



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
2699 Park Avenue, Suite 100
Huntington, WV 25704

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

May 2, 2006

_____ for _____

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held April 5, 2006. Your hearing request was based on the Department of Health and Human Resources' action to deny medical eligibility for 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 and benefit levels for the Title XIX MR/DD Home and Community Based Waiver Program are determined based on current regulations. One of these regulations is the individual must have both a diagnosis of mental retardation and/or a related condition and require the level of care and services provided in an 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 you do 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,

Thomas M. Smith
State Hearing Officer
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review
Susan Hall, BHHF
Richard Workman, BMS

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

_____,

Claimant,

v.

Action Number: 05-BOR-6862

**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 28, 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 April 5, 2006 on a timely appeal filed November 1, 2005. It should be noted that the hearing was originally scheduled for February 17, 2006 but was rescheduled at the request of the Department.

It should be noted here that the claimant's benefits have been denied pending a hearing decision. It should also be noted that the Department's representatives testified by speaker phone from Charleston, WV on agreement of claimant's representative.

II. PROGRAM PURPOSE:

The Program entitled Title XIX MR/DD Wavier Services is set up cooperatively between the Federal and State governments and administered by the West Virginia Department of Health & Human Resources.

Under Section 2176 of the Omnibus Budget Reconciliation Act of 1981, states were allowed to request a waiver. 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.

III. PARTICIPANTS:

1. _____, Claimant's mother & representative.
2. Susan Hall, Program Coordinator, BHHF (participating by speaker phone).
3. Richard Workman, Psychologist Consultant, BMS (participating by speaker phone).

Presiding at the Hearing was Thomas M. Smith, 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 November 1, 2004.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- #1 Copy of regulations.
- #2 Copy of notification letter dated 7-28-05.
- #3 Copy of notification letter dated 10-20-05.
- #4 Copy of annual medical evaluation 5-17-05 (4 pages).
- #5 Copy of annual medical evaluation 8-20-05 (4 pages).
- #6 Copy of Psychological Evaluation 4-7-05 (5 pages).
- #7 Copy of Social History 6-2-05 (4 pages).
- #8 Copy of IEP 5-17-05 (14 pages).

(It should be noted that the remaining documents in the Department's packet were not entered as evidence in the hearing and were not considered.)

Claimant's Exhibits:

- CI-1 Copy of Psychological Evaluation 2-7-06 (4 pages).
- CI-2 Copy of fax cover sheet from [REDACTED]
- C-3 Copy of letter from [REDACTED] M. D. 2-15-06.
- CI-4 Copy of well examinations 9-20-05.
- CI-5 Copy of annual medical evaluation 2-14-06 (4 pages).

VII. FINDINGS OF FACT:

- 1) The claimant was an initial applicant for the Title XIX MR/DD Waiver Services Program when an application packet submitted by [REDACTED] was denied for consideration of medical eligibility with notification issued on 7-28-05 (Exhibit #2) which indicated that the physician had not offered an eligible diagnosis and a current psycho-educational assessment was needed by the school system.
- 2) Additional information was submitted and medical eligibility was denied with notification issued on 10-20-05 (Exhibit #4) indicating that the documentation did not support that mental retardation was severe enough to require institutional care and that three (3) or more substantial adaptive deficits in major life areas did not exist.
- 3) The claimant's hearing request was received by the Board of Review on 11-1-05 and by the State Hearing Officer on 12-29-05 and the hearing was convened on 4-5-06.
- 4) Ms. Hall testified regarding the medical eligibility criteria listed in Chapter 500.
- 5) Annual Medical Evaluation (Exhibit #3) completed 5-17-05 indicates that most physical and neurological areas are normal, that the claimant is ambulatory, continent, feeds self, is self-care with hygiene, is alert, and has a diagnosis of ADHD and behavior disorder with rage attacks.
- 6) Psychological Evaluation completed by [REDACTED] on 4-7-05 (Exhibit #6) gives IQ scores of 66 full-scale, 70 nonverbal and 66 verbal, shows Vineland scores of 76 for communication, 94 for daily living skills, 91 for socialization, and 85 for composite, shows WISC-II full-scale IQ as 56 with scores of 73 in math, 71 in academic skills, and 69 in academic applications.
- 7) Annual Medical Evaluation completed 8-20-05 (Exhibit #5) indicated check marks in certain neurological areas which were changed to x's meaning abnormal but did not indicate who changed the report. The report gave a mental diagnosis of bipolar and MRI.
- 8) Testimony from Mr. Workman indicated that the claimant has no substantial deficits in the major life activities of self-care, receptive or expressive language, mobility, learning, self-direction, capacity for independent living, or economic self-sufficiency. Mr. Workman testified that the claimant did not have substantial deficits in at least three (3) major life areas and did not require ICF/MR level of care.
- 9) Testimony from Ms. _____ indicated that the claimant wets her pants when overstimulated, cannot tell time, does not know the value of money, that she is schizophrenic and bipolar and was sexually abused as a child, that she kicks, hits and runs away, that she will not brush her teeth or shampoo her hair, that she lies and has no conscience, that she self-inflicts bruises, that she would walk in front of a car, and that she is now in special education classes.
- 10) Ms. _____ provided a packet of documents (marked Exhibits #C1-1 through #C1-5) during the hearing and the State Hearing Officer forwarded a copy of the evidence to Ms. Hall and Mr. Workman to be reviewed prior to issuance of the hearing decision. Mr. Workman requested until 4-19-06 to review the documents and his request was granted. On 4-28-06, Mr. Workman notified the State Hearing Officer that the packet

of additional evidence had been reviewed but did not change the decision to deny medical eligibility.

- 11) Psychological Evaluation completed 2-7-06 (Exhibit #CI-1) indicates a full-scale IQ of 58 and gave ABS percentile scores of 25 for independent functioning, 94 for physical development, 5 for economic activities, 34 for language development, 48 for numbers and time, 32 for pre-vocational activities, 48 for self-direction, 38 for responsibility, and 16 for socialization.
- 12) Annual Medical Evaluation completed 2-14-06 (Exhibit #CI-5) indicated only ADHD under neurological and gave diagnoses as ADHD, sleep d/o, NOS, Behavioral d/o, NOS and MR.
- 13) Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, June 1, 2001 Introduction states, in part:

>=The Medicaid Home and Community-Based MR/DD Waiver (authorized under Title XIX 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 individuals who require 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. West Virginia supports an individual=s freedom of choice of providers for MR/DD Waiver Program services.

ELIGIBILITY

Medical eligibility for this program is determined at the state level by the Bureau for Medical Services (BMS) and the Officer of Behavioral Health Services (OBHS). To be programmatically (medically) eligible, an individual must have **mental retardation or a related condition which requires intensity of training and support and that is received in an ICF/MR setting**. HCFA defines this as a need for >=active treatment=>. The medical eligibility determination is based on assessments performed by a physician, a licensed psychologist and a licenses social worker. **All persons who are certified eligible to be in an ICF/MR setting are eligible to participate in the MR/DD Waiver Program.**=>

- 14) Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, June 1, 2001, Chapter I states, in part:

I. LEVEL OF CARE CRITERIA FOR MEDICAL ELIGIBILITY

A. In order to be eligible for the Title XIX MR/DD Home and Community-Based Waiver Program an individual must have **both** a diagnosis of mental retardation and/or a related condition(s) **and** require the level of care and services provided in an

Intermediate Care Facility for individuals with Mental Retardation and/or related conditions (ICF/MR).

Definition

An Intermediate Care Facility provides services in an institutional setting for persons with mental retardation or related conditions. The primary purpose of the institution is to provide health and rehabilitative services. The institution provides services to individuals who are in need of and who are receiving active treatment.

B. The following list includes some examples of **related conditions**. **This list does not represent all related conditions.**

1. Autism or Pervasive Developmental Disability, NOS
2. Spina Bifida
3. Cerebral Palsy
4. Tubercous Sclerosis
5. Traumatic Brain Injury and/or Spinal Cord Injuries (occurring during the developmental period)

C. The evaluations must demonstrate that an individual has a diagnosis of **mental retardation** and /or a **related condition** which constitute a severe chronic disability which is:

1. Attributable to a mental or physical disability or a combination of both;
2. Manifested before a person reaches twenty-two years of age;
3. Likely to continue indefinitely; **and**
4. **Substantially** limits functioning in **three or more** of the following areas of major life activities:
 - a. Self-Care
 - b. Learning (functional academics)
 - c. Mobility
 - d. Capacity for Independent Living (home living, social skills, health and safety, community use, leisure)
 - e. Receptive and/or Expressive Language
 - f. Self-Direction
 - g. Economic Self-Sufficiency (Employment)

D. Level of care determinations are made by the Office of Behavioral Health

E. Evaluations must demonstrate the need for an ICF/MR level of care and services. This is demonstrated by the individual=s need for intensive instruction, services, safety, assistance and supervision to learn new skills and increase independence in activities of daily living. The level of care and services needed must be the same level which is provided in an ICF/MR facility.=>

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 means 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."

17) The areas of dispute involve whether the claimant meets the criteria of functionality (substantial limitations) in the seven (7) major life areas of self-care, receptive or expressive language, learning, mobility, self-direction, and economic self-sufficiency. The documentation clearly shows that the claimant has no substantial limitations in the areas of mobility, learning, receptive and/or expressive language. In the areas of self-care and self-direction, the claimant has some deficiencies but not enough to meet the criteria for a substantial deficit. The claimant has some deficits in socialization but does not have scores which show that she meets the criteria to be a substantial deficit. The claimant's age of 12 would not qualify under the area of economic self-sufficiency. The preponderance of the evidence and testimony show that the claimant does not meet the criteria for substantial deficits in the seven (7) major life areas.

VIII. CONCLUSIONS OF LAW:

1) Regulations require that a diagnosis of MR or related condition exist which must be severe and chronic and have been manifested prior to age 22 and is likely to continue. The claimant has a diagnosis of Pervasive Developmental Disorder, NOS and Autism which manifested prior to age 22 and is likely to continue.

2) Regulations require that substantial limitations in functioning must exist in three (3) or more of the major life areas in order to show that an individual requires ICF/MR level of care. The claimant did not meet the criteria for substantial limitations in the major life areas of self-care, receptive or expressive language, learning, mobility, self-direction, capacity for independent living, or economic self-sufficiency. The claimant does not require ICF/MR level of care and does not meet the medical eligibility requirements for the Title XIX MR/DD Waiver Services Program.

IX. DECISION:

It is the decision of the State Hearing Officer to uphold the action of the Department to deny medical eligibility for 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 May, 2006.

**Thomas M. Smith
State Hearing Officer**