



**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

April 10, 2008

_____ by _____

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your son's hearing held April 7, 2008. Your hearing request was based on the Department of Health and Human Resources' action to deny eligibility for services under the Title XIX MR/DD Waiver Services 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, November 2005).

The information, which was submitted at the hearing, did not support that your son's condition has, at this stage, caused substantial deficits in three of the six major life areas. He therefore, 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,

Sharon K. Yoho
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**

_____ by: _____,

Claimant,

v.

Action Number: 08-BOR-752

**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 April 7, 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 April 7, 2008 on a timely appeal, filed January 24, 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:

John Sassi, Bureau of Behavioral Health & Health Facilities (participating by speakerphone)

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

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

IV. QUESTIONS TO BE DECIDED:

The question to be decided is whether the claimant meets the medical 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 (November, 2005)

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 mailed July 3, 2007
- D-3 DD-2A Level of Care Evaluation dated May 24, 2007
- D-4 Psychological Evaluation dated March 13, 2007
- D-5 Physical Therapy Assessment to Determine Eligibility
- D-6 WV Birth to Three Speech-Language Evaluation dated May 5, 2007
- D-7 WV Birth to Three Assessment dated 5/22/07
- D-8 Psychological Evaluation dated October 23, 2007
- D-9 Letter from Pediatric Neurologist dated October 17, 2007
- D-10 DD-2A Level of Care Evaluations dated March 23, 2008 & March 24, 2008
- D-11 Letter from Physical Therapists dated March 27, 2008

VII. FINDINGS OF FACT:

- 1) The claimant's mother submitted an application packet to the Bureau of Behavioral Health in June 2007 to determine if her son would qualify for services under the Title XIX MR/DD Waiver Program.
- 2) The Department reviewed the documents provided and determined medical eligibility for the program was not met. The Department mailed a notice of denial on July 3, 2007

stating in part: “Documentation submitted for review does not support the presence of substantial adaptive deficits as defined for Title XIX Waiver eligibility in three or more of the six major life areas. The DD-3 was beyond 90 days upon receipt by the Waiver office.”

- 3) An updated more current DD-3, Psychological Evaluation, was provided to the Department for review. After review of this updated document, the Department again made a determination that the child did not meet the eligibility criteria. Another denial notice was mailed on December 7, 2007, which prompted the request for a hearing.
- 4) The claimant is currently a three-year-old male who resides with his mother and father. He has been receiving services under the Birth to Three Program and has received services under the CDCSP Medicaid program.
- 5) He has a diagnosis of Cerebral Palsy, which the Department has identified as an eligible diagnosis for the MR/DD Waiver program. The DD-2a, Level of Care Evaluation, completed on May 24, 2007 lists an Axis II diagnosis of Spastic Quadriplegia with Language Delay. This report was completed when the child was 27 months old. It notes that the child could ambulate with human help. He was not toilet trained and he needed assistance for feeding. He was reported to be alert with limited communication. At this point, he was needing total care for personal hygiene.
- 6) The DD-3, Psychological Evaluation dated March 13, 2007 (Exhibit D-4) reports that the child was able to take only a few tentative steps, with leg braces and while holding on to a stable object. He could not throw a ball, or climb on furniture. He could sit unsupported and could rise to a sitting position. He could move across the floor by crawling. He could transfer objects from one hand to another, put objects into containers, screw, and unscrew lids.
- 7) Under the self-help category, the psychological reported the child to be able to eat finger foods and drink from a sippy cup and from a straw. He was able to make his wants and needs known. He was able to assist in clothing being taken off. He was aware of the function of the telephone and displayed appropriate behavior when riding in a car.
- 8) In the Language category, the psychological report noted the child understood the meaning of the word “no”, “yes, and “shhh”. He would point to pictures and body parts while following instructions. He could say a few words, but not the 50 to 100 words expected of a 24 month old. The child was able to engage in some appropriate activities without prompting such as playing with toys. He would play simple interaction games and imitate complex actions of others. He was able to play with other children and able to play make believe.
- 9) The Psychological Evaluation included Vineland Adaptive Behavior scores that coincided with the above reported findings. The scores indicate that the child was within the moderately low limits for his age. The Department looks for scores that are 3 standard deviations below the mean. The Vineland has a mean of 100 and a standard deviation of 15 and therefore 3 standard deviations below the mean would be a score of 55. The child’s standard scores were as follows: Communication 82, Daily Living

Skills 81, Socialization 84, Motor Skills, 69 and the Adaptive Behavior Composite score was 73.

- 10) Assessments offered in Exhibit (D-5, D-6 and D-7) all point toward developmental delays in motor and speech development.
- 11) The updated psychological (Exhibit D-8) noted positive development in some areas. An updated Vineland showed some decrease in scores however, the scores were still well above the 55 mark and remained in the moderately low range.
- 12) The physician who completed the DD-2a and the psychologist who completed the DD-3 both related that this child needs the level of care and services provided in an ICF/MR facility.
- 13) The claimant's mother offered testimony to further explain her son's limitations. She reports that he is having problems with swallowing solids and is scheduled for treatments at a swallowing clinic. She states that he is speaking many words now, but that she is often the only person who understands the words he is trying to say. He is now potty trained, but due to his motor difficulties, he is not able to toilet by himself.
- 14) Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500, November 2005 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).

- 15) 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

16) 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 substantial limited functioning be defined on standardized measures of adaptive behavior scores as three (3) standard deviations below the mean. The claimant's standard scores on the Vineland were above this range in all categories.
- (2) The Department determined that the child did have an eligible diagnosis for the program however, denied eligibility due to substantial limits in functioning was not met. Even though the Physician who completed the Medical evaluation and the Psychologist who completed the Psychological both relate that the child needs the level of care provided in an ICF/MR facility, evidence and testimony did not support this.
- (3) At this young age, the claimant does not show substantial limitations when compared to others his age. The Department was correct to deny medical eligibility for the MR/DD program.

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 10th Day of April 2008.

Sharon K. Yoho
State Hearing Officer