



**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

June 26, 2008

by _____

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your son's hearing held June 11, 2008. Your hearing request was based on the Department of Health and Human Resources' proposed action to discontinue services under the Title XIX MR/DD Waiver Program for your son.

In arriving at a decision, the State Hearings Officer is governed by the Public Welfare Laws of West Virginia and the rules and regulations established by the Department of Health and Human Resources. These same laws and regulations are used in all cases to assure that all persons are treated alike.

Eligibility for the MR/DD Home and Community-Based Waiver Program is based on current policy and regulations. Policy states that in order to be eligible for the Title XIX MR/DD Home & Community-Based Waiver Program, an individual must have a diagnosis of mental retardation and or related condition. A related condition would be any condition, other than mental illness, found to be closely related to mental retardation if this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons. The condition must be severe and chronic with concurrent substantial deficits that require the level of care and services provided in an Intermediate Care Facility for the Mentally Retarded (ICF/MR facility). (Chapter 500 of Title XIX MR/DD Home and Community Based Waiver Program Revised Operations Manual).

The information, which was submitted at the hearing, did support that your son exhibits substantial limitations in three of the major life areas due to a diagnosis of Autism Disorder. He therefore, does meet the medical criteria for continued eligible for the Title XIX MR/DD Waiver Services Program.

It is the decision of the State Hearings Officer to reverse the action of the Department to terminate 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, BBHMF
Richard Workman, BBHMF
[REDACTED]

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

_____ by: _____,

Claimant,

v. **Action Number: 08-BOR-980**

**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 June 11, 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 originally scheduled for April 28, 2008 and continued to allow the claimant's newly obtained representative time to prepare. The hearing was convened on June 11, 2008 on an appeal, filed March 4, 2008.

This decision was postponed to allow 10 days for the claimant's representative to respond to a school document which was not available to her at the time of the telephone hearing. Her response was not considered when making a decision in this matter as her response was faxed outside of the 10 days allowed. A brief glance revealed that the response was as much a case summary as it was a response to the individual document.

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:

Steven Brady, Bureau of Behavioral Health

Richard Workman, Psychologist Consultant, BMS

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

All participants appeared by Speakerphone

IV. QUESTIONS TO BE DECIDED:

The question to be decided is whether the 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

The Code of Federal Regulations – 42 CFR 435.1009 and 42 CFR 483.440

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

D-1 Title XIX MR/DD Waiver Program Revised Manual Chapter 500

D-2 Notification of denial dated February 21, 2008

D-3 DD-2A Level of Care Evaluation received March 3, 2008

D-4 Psychological Evaluation dated February 28, 2007

D-4a ABS Summary Report dated February 28, 2007

D-5 IEP, _____ County Schools dated January 9, 2008

- D-5a Eligibility Committee Report, [REDACTED] County Schools dated January 9, 2008
- D-5b Psycho Educational Evaluation dated November 8, 2007
- D-5c Special Education Teacher Report dated November 30, 2007
- D-5d Special Education Developmental/Social History dated November 28, 2007

Claimant's Exhibits:

- C-1 Psychological Update dated April 9, 2008

VII. FINDINGS OF FACT:

- 1) The claimant's mother with the assistance of [REDACTED] submitted documents to the Title XIX MR/DD Waiver program for a reevaluation of the claimant's medical condition to determine if he remains medically eligible for the program. The Department on February 21, 2008 completed this reevaluation. The Department reached the decision that the claimant no longer met the medical criteria for the program. A notice of proposed termination was mailed to the claimant on February 21, 2008. This notice advised that, "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." The Department found substantial adaptive deficits in only the areas of self-care and receptive or Expressive Language.
- 2) The claimant's witnesses object to there being no substantial adaptive deficits found in the areas of Self-Direction and inCapacity for Independent Living.
- 3) The physician completing the Level of Care Evaluation, Exhibit D-3 had issued the claimant a diagnosis of Autistic Spectrum Disorder. The Psychological dated February 28, 2007, Exhibit D-4, noted diagnosis of Autistic Disorder and Borderline Intellectual Functioning. A Psychological Update dated April 8, 2008, Exhibit C-1, listed diagnosis Autistic Disorder and Mild Mental Retardation. The Department contends that while there is an eligible diagnosis, the severity of the condition does not constitute a severe disability resulting in the three substantial limitations needed to qualify.
- 4) A Psychological dated February 28, 2008, (Exhibit D-4) was completed when the child was age 5. It reports that the child exhibits behavior problems and some hyperactivity and that he is in constant motion. He scratches, slaps or rubs himself, rolls back and forth continually. He bangs his head or other body parts against objects, pulls his own hair and pokes objects in his eyes, ears, nose or mouth. He gets lost when leaving his own living area and fails to recognize possible dangers in the home and community. He recognizes fewer than 10 words, and cannot be reasoned with. He does not always talk sensibly. The evaluator noted that testing was difficult as the claimant became non-compliant toward the end and spent much time crying or screaming. He does not always respond when spoken to. He will dart or run away from his mother if allowed to be loose in the yard or during outings. He climbs and jumps from objects putting him at risk for injury. Constant supervision is needed to ensure his safety and that of others around him. He is aggressive towards others.

- 5) This Psychologist recommends an ICF/MR level of care and notes that his self-direction needs are in the areas of initiative, passivity, attention persistence and leisure time activities. He engages only in activities when he is assigned to the activity. He requires constant encouragement to complete tasks and will not maintain attention for even as long as five minutes.
- 6) The Psychologist report of February 28, 2008 included Adaptive Behavioral Scale scores on Exhibit D-4a. Testing produced the following percentile scores using a non-MR testing scale.

Independent Functioning	1
Language Development	2
Self-Direction	1
Responsibility	2
Socialization	1
Personal Self-Sufficiency	1
Community Self Sufficiency	1
Personal-Social Resp.	1

While there were no scores in the range of less than 1 percentile, the Department considered the score of 1 for Independent Functioning and the score of 2 along with documentation and narrative descriptions and determined that the claimant met the criteria in the areas of Self-Care and Language.

The claimant's academic scores placed him in the borderline range of intellectual functioning.

- 7) The child needs adult supervision when he attends regular classroom to help him stay on task. He creates disruptive incidents regularly and must be taken out of the classroom and to a small room to calm down and get re-directed. His mother testified that he likes matchbox cars, but does not actually play with them. He carries them in his pocket and sits them on the tub when he is bathing. He likes to look at pictures on the computer that come up with video games or from photos of him that have been put on the computer. His mother tried to get him involved in hitting golf balls and in swimming. He did not want to participate in either activity. He does not interact with other children in a normal manner and evaluators have difficulty engaging him during testing.
- 8) Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500, November 2005 states, in part:

“Medical Eligibility Criteria

The MR/DD State Waiver Office determines the medical eligibility for an applicant in the MR/DD Waiver Program. In order to be eligible to receive MR/DD Waiver Program Services, an applicant must meet the following medical eligibility criteria:

* Have a diagnosis of mental retardation and/or a related condition

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

The MR/DD State Waiver Office determines the level of care based on the Annual Medical Evaluation (DD-2A), Psychological Evaluation (DD-3), that documents that the mental retardation and/or related conditions with associated concurrent adaptive deficits were manifested prior to the age of 22, and are likely to continue indefinitely. Other documents, if applicable and available, that can be utilized include the Social History, IEP for school age children, Birth to Three assessments, and other related assessments.

The evaluations must demonstrate that the applicant has a diagnosis of mental retardation and/or a related developmental condition, which constitutes a severe and chronic disability. For this program, individuals must meet the diagnostic criteria for medical eligibility not only by the relevant test scores, but also the narrative descriptions contained in the documentation. To be eligible, the member:

* Must have a diagnosis of mental retardation, with concurrent substantial deficits (substantial limitations associated with the presence of mental retardation), and/or

* Must have a related developmental condition, which constitutes a severe and chronic disability with concurrent substantial deficits.

- Examples of related conditions, which may, if severe and chronic in nature, make an individual eligible for the MR/DD Waiver Program, include, but are not limited to, the following:

* Any condition, other than mental illness, found to be closely related to mental retardation because this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons, and requires services similar to those required for persons with mental retardation.

* Autism

* Traumatic brain injury

* Cerebral Palsy

* Spina Bifida

* Tuberous Sclerosis

Additionally, the member who has a diagnosis of mental retardation and/or related condition and associated concurrent adaptive deficits must have the following:

* were manifested prior to the age of 22, and

* likely to continue indefinitely

- Must have the presence of at least three (3) substantial deficits as that term is defined in Title 42, Chapter IV, Part 435.1009 of the Code of Federal Regulations (CFR). Refer to 503.1, Functionality section for a list of the major life areas.

Functionality

* Substantially limited functioning in three or more of the following major life areas: (Substantially limited” is defined on standardized measures of adaptive behavior scores three (3) standard deviations below the mean or less than 1 percentile when derived from non MR normative populations or in the average range or equal to or below the seventy fifth (75) percentile when derived from MR normative populations. The presence of substantial deficits must be supported not only by the relevant test scores, but also the narrative descriptions contained in the documentation submitted for review, i.e., psychological, the IEP, Occupational Therapy evaluation, etc.) Applicable categories regarding general functioning include:

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

For applicable major life functioning, refer to Code of Federal Regulations (CFR): 42 CFR 435.1009

Active Treatment

Requires and would benefit from continuous active treatment

Medical Eligibility Criteria: Level of Care

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

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

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

Conditions Ineligible

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

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

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

9) 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

10) 42 CFR 483.440(a) states, in part:

"(a) Standard: Active treatment.

(1) Each client must receive a continuous active treatment program, which includes aggressive, consistent implementation of a program of specialized and generic training, treatment, health services and related services described in this subpart, that is directed toward--

- (i) The acquisition of the behaviors necessary for the client to function with as much self determination and independence as possible; and
- (ii) The prevention or deceleration of regression or loss of current optimal functional status.

(2) Active treatment does not include services to maintain generally independent clients who are able to function with little supervision or in the absence of a continuous active treatment program.

VIII. CONCLUSIONS OF LAW:

- (1) Regulations provide that along with an eligible diagnosis, the client must exhibit substantial deficits associated with that diagnosis. Three substantial deficits in five of the major life areas is required for medical eligibility for the program. A percentage score of less than 1% when using non-MR norms is what the department looks for in the ABS scores. The Department determined that this claimant was substantially limited in the areas of Self-Care and Language. The percentile scores assigned with the ABS testing for these two areas was not less than 1 percent however, other documentation and narrative descriptions supported that he does have substantial limits in these areas.
- (2) The claimant's ABS score in the area of Self-Direction was 1 percent. Other documentation and narrative descriptions support that he only engages in activities that he is assigned to and that he requires constant encouragement to complete tasks. He cannot maintain attention for even five minutes. Evidence and testimony do not support that this child has the ability to direct himself towards any activity. His ABS score of 1 percent combined with other written and verbal evidence supports that the Department should have found substantial limitations in the major life area of Self-Direction.

- (3) While it is understood that this child would not be expected to have the capacity for independent living at this young age, it is questionable that he would have that capacity as an adult without receiving the types of active treatment offer in an ICF/MR facility.

IX. DECISION:

It is the decision of the State Hearing Officer to **reverse** the action of the Department to deny medical eligibility and in their termination to discontinue services under the Title XIX MRDD Waiver Services Program for this claimant.

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this 26th Day of June 2008.

Sharon K. Yoho
State Hearing Officer