



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
Governor

Martha Yeager Walker
Secretary

May 12, 2005

By _____

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your son's hearing held April 18, 2005. Your Hearing request was based on the Department of Health and Human Resources' action to deny your application for MR/DD Waiver Program benefits.

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 MR/DD Home and Community-Based Waiver Program are determined based on current regulations. One of these regulations specifies that in order to be eligible for the Title XIX MR/DD Home & 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 Facility). (West Virginia Title XIX MR/DD Waiver Home & Community-Based Policy Manual, Chapter 500-8).

The information which was submitted at the hearing revealed that your son does have a qualifying diagnosis for the MR/DD Waiver Program however; he does not require the level of care provided in an ICF/MR Facility.

It is the decision of the State Hearing Officer to **uphold** the action of the Department in their denial of services under the MR/DD Waiver Program.

Sincerely,

Sharon Yoho
State Hearing Officer
Member, State Board of Review

cc: Susan Hall, BBHMF
Linda Workman, BBHMF
Chairman, BOR

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

_____ by _____,

Claimant,

v.

Action Number: _____

**West Virginia Department of
Health and Human Resources,**

Respondent.

DECISION OF THE STATE HEARING OFFICER

I. INTRODUCTION

This is a report of the State Hearing Officer resulting from a fair hearing concluded on April 18, 2005 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 18, 2004 on a timely appeal filed January 4, 2005.

It should be noted here that the claimant's application for the MR/DD Waiver Program has been denied.

All persons giving testimony were placed under oath.

II. PROGRAM PURPOSE:

The program entitled MR/DD Home and Community-Based Waiver is set up cooperatively between the Federal and State Government and administered by the West Virginia Department of Health and 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

_____, Claimant's mother

Susan Hall, MR/DD Waiver Program Manager

Linda Workman, Psychologist Consultant, Bureau for Medical Services

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

IV. QUESTION(S) TO BE DECIDED

The question to be decided is whether it has been established that the claimant meets the medical eligibility criteria for the MR/DD Waiver Program

V. APPLICABLE POLICY

Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500-8.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Departments' Exhibits:

D-1 MRDD Medical Eligibility Criteria, Chapter 500-8

D-2 Notice of Denial dated December 16, 2004

D-3 MRDD Application Form dated October 18, 2004

D-4 Annual Medical Evaluation dated October 27, 2004

D-5 Comprehensive Psychological Evaluation dated September 01, 2004

- D-6 Adaptive Behavior Scale testing results dated September 1, 2004
- D-7 Social History dated October 13, 2004
- D-8 Individual Program Plan dated November 8, 2004
- D-9 Individualized Education Program dated October 13, 2004
- D-10 I.E.P. progress report dated October 11, 2004

VII. FINDINGS OF FACT:

1. _____ is a 9-year-old male who, resides with his family. He is diagnosed with Tuberous Sclerosis. He attends public school with the majority of his instruction being obtained in regular classroom. He does receive 23% of his instruction in the Learning Disabilities resource room.
2. _____ has an Axis III. diagnosis of Tuberous Sclerosis. He has an Axis I. Diagnosis of Attention Deficit/Hyperactivity Disorder and Cognitive Disorder. He has an Axis IV diagnosis of Psychosocial Stressors. He has also been diagnosed with GERD.
3. His annual medical evaluation of October 27, 2004 reports that assistance is needed with personal hygiene and close supervision is needed due to mental and behavioral difficulties. It reports that he is incontinent. Tuberous Sclerosis is described as a condition which results in the occurrence of benign tumors in the kidneys, brain and heart. His physician indicates that the patient requires the level of care and services that are provided in an ICF/MR intermediate care facility.
4. A comprehensive psychological evaluation was completed on September 1, 2004. The evaluation reported _____ to exhibit physical and verbal aggression. He has difficulty remaining on task and has impulsive behaviors. He obsesses on being at home where he can play video games. He exhibits sensory defensiveness and when over-stimulated he is difficult to control. He rocks back and forth and will not remain in a car seat belt. The evaluation notes no significant problems with mobility. He is reported to be able to feed himself and drink from a "sippy" cup which avoids spills. He is toilet trained but does have bladder incontinent problems which require him to wear diapers. He has some problems with dressing himself. His language was reported to be sufficient to express his needs and wants. His Adaptive Behavior Scale scores were recorded to be compared to non-mental retardation norms. No percentage scores were listed to be below the 1% range. Scores of 1% were recorded in the areas of Independent Functioning, Economic Activity, Self Direction and Socialization. The psychological made note that full symptoms of Tuberous Sclerosis with a child of _____'s age are believed to not be fully developed yet.
5. Ms. Workman testified that the above Psychological Evaluation was part of a second application packet that the Bureau of Medical Services had received recently for Mr. _____.

Major differences were noted in the two packets. She reports that the Psychological as well as the Individual Education Program showed significant drops in scores and in the level of Mr. _____ abilities and needs. This fact raised some question of credibility from Ms. Workman which Ms. _____ addressed. She stated that her son had regressed since the previous Psychological and that the Psychologist who completed the newest Psychological was a stranger to _____, “so he showed his true colors”.

6. Ms. _____ voiced her concerns that the school system as well as _____ Hospital are showing a lack of support in her attempts to deal with the problems with _____. She has been told by _____ doctors that they can not help _____ since his problem is an organic problem. She reports that _____ does obsess over video games, will steal food and likes to cut up and destroy things. She says she has difficulty getting him to bath and brush his teeth. He requires constant supervision.
7. Ms. Workman testified that the MRDD program is for individuals who require assistance in learning the most basic skills of daily living. She reports that after review of the documents, a decision was reached that _____ did have a qualifying diagnosis for the MR/DD program, but the documentation did not support the belief that he had the presence of substantial deficits in three or more of the seven Major Life Activities which include:
 - a. Self-Care
 - b. Learning (functional academics)
 - c. Mobility
 - d. Capacity for Independent Living
 - e. Language
 - f. Self-Direction

VIII. CONCLUSIONS OF LAW:

1. Eligibility Criteria for the MR/DD Waiver Program are outlined in Chapter 500 of the Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual. The level of care criteria for medical eligibility is outlined in this chapter and reads as follows:

Diagnosis

- Must have a diagnosis of mental retardation, which must be severe and/or 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, 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
- Tuberos Sclerosis
- Additionally, 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

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 daily living.
 - A need for the same level of care and services that is provided in an ICF/MR institutional setting.

IX. DECISION:

It is clear that the claimant does have a qualifying diagnosis of Tuberous Sclerosis, however the current degree of his limitations due to this condition do not meet the qualifications for the MRDD program. Policy is clear that eligibility requires that there be substantial limitations in 3 or more of the major life areas. Evidence and testimony support the decision of the Department, that the claimant did not at the time of application have substantial limited functioning in three (3) or more of the major life areas. The delays that he was experiencing were not severe enough to require the level of care offered in an ICF/MR institutional facility. This claimant's symptoms from the diagnosis of Tuberous Sclerosis are reported to not be fully developed therefore it is believed that a decision of eligibility for the MRDD program could be a possibility for the future.

It is the finding of the Hearing Officer that sufficient evidence was presented to show that _____ did not meet medical eligibility criteria for the MR/DD waiver program for the application which was processed in December 2004. It is the ruling of this hearing officer that the action to deny these benefits was justified and such action is **upheld**.

X. RIGHT OF APPEAL:

See Attachment.

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision.

Form IG-BR-29.

ENTERED this 12th Day of May, 2005

State Hearing Officer

