



**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**

December 21, 2006

Dear Ms. _____,

Attached is a copy of the findings of fact and conclusions of law on your hearing held November 8, 2006. Your hearing request was based on the Department of Health and Human Resources' action to deny medical eligibility for the Children with Disabilities Community Services (CDCSP) Program.

In arriving at a decision, the State Hearing 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 Children with Disabilities Community Services Program are determined based on current regulations. One of these regulations is to be eligible for the Children with Disabilities Community Services Program, the child must require the level of care provided in a Nursing Facility (NF) or an Intermediate Care Facility for Individuals with Mental Retardation and/or Related Conditions (ICF/MR) or an acute care hospital or an approved in-patient psychiatric facility for children (CDCSP Manual Section D, I).

The information which was submitted at the hearing revealed that you meet the medical criteria to be eligible for the Children with Disabilities Community Services Program as you require a level of care provided in a Nursing Facility.

It is the decision of the State Hearing Officer to reverse the action of the Department to deny medical eligibility for the Children with Disabilities Community Services (CDCSP) Program.

Sincerely,

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

cc: Board of Review
Susan Striar-May, BMS
Sandra Joseph, M. D., BMS
Alva Page, III, Department's Attorney
Benita Whitman, Claimant's Attorney

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

Claimant,

v.

Action Number: 06-BOR-2358

**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 December 11, 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 8, 2006 on a timely appeal, filed July 5, 2006. It should be noted that the hearing was originally scheduled for September 28, 2006 but was rescheduled at claimant's request.

It should be noted here that the claimant's benefits have continued pending a hearing decision. It should also be noted that the hearing was convened in the _____ County DHHR office and that the Department representatives participated by speaker phone from _____ WV upon claimant's agreement.

II. PROGRAM PURPOSE:

The program entitled CDCSP is set up cooperatively between the Federal and State Government and administered by the West Virginia Department of Health and Human Resources.

The Department has chosen the option of providing Medicaid to disabled children, up to the age of 18, who can receive necessary medical services while residing in their family (natural or adoptive) homes or communities. The Medical Services must be more cost-effective for the State than placement in a medical institution such as a nursing home, ICF/MR facility, acute care hospital or approved Medicaid psychiatric facility for children under the age of 21.

III. PARTICIPANTS:

1. _____, Claimant's mother.
2. Benita Whitman, Claimant's attorney.
3. [REDACTED] Supervised Psychologist (by speaker phone).
4. Susan Striar-May, Consultant, Bureau for Medical Services (BMS) (by speaker phone).
5. Sandra Joseph, M. D., Medical Director, Bureau for Medical Services (BMS) (by speaker phone).
6. Alva Page, III, Department's Attorney (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 CDCSP Program.

V. APPLICABLE POLICY:

Eligibility Guide for CDCSP Program 9-1-94
Medicaid Program Instruction MA-03-65 dated 12-1-03.
WV Income Maintenance Manual Section 16.7 D.
State Medicaid Manual Section 3589
Common Chapters Manual Section 780 D.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 Copy of denial notification letter dated 6-26-06.
- D-2 Copy of memorandum from [REDACTED] 6-20-06.
- D-3 Copy of PAS-2000 dated 6-12-06 (6 pages).
- D-4 Copy of memorandum from [REDACTED] 4-21-06.
- D-5 Copy of memorandum from [REDACTED] 1-13-06.
- D-6 Copy of Annual Medical Evaluation (DD-2A) 2-3-06 (4 pages).
- D-7 Copy of Comprehensive Psychological Evaluation 12-2-05 (18 pages).
- D-8 Copy of Social History 12-2-05 (3 pages).
- D-9 Copy of Individualized Education Program 5-26-05 (6 pages).
- D-10 Copy of Cost Estimate Worksheet (2 pages).
- D-11 Copy of Individual Program Plan-Annual 12-12-03 (12 pages).
- D-12 Copy of Individualized Education Program 5-7-04 (6 pages).
- D-13 Copy of Master Treatment Plan (2 pages).
- D-14 Copy of Physical Therapy note from [REDACTED] 9-5-05
- D-15 Copy of letter to Susan Striar-May 2-7-05.
- D-16 Copy of Occupational Therapy Initial Evaluation 3-2-04 (2 pages).

- D-17 Copy of Evaluation and Plan of Care from Rehabilitation Services 4-17-04 (4 pages).
- D-18 Copy of Individual Program Plan 1-29-03 (12 pages).
- D-19 Copy of Physical Therapy Evaluation 12-9-03 (4 pages).
- D-20 Copy of report from [REDACTED] General Hospital received 3-22-04.
- D-21 Copy of letter from [REDACTED] 12-9-05 with Eligibility Guide (4 pages).
- D-22 Copy of written closing arguments from Mr. Page (10 pages).

(It should be noted that the Department had provided copies of other documents which were not admitted into evidence during the hearing and these documents are marked as "Not admitted" for identification purposes only.)

Claimant's Exhibits:

- Cl-1 Copy of Psychological Evaluation 4-28-06 (7 pages).
- Cl-2 Copy of Evaluation and Plan of Care Rehabilitation Services 4-7-04 (4 pages).
- Cl-3 Copy of Medicaid Program Instruction MA-94-41 8-29-94 and Eligibility Guide for the CDCSP Program 9-1-94 (30 pages).
- Cl-4 Copy of written closing arguments from Ms. Whitman (10 pages).

VII. FINDINGS OF FACT:

- 1) The claimant was an active recipient of the Children with Disabilities Community Services Program (CDCSP) when a reevaluation of medical eligibility resulted in denial of medical eligibility on 6-26-06 with notification of the decision issued that date (Exhibit #D-1).
- 2) The claimant was evaluated under the criteria for nursing home care and a PAS-2000 completed by [REDACTED] M. D. on 6-12-06 indicated that the claimant could not physically vacate the building in an emergency (item #25), that the claimant required physical assistance with eating (item #26a), bathing (item #26b), dressing (item #26c), and grooming (item #26d), and that the claimant could not administer her own medications (item #28). The PAS-2000 completed on 6-12-06 provided the claimant with six (6) deficits.
- 3) The Department contended that other documentation submitted conflicts with the findings of the PAS-2000 by [REDACTED]
- 4) Testimony from the Medical Director purported that other documentation conflicted with the findings of the PAS-2000 in the following items:

Item #25 physical inability to vacate the building: P.T. Evaluation (Exhibit D-19) says claimant can broad jump 18 inches and can walk on chalk line. Rehabilitation report (Exhibit D-17) states claimant can walk on a treadmill and was measured on stress test for ten (10) minutes. Item #26 h and j from the PAS-2000 state that claimant can transfer and walk independently (Exhibit D-3). IEP (Exhibit D-9) shows no restrictions, in regular education classes full-time, and indicates no devices needed.

Item #28 Administering medications: Nothing in IEP (Exhibit D-9) about medications at school. DD-2A (Exhibit D-6) not consistent with PAS-2000 list of medications. No reason why the claimant cannot take her own medications.

Item #26a Eating: DD-2A (Exhibit D-6) states claimant is independent and eats finger foods. IEP (Exhibit D-9) states claimant feeds self. OTT evaluation (Exhibit D-16) states claimant's grip strength diminished in left and right hand but normal range of motion. Manual muscle testing on Exhibit D-6 shows 70% and other reports give 95%. Exhibit D-17 shows 4 of 4 in Quad and Exhibit D-20 shows 80% with shoulders and shows no difficulties with tandem walking and shows no PT at school.

Testimony from the Medical Director purported that inconsistencies existed with the PAS-2000 in the areas of vacating the building, eating, and medication administration and that deficits did not exist in those areas and does not have a severe, chronic disability.

5) Testimony from the claimant's mother purported that:

The claimant was born with spina bifida and has limits with range of motion, a whole in her heart, hearing problems, multiple ear infections, and hearing loss.

The claimant has mirror image which means that both hands do the same things or mimic each other and she eats finger foods and textures that things cling to and scoops only and cannot cut up food.

The claimant has limits in arm strength, cannot hold things for long periods, has difficulty with buttoning, lifting, pulling and cannot open a window in the house.

The claimant needs help with all dressing, with shirts, pullovers, and shoes, cannot zip jeans and wears tennis shoes 98% of the time.

The claimant needs help with grooming as she can comb her bangs but not the back of her head as she cannot get her arm and neck to work together.

The claimant needs help with bathing with washing her back, hair, underarms, private parts, feet, and back of legs.

The claimant cannot open medicine bottles as she cannot hold the bottle with one hand and turn the lid with the other hand as she cannot coordinate her hands.

The claimant cannot get out of the house in an emergency as she would not be able to open the dead bolt on the door or could not raise the window to get out.

The claimant transfers from class to class by following the other students and the teacher walks her to class.

The claimant cannot catch herself if she falls as her arms do not go out to catch herself.

The claimant had PT through the school but not during summer and it did help her (Exhibit D-14).

The claimant needs extra time to complete school work, tests, and lengthy writing assignments and keeps her books at home due to the weight of carrying them around.

The claimant attends PE classes at school but is limited to things which would not hurt her neck. The claimant can bounce a ball and catch it.

6) Testimony from [REDACTED] purported that:

He evaluated the claimant on 4-19-06 (Exhibit #CI-1) and found that she was substantially below age and intelligence level in motor coordination which interferes with daily living.

The visual motor coordination abilities of the claimant are extremely low in comparison to other children her own age as 99% will do better than the claimant.

The ABS scores showed that the claimant is lower than 99% of the population.

The Subtest Scaled Scores showed weaknesses in Block Design (4), Symbol Search (4) and Cancellation ((1)) which indicated problems with visual motor coordination, difficulty integrating and coordinating visual motor abilities and the two (2) tests are consistent with the claimant's mother's information provided in the Vineland ABS.

Psychomotor was within normal limits.

Recommendation was only for OT.

7) WV Income Maintenance Manual Section 16.7, D states, in part:

"The Dept. has chosen the option of providing Medicaid to disabled children, up to the age of 18, who can receive necessary medical services while residing in their family (natural or adoptive) homes or communities. The medical services must be more cost-effective for the State than placement in a medical institution such as a nursing home, ICF/MR facility, acute care hospital, or approved Medicaid psychiatric facility for children under the age of 21.

This coverage group allows children to remain with their families by providing medical services, in the home or community, that are more cost-effective than care in a medical institution. It also eliminates the requirement that the income and assets of parents and/or legal guardians be deemed to the children.

A child is eligible for Medicaid as a CDCSP client when all of the following conditions are met:

The child has not attained the age of 18;

The child has been determined to require a level of care provided in a medical institution, nursing home, ICF/MR, hospital, or psychiatric facility;

He is expected to receive the necessary services at home or in the community.

The estimated cost of services is no greater than the estimated cost of institutionalization.

The child has been denied SSI eligibility because the income and assets of his parent(s) were deemed to him, and as a result, the SSI income or asset eligibility test was not met.

The Long-Term/Alt. Care Unit in the Office of Medical Services determines

medical eligibility and notifies the county office and the case management agency of the decision in writing. Refer to Chapter 12 for details about determining medical eligibility."

8) State Medicaid Manual Section 3589 states:

Under Section 134 of the Tax Equity and Fiscal Responsibility Act of 1982 (P.L. 97-248), States are allowed at their option, to make Medicaid benefits available to children (age 18 or under) at home who qualify as disabled individuals under Section 1614 (a) of the Social Security Act provided certain conditions are met, even though these children would not ordinarily be eligible for SSI benefits because of the deeming of parental income or resources. The specific statutory provisions establishing this option are contained in Section 1902 (e) of the Social Security Act.

This option is available even if you do not have an approved home and community-based services waiver. You are allowed to make Medicaid coverage available under this option without the burden of seeking approval, on a case-by-case basis, from the Secretary.

In order for a child to establish Medicaid eligibility under this option, determine that:

if the individual were in a medical institution, he/she would be eligible for medical assistance under the State plan for Title XIX;

the child requires a level of care provided in a hospital, skilled nursing facility, or intermediate care facility;

it is appropriate to provide the care to the child at home; and

the estimated cost of caring for the child outside of the institution will not exceed the estimated cost of treating the children.

Children meeting these standards would be eligible for Medicaid even though they were not receiving SSI cash assistance at home. Under the law these children are deemed, for Title XIX purposes only, to be receiving SSI, or a State supplemental payment. Of course, 209 (b) States which do not provide Medicaid to disabled SSI and State supplement recipients under age 19 may not take advantage of this option.

In determining whether the child requires a level of care provided in a hospital, skilled nursing facility or intermediate care facility, determine that the child requires the level of care appropriate to these facilities as defined in 42 CFR 440.10 (hospital), 440.40 (skilled nursing facilities) or 440.150 (intermediate care facilities). If you elect this option you will need to provide coverage to all disabled children who meet the conditions. This is unlike the situation that exists for home and community-based waivers for which the law authorizes a waiver of the statewideness and comparability requirements."

9) Medicaid Program Instruction MA-03-65 dated 12-1-03 Eligibility Guide for Children with Disabilities Communities Services Program states, in part:

“B. A child must have five (5) deficits to qualify medically. The capabilities of the child will be compared to the other children his/her own age. The deficits will be derived from a combination of the following assessment elements of the PAS2000:

Question #26

1. Eating Level 2 or higher (physical assistance to get nourishment, not preparation;
2. Bathing Level 2 or higher (physical assistance or more);
3. Grooming Level 2 or higher (physical assistance or more);
4. Dressing Level 2 or higher (physical assistance or more);
5. Continence Level 3 or higher (must be incontinent);
6. Orientation Level 3 or higher (totally disoriented, comatose);
7. Transfer Level 3 or higher (one person or two persons assist in the home);
8. Walking Level 3 or higher (one person assist in the home);
9. Wheeling Level 3 or higher (must be Level 3 or 4 on walking in the home to use Level 3 or 4 for wheeling in the home. Do not count outside the home).

Question #25

In the event of an emergency, the individual is (c) mentally and/or (d) physically unable to vacate a building.

Question #27

The child has skilled nursing needs in one or more of these areas, (g) suctioning, (h) tracheotomy, (i) ventilator, (k) parenteral fluids, (l) sterile dressings, or (m) irrigations. (The use of oxygen is not a deficit.)

Question #28

The child is (c) not capable of administering his/her own medications.

C. The evaluations must demonstrate that a child has a diagnosis of a severe, chronic disability which is attributable to a physical impairment or medical condition requiring Nursing Facility Level of Care. The child's need for this level of care and its corresponding services must be for an extended duration.

D. It is also necessary that the level of services provided in the community must serve the child as well as or better than comparable services in a nursing facility and the total costs must be less than the same services delivered at that level of care.”

10). Common Chapters Manual Section 780 D states, in part:

AD. The Decision

The State Hearing Officer shall weigh the evidence and testimony presented and render a decision based solely on proper evidence given at the hearing.....The hearing officer=s

decision must also be based on facts as they existed at the time of the Department's action or proposed action at issue.....

1. CASE DECISION REVERSED, RETROACTIVE PAYMENTS

If the policy was misapplied or other incorrect decision was made, the State Hearing Officer will reverse.....

2. CASE DECISION UPHELD

If the policy was properly and correctly followed, the State Hearing Officer will uphold.@

- 11) The area of dispute involved whether the evidence and testimony show that the claimant meets the medical criteria for the CDCSP Program under the nursing facility level of care. The documentation must show that the applicant has a diagnosis of a severe, chronic disability which is attributable to a physical impairment or medical condition requiring nursing facility level of care. The Department contended that the documentation did not show that the claimant had a severe, chronic condition requiring nursing facility level of care and that she did not have at least five (5) deficits in the major life areas. The Department contended that the claimant did not meet the criteria for a deficit in the areas of vacating a building, eating, and self-administering medications even though the PAS-2000 completed on 6-12-06 indicated such deficits existed. The Department did not oppose the finding of a deficit in the areas of dressing, grooming, and bathing. Therefore, the documentation showed that the claimant met a deficit in those three (3) areas. In regard to the issue of a severe, chronic disability, the evidence and testimony clearly shows that the claimant has a severe and chronic disability with encephalocele and congenital cervical spine fusions. In regard to the number of deficits, the State Hearing Officer finds that the evidence and testimony show that the claimant does require physical assistance with eating. The claimant is limited in the foods which she eats and does not have the ability to cut up food. These limitations show that she requires physical assistance with eating (item #25 on the PAS-2000). The State Hearing Officer finds that the claimant is unable to self-administer medications. While there was disagreement over the extent of medications required by the claimant, the fact remains that when the claimant is required to take medications, she has difficulty opening the bottles and knowing when to take the medications. Therefore, the State Hearing Officer finds that the claimant is unable to self-administer her medications and meets a deficit in that area. The State Hearing Officer finds that the evidence and testimony do not support a finding that the claimant is physically unable to vacate a building in an emergency. The fact that the PAS-2000 showed that she is independent with walking and transferring and the lack of any other substantial documentation shows that the claimant does not meet a deficit in this area. The State Hearing Officer finds that the claimant has five (5) deficits and continues to meet the medical eligibility requirements of the CDCSP Program.

VIII. CONCLUSIONS OF LAW:

- (1) Regulations in the CDCSP Manual under Program Eligibility Criteria state that medical eligibility will be based on the child requiring a level of care provided in a Nursing

Facility (NF) or an Intermediate Care Facility for Individuals with Mental Retardation and/or Related Conditions (ICF/MR), or an acute care hospital or an approved Medicaid in-patient psychiatric facility for children under the age of 21.

- (2) Regulations in the Medicaid Program Instruction MA-03-65 state that Nursing Facility level of care will be determined based on a PAS-2000, Cost Estimate Worksheet, Social Assessment and History, IPP and IEP or IFSP, specialty evaluations, and Home Health Care Plan.
- (3) Regulations in Medicaid Program Instruction MA-03-65 state that a child must have five (5) deficits to qualify medically. The evidence and testimony show that the claimant has a deficit in the areas of eating, bathing, dressing, grooming, and medication administration.
- 4) Regulations in Medicaid Program Instruction MA-03-65 state that a child must have a diagnosis of a severe, chronic disability which is attributable to a physical impairment or medical condition requiring Nursing Facility level of care. The evidence and testimony show that the claimant has a severe, chronic disability which requires Nursing Facility level of care.

IX. DECISION:

It is the decision of the State Hearing Officer to reverse the action of the Department to deny medical eligibility for the CDCSP Program.

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this 21st Day of December, 2006

Thomas M. Smith
State Hearing Officer