



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

November 16, 2006

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your daughter's hearing held November 3, 2006. Your hearing request was based on the Department of Health and Human Resources' action to deny medical eligibility for services under the Title XIX MR/DD Waiver Services Program for your daughter.

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 substantiate that your daughter met 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
Susan Hall, BHHF

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

_____ by: _____,

Claimant,

v.

Action Number: 06-BOR-2401

**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 November 3, 2006 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 November 3, 2006 on a timely appeal, filed July 17, 2006.

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's Witnesses:

[REDACTED] Claimant
[REDACTED] Birth To Three

Department's Witnesses:

Susan Hall, Bureau of Behavioral Health & Health Facilities (participating by speakerphone)
Rick 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 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 letter dated May 26, 2006
- D-3 Memorandum from [REDACTED] dated April 20, 2006
- D-4 Annual Medical Evaluation dated March 24, 2006
- D-5 Annual Medical Evaluation dated July 20, 2006
- D-6 Psychological Evaluation dated April 6, 2006
- D-7 Social History dated April 18, 2006
- D-8 Individual Program Plan (IPP) dated April 18, 2006
- D-9 Individualized Family Service Plan, Birth To Three

VII. FINDINGS OF FACT:

- 1) The claimant, _____, submitted an application packet to the Bureau of Behavioral Health in April 2006 to determine if her daughter, _____, would qualify for services under the Title XIX MR/DD Waiver Program. The Bureau of Behavioral Health reviewed the documents submitted and determined

that based on the information made available to them her daughter did not meet the medical criteria for the program.

- 2) The Department sent a denial notice on May 26, 2006 advising that the application had been denied. The reason stated on the denial letter was, "Documentation does not support the presence of an eligible diagnosis of mental retardation or a related condition nor the presence of substantial adaptive deficits in three or more of the six major life areas which are due to mental retardation or a related condition".
- 3) At the time of the application, the claimant's daughter was eleven-months-old. She was born without the lower part of her spine, a condition diagnosed as Lumbo Sacral Agenesis. This condition has rendered this child with no use of the lower part of her body. An Annual Medical Evaluation dated March 24, 2006 identified Physical diagnosis of Lumbo Sacral Agenesis and Dysplastic Appearing Lower Extremities. This Evaluation did not list any diagnosis under the Mental diagnostic section. The child was 10 months old at the time of this evaluation and was reported to be ambulatory with human help and able to feed self finger foods. Under Mental and Behavioral Difficulties, the evaluator noted that she needs close supervision.
- 4) Another Annual Medical Evaluation was completed on July 20, 2006. This evaluation noted under the Mental diagnostic section that the patient was alert. Under Mental and Behavioral Difficulties the evaluator noted that the patient was alert.
- 5) A Psychological Evaluation dated April 6, 2006 notes under Axis I and Axis II diagnosis, "No diagnosis". Under Axis III diagnosis, the Lumbo Sacral Agenesis is noted. This evaluation was completed when the child was eleven-months-old. A Vineland test was administered. The Vineland test resulted in the following scores:

Psychomotor 10 month level – it notes motor skills include sitting supported for at least a minute, raising herself to a sitting position and using a "commando" crawl to get from one place to another. Fine motor skills of picking up small objects with thumb and fingers, and transferring objects from one hand to the other.

Self-Help 10 month level – eats solid foods, drinks from sippy cup unassisted and indicates when wet or soiled.

Language 9 month level – smiles in response to caregiver or familiar people, raises arms in anticipation of being picked up, attempts to imitate sounds immediately after hearing them. Understands "no".

Socialization 13 month level – shows affection toward others, shows interest in what others are doing, plays simple interactive games with others, imitates simple adult movements, laughs, smiles appropriately in response to positive statements.

- 6) Adaptive Behavior Scale scores reported on the April 6, 2006 Psychological were also within normal range. Communication was scored at 9 months. Daily Living Skills received a score of 12 months. Socialization was scored at 12 months. Motor skills were scored at 10 months.

- 7) 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

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) Policy requires the applicant to have a qualifying diagnosis for the MR/DD program and evidence does not support that this individual meets that criteria for the program. At this early age, evaluations indicated no mental delays. Her diagnosis are not related to Mental Retardation.
- (2) Regulations require that along with a qualifying diagnosis substantial limitations in functioning must exist in three (3) or more of the six (6) major life areas. Testimony and evidence did not support that this applicant has this level of delays.
- (3) The Vineland scores indicate that this applicant is not demonstrating major delays as compared to other children her age.
- (4) While it is evident that this child does have a physical disability that most likely will result in increasing delays as she matures, it is not known whether her condition will manifest mental delays.

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 16th Day of November, 2006.

**Sharon K. Yoho
State Hearing Officer**