptive Behavior Scale dated January 25, 2008
- D-8 Notification Letter dated February 29, 2008
- D-9 _____ County Schools Individual Education Plan (IEP) dated February 23, 2007
- D-10 Child Progress and Planning Report dated November 9, 2007

Claimants' Exhibits:

- C-1 None

VII. FINDINGS OF FACT:

- 1) An application for Title XIX MR/DD Waiver Services was submitted on October 12, 2007. A denial notification letter dated November 2, 2007 was issued to Claimant which read in part (D-2):

Your Waiver Application is hereby denied

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:

Receptive or Expressive Language
Learning
Mobility
Self-Direction
Capacity for Independent Living

- 2) Testimony from Linda Workman, consulting psychologist with the Bureau of Medical Services (BMS) revealed that the Claimant does have an eligible diagnosis of autism. A review of the eligibility criteria states that Claimant's condition manifested prior to the age of 22 and it is likely to continue indefinitely. Claimant also received a recommendation for ICF/MR level of care by a physician. The Department, however, contends that the Claimant's condition is not severe as demonstrated by the lack of at least three (3) substantial adaptive deficits of the six (6) major life areas, with the Claimant being awarded only one (1) deficit in Self-Care.
- 3) The psychological evaluation (D-4) administered on July 23, 2007 indicates Claimant does have intact gross motor skills but has some delays with his fine motor skills. Claimant is incontinent and does not participate in dressing himself. Claimant's speech is limited to rehearsed one-step commands and he has difficulty using words spontaneously or appropriately. He engages in echolalia frequently. Claimant enjoys playing with cars, playing outside, and lining up Lincoln Logs and cassette tapes. Claimant does not play with peers and has behavioral problems including tantrums, self injuring and biting/striking others. He does not seem aware of dangers and frequently runs off.

The Vineland Adaptive Behavior Scale (Vineland II) was administered that date and Claimant's results in the four domain composites were:

Communication: 63
Daily Living Skills: 55
Socialization: 48
Motor Skills: 61

The mean of the Vineland II is 100 with a standard deviation of 15. A score of 55 or below is required for a deficit. Claimant's only deficit derived from this test in relation to the six major life areas was Daily Living Skills which falls under Self-Care. Although Claimant had a score of 48 in the area of Socialization, it is not a major life area. It does relate to the major life area of Capacity for Independent Living, but is not a stand alone category.

- 4) The Social History completed by Seneca Health Services on July 23, 2007 (D-6) reiterates Claimant's social and communication problems. It states Claimant did not

participate in the WV Birth to Three Program due to his delays and behaviors not being noted as a problem. At age three, he was enrolled in the Preschool Handicapped Program in the [REDACTED] County school system where he received Occupational and Speech Therapy.

- 5) Claimant's Adaptive Behavior Scale (ABS) test scores dated January 25, 2008 were submitted for a reconsideration of the November 2007 denial (D-7):

Independent Functioning	<1%
Physical Development	75%
Economic Activity	09%
Language Development	02%
Numbers and Time	05%
Prevocational/Vocational	25%
Self-Direction	02%
Responsibility	02%
Socialization	01%

A qualifying score from the ABS is less than 1 percentile. Claimant had only one qualifying score under Independent Functioning, again relating to Self-Care.

- 6) The Individual Education Plan (IEP) from [REDACTED] County Schools dated February 23, 2007 reported (D-9):

_____ is making progress in school. He can use writing instruments appropriately and draws several recognizable pictures. He can write some letters and can name most letters and several numbers. He is beginning to count objects and sings along at circle time with the group. Although he does not follow class rules without prompts, he is beginning to follow class routines without assistance. He plays alongside the other children and is beginning to play appropriately with other children. He is beginning to make requests using words appropriately and is echoing less when talking. He can follow simple requests or commands but continues to run or bolt from the group without warning on occasion. He is a picky eater but can feed himself without difficulty. He prefers drinking from a straw but will drink water or milk from a cup if he is thirsty. He is toilet trained.

_____ is doing really well with his fine motor skills, he draws excellent pictures and know his name, and can write '_____' but can[not] spell it. At this time, _____'s fine motor skills are at age level and he no longer qualifies for Occupational Therapy.

_____ 's communication skills are improving. He has significantly less echolalia and is beginning to initiate communication. He uses one, two and occasionally three word phrases to request. _____ plays along with other children in the group and is starting to use gestures and words during circle singing time. He inconsistently follows requests and commands. _____ would benefit from continued speech/language services.

- 7) The Child Progress and Planning Report dated November 9, 2007 (D-10) lists in part:

Cognitive Development:

- Sorts objects by one property such as size, shape, color, or use
- Notices objects that are similar in many ways
- Figures out a logical order for a group of objects
- Notices and recreates simple patterns with objects
- Continues to work on tasks even when encountering difficulties

Physical Development

- Moves with direction and refined coordination
- Copies and draws simple shapes, letters, and words including name

Language Development

- Plays with words, sounds, and rhymes
- Uses two-word phrases
- Follows one-step directions
- Recognizes and names many letters

- 8) The test scores and narratives provided supported a deficit for the Claimant in only one (1) major life area, Self-Care. Claimant is fully mobile and fine motor skills have progressed as such that Occupational Therapy has ended. Test scores on the Vineland II for the area of Language were above the acceptable standards. Claimant is making progress in the area of Learning according to the IEP. Due to Claimant's young age, there was insufficient documentation provided for the area of Capacity of Independent Living to make a determination. According to the written documentation provided, Claimant does have interests and enjoys several activities indicating a lack of a substantial deficit in Self-Direction.

- 9) [REDACTED] case manager with [REDACTED] testified that she believes Claimant does have substantial deficits in all the major life areas in her observation of his behaviors. His language is significantly delayed as he mostly engages in echolalia. His social skills are delayed not only due to his delays in communication but his outbursts and aggressive behavior.

Ms. [REDACTED] contested the Progress and Planning Report (D-10) that was completed by Claimant's teacher. She stated Claimant exhibits very little of the developments as shown on the report. She also felt the report was a standard document used for all students. He is not toilet trained as noted in the IEP.

- 10) _____, Claimant's mother, testified that Claimant does say a few sentences but only uses words he has heard from his family and peers. It takes an exceptional amount of time to teach him even the simplest of tasks. He hits and kicks family members and other children at school. He has no understanding of appropriate behavior or physical dangers. He did not participate in the Birth to Three program not because there wasn't a need, but that Claimant's physician failed to make a referral.
- 11) Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500 states, in part:

Medical Eligibility Criteria

BMS and OBHS determine the medical eligibility for an applicant in the MR/DD Waiver Program. In order to be eligible and to receive MR/DD Waiver Program Services, an applicant must meet the following medical eligibility criteria:

- Have a diagnosis of mental retardation and/or a related condition
- Require the level of care and services provided in an ICF/MR (Intermediate Care Facility for the Mentally Retarded) as evidenced by required evaluations and corroborated by narrative descriptions of functioning and reported history. An ICF/MR provides services in an institutional setting for persons with mental retardation or related condition. An ICF/MR facility provides 24-hour supervision, training, and support.

OBHS and BMS determine the level of care based on the Annual Medical Evaluation (DD-2A), Psychological Evaluation (DD-3), and Social History (DD-4) Evaluation, and other documents as requested.

The evaluations must demonstrate that the applicant has a diagnosis of mental retardation, which must be severe and chronic, and/or a related developmental condition, which constitutes a severe and chronic disability. For this program, individuals must meet the diagnostic criteria for medical eligibility.

Medical Eligibility Criteria: Diagnosis

- Must have a diagnosis of mental retardation, which must be severe and chronic, in conjunction with substantial deficits (substantial limitations associated with the presence of mental retardation), and/or
- Must have a related developmental condition, which constitutes a severe and chronic disability with concurrent substantial deficits.
- Examples of related conditions, which may, if severe and chronic in nature, make an individual eligible for the MR/DD Waiver Program, include, but are not limited to, the following:

Any condition, other than mental illness, found to be closely related to mental retardation because this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons.

- Autism
- Traumatic brain injury
- Cerebral Palsy
- Spina Bifida

- Tuberous Sclerosis

Additionally, mental retardation and/or related condition with associated concurrent adaptive deficits:

- were manifested prior to the age of 22, and
- are likely to continue indefinitely
- Substantial deficits associated with a diagnosis other than mental retardation or a related diagnosis do not meet 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 or more of the following major life areas: (Substantial limits is defined on standardized measures of adaptive behavior scores three (3) standard deviations below the mean or less than 1 percentile when derived from non MR normative populations or in the average range or equal to or below the seventy fifth (75) percentile when derived from MR normative populations. The presence of substantial deficits must be supported by the documentation submitted for review, i.e., the IEP, Occupational Therapy evaluation, narrative descriptions, etc.)

- Self-Care
- Receptive or expressive language (communication)
- Learning (functional academics)
- Mobility
- Self-direction
- Capacity for independent living (home living, social skills, employment, health and safety, community use, leisure)

Active Treatment

Requires and would benefit from continuous active treatment

Medical Eligibility Criteria: Level of Care

To qualify for ICF/MR level of care, evaluations of the applicant must demonstrate:

- A need for intensive instruction, services, assistance, and supervision in order to learn new skills and increase independence in activities of daily living
- A need for the same level of care and services that is provided in an ICF/MR institutional setting

The applicant, his/her family, and/or legal representative must be informed of the right to choose between ICF/MR services and home and community-based services under the MR/DD Waiver Program, and informed of his/her right to a fair hearing (Informed Consent, DD-7).

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) Claimant does have an eligible diagnosis of autism that manifested prior to the age of 22 that is likely to continue indefinitely as required by policy.
- 2) However, regulations require that substantial limited functioning be defined on standardized measures of adaptive behavior scores as three (3) standard deviations below the mean or less than one percentile. The Claimant had only one qualifying score on the Vineland II in the area of Self-Care.
- 3) Claimant did have a recommendation for ICF/MR care by a physician and his psychologist but the documentation submitted did not demonstrate substantial limitations in functioning were not shown in any of the major life areas except for Self-Care. Claimant does not meet the criteria for the MR/DD Waiver program.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the decision 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

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this 16th Day of May, 2008.

Kristi Logan
State Hearing Officer