



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
150 Maplewood Avenue
Lewisburg, WV 24901

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

October 6, 2006

Dear Ms. _____

Attached is a copy of the findings of fact and conclusions of law on your daughter's hearing held August 28, 2006. Your hearing request was based on the Department of Health and Human Resources' action to deny 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 meets 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,

Margaret M. Mann
State Hearing Officer
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review
Stephen Brady, BBHMF

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

_____ by _____,

Claimant,

v.

Action Number: 06-BOR-1839

**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 August 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 August 28, 2006 on a timely appeal, filed April 27, 2006.

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 Grandmother/Adoptive Mother

Department's Witnesses:

Stephen Brady, Bureau of Behavioral Health & Health Facilities (By telephone)

Linda Workman, Psychologist Consultant, BMS (By telephone)

Observing:

Cheryl McKinney, State Hearing Officer

Presiding at the Hearing was Margaret M. Mann, 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 Annual Medical Evaluation dated November 21, 2005
- D-3 Psychological Evaluation dated February 6, 2006
- D-4 Social History dated February 2, 2006
- D-5 Individual Program Plan (IPP) dated February 17, 2006
- D-6 Notification of denial dated April 10, 2006

VII. FINDINGS OF FACT:

- 1) An application packet was submitted on March 16, 2006 in order to determine if _____ would qualify for services under the Title XIX MR/DD Waiver Program. The Bureau of Behavioral Health reviewed the documents submitted and determined that she did not qualify medically for the program.
- 2) The Department sent a notification letter dated April 10, 2006 (Exhibit D-6) stating, "Your Waiver Application is hereby denied. Your Application was denied because: Documentation submitted for review does not support the presence of substantial

adaptive deficits as defined for MR/DD eligibility in three or more of the six major life areas.”

- 3) _____ is 10 years of age. She is being raised by _____, her grandmother/adoptive mother.
- 4) The Annual Medical Evaluation dated November 21, 2005 (Exhibit D-2) lists diagnoses of Mental Retardation – mild, Pervasive Developmental Disorder (Autism Spectrum Disorder), ADHD and Obsessive Compulsive Disorder. Items noted on the evaluation under neurological are decreased attention span, has eyeglasses and (?) slightly decreased coordination. Under Problems Requiring Special Care: Mobility: Ambulatory; Continence Status: Continent; Feeding: Feeds Self; Personal Hygiene: Independent; and Mental and Behavioral Difficulties: Alert and Needs Close Supervision. There was a recommendation for ICF Level of Care.
- 5) The Psychological Evaluation dated February 6, 2006 (Exhibit D-3) lists no Axis II diagnosis, Axis I diagnosis of Pervasive Developmental Disorder NOS, no diagnosis under Axis III, and Axis IV - None. Current Behaviors: Self-Help – She is able to feed herself and drink without difficulty although she prefers to eat with her fingers. She is full self-care for toileting. She requires supervision for all aspects of bathing and oral hygiene and requires assistance in all aspects of use and care of clothing except undressing. Language - She has difficulty with writing skills with a limited written vocabulary for her age despite a much more extensive spoken vocabulary. However, it is reported that despite vocabulary skills, she uses language in a simplistic manner. She responds best to concrete one-step questions and instructions and is reported to be non-responsive and sometimes engage in nonsensical speech. Affective – She is reported to show some attraction and appropriate physical affection toward others. Mental Status – She presented as a somewhat distractible, well-nourished child appearing about her stated age. Her speech was parsimonious and telegraphic. She was oriented to time, place and person at an age appropriate level but was not to circumstances. Others – She is reported to participate in religious meetings, school activities and casual peer level games.
- 6) The Psychological Evaluation dated February 6, 2006 (Exhibit D-3) reads that the Slosson Intelligence Test, 1985 Edition was administered. A Basal Score was not achieved until a mental age of 4-8 and the ceiling item was at mental age 9-8 with 28 added months for a mental age of 7-0. This resulted in a Standard Score of 72, falling at the 4th percentile with a 95% CI of her true score falling between a Standard Score of 65 to 79. Her scores are not inconsistent with Standard Benet scores obtained in the 2002 evaluation and still leave open the question of why her academic achievement scores are so divergent. Her academic achievement scores would suggest she should be demonstrating better adaptive functioning than noted below. _____’s scores on the ABS-S:2 appear more representative of the Mental Retardation norms than those of her normal age range cohort. There are delays in Economic Activity, Socialization, Community Self-Sufficiency, and Personal-Social Responsibility that are not readily explained by the historical diagnosis of a learning disability. She presents with a marked range of adaptive behaviors that range from the norm for age cohort to the range associated with a moderate range of mental retardation. This would suggest the presence of an atypical and pervasive developmental disorder.

- 7) Developmental Findings/Conclusions in the Psychological Evaluation dated February 6, 2006 (Exhibit D-3) reads in part that _____ has characteristics associated with Asperger's Disorder and Autistic Disorder but not in a clear diagnostic pattern. Given the high degree of variability over various academic and adaptive domains, it is suggested her intellectual functioning is higher than estimated by the current assessment. Placement Recommendations: She should be provided residential and community services at the ICF/MR level of services such as are found in the Title XIX Waiver program to develop skills that will prevent the possibility of institutionalization.
- 8) The Social History (Exhibit D-4) dated February 2, 2006 reads in part that _____ attends _____ Elementary School Autistic Classroom. She receives speech therapy.
- 9) The IEP (Exhibit D-5) reads in part that at a conference 01/11/06 "It was addressed whether _____ knows and understands what she is doing. Teachers stated _____ chooses not ?, knows the difference. _____ manipulates and enjoys the attention." The IEP goals are to improve behavior at home, school and community. The recording dated 10/26/05 reads in part that _____ has improved in her vocabulary and reading skills. She enjoys being read to and often verbalizes events in her life that correlate to events in the story. She has problems with math. She can recall basic facts to ten. She needs to improve her ability to write numbers to 1,000, solve grade-level story problems, and identify fractions problems.
- 10) Testimony from Ms. _____ revealed that the psychological report submitted with packet was the first evaluation where mental retardation was not noted. She has to help _____ dress, she brushes _____'s teeth, bathes her completely, and she has to clean her completely after using the bathroom. _____ can speak words and knows what they mean; however, she has no comprehension of safety, she is afraid of strangers but has no concept of danger. Ms. _____ knows that _____ is mildly mentally retarded. _____ can't remember directions. She wants but doesn't know what she needs. She is aggressive. If she doesn't get some extra help, she won't be able to overcome the behavior. _____ needs help more than she can give.
- 11) 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) Regulations require that a diagnosis of Mental Retardation or related condition exists which must be severe and chronic and have been manifested prior to age 22 and is likely to continue. Documentation presented at this hearing includes a diagnosis of Pervasive Developmental Disorder.
- (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. The evidence presented at the hearing does not support that the claimant has substantial limitations in functioning in three or more of the six major life areas.
- (3) Regulations require that evaluations of the applicant must demonstrate a need for the same level of care and services that is provided in an ICF/MR facility. Evidence presented at the hearing does not support this requirement.

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 6th Day of October, 2006.

Margaret M. Mann
State Hearing Officer