



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
P.O. Box 2590
Fairmont, WV 26555-2590

Joe Manchin
Governor

Martha Yeager Walker
Secretary

August 16, 2006

Dear Dr. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held June 28, 2006. Your Hearing request was based on the Department of Health and Human Resources' action to deny your application for benefits and services through the MR/DD Waiver 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 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 a related condition. 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 individuals with Mental Retardation and /or related conditions (ICF/MR Facility). (West Virginia Title XIX MR/DD Waiver Home & Community-Based Policy Manual, Chapter 1).

The evidence submitted at the hearing fails to demonstrate that your daughter has been diagnosed with Mental Retardation and/or a related condition. In addition, there is insufficient evidence show that your daughter has substantial adaptive deficits in three (3) or more of the major life areas.

It is the decision of the State Hearing Officer to **uphold** the Department's action in denying your application for benefits and services through the Medicaid, Title XIX MR/DD Waiver Program.

Sincerely,

Thomas E. Arnett
State Hearing Officer
Member, State Board of Review

cc: Chairman, Board of Review
Susan Hall, Program Manager, MR/DD Waiver Program

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

Claimant,

vs.

Action Number: 05-BOR-6690

**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 August 16, 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 scheduled to convene on February 17, 2006 and again on February 15, 2006 but was convened on June 28, 2006 on a timely appeal filed September 14, 2005.

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

Dr. _____, M.D., Claimant's Mother/Representative
Susan Hall, Program Manager, MR/DD Waiver Program
Richard Workman, Psychologist Consultant, Bureau for Medical Services

Presiding at the hearing was Thomas E. Arnett, 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 the Department was correct in its action to deny the Claimant's application for benefits and services through the MR/DD Waiver Program.

V. APPLICABLE POLICY

Title XIX MR/DD Home and Community-Based Waiver Program Operations
Manual, Chapter 1.
Code of Federal Regulations §42 CFR 435.1009(a),2

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

- D-1 Notice of Denial dated 6/22/05
- D-2 DD-2a, Annual Medical Evaluation completed on 4/1/05
- D-3 Initial Psychological Evaluation dated 4/1/05
- D-4 Correspondence from _____ S. _____ dated 6/5/06 accompanied by physician evaluations and letters.
- D-5 MR/DD Waiver Manual, Chapter I, Eligibility Criteria

VII. FINDINGS OF FACT:

- 1) On May 23, 2005, the Department notified the Claimant via a NOTICE OF DENIAL (Exhibit D-1) that her Waiver application was denied. This notice states in part:

Your Waiver Application is hereby denied.

Documentation submitted for review does not support the presence of substantial adaptive deficits in three or more of the major life areas identified for MR/DD Waiver eligibility, at this time. Also, Miss _____ has not been awarded an eligible diagnosis of mental retardation or a related condition.

- 2) Richard Workman testified that he was unable to find any information that would qualify the Claimant's medical condition "VACTERL Syndrome" as a related condition. Mr. Workman indicated that a related condition must have a high incidence of cognitive delays / Mental Retardation in order to qualify. Mr. Workman used the related condition of Cerebral Palsy as an example and testified that approximately 75% of those individuals who have Cerebral Palsy also have a diagnosis of Mental Retardation. He stated that he was unable to find any evidence that individuals with VACTERL Syndrome have a high rate of cognitive delays or Mental Retardation. Mr. Workman testified that VACTERL association is not an actual diagnosis, but rather a list of anomalies that have been found to occur together. When an individual has at least three or more of these individual anomalies, they are give the VACTERL association – (V)Vertebrae, (A) imperforate anus, (C) cardiac anomalies, (TE)Tracheoesophageal fistula, (R) renal or kidney anomalies and (L) for limb anomalies.
- 3) The Annual Medical Evaluation (Exhibit D-2) dated 4/1/05 reveals under the Diagnostic Section (page 4) that the Claimant's diagnosis is "mild global development delays in 8 month old infant." In order to be eligible for participation in the MR/DD Waiver Program, an individual must have a diagnosis of Mental Retardation or a related condition and demonstrate severe [emphasis added] chronic disabilities. The diagnosis provided by the Claimant's physician clearly fails to meet this standard.
- 4) The Vineland Adaptive Behavior Scores included in Exhibit D-3 reveal scores that are in excess of moderate level adaptive deficits (Standard Score of 55 & below and a Percentile Rank of less than 1%). While the Department acknowledged that it is difficult to get an accurate assessment on an 8-month old child, the lowest Standard Score reported is the Claimant's Composite score of 73.

This program also looks closely at Axis II diagnosis, and while the Department indicated that most psychologists would refrain from diagnosing an 8-month old child with Mental Retardation, there is insufficient evidence in the narrative report to indicate cognitive delays at that level. This evaluation fails to provide an eligible diagnosis.

- 5) Exhibit D-4 includes correspondence from [REDACTED] M.D., dated March 22, 2006 and a *Child Development Unit Evaluation* completed on March 2, 2006. Dr. [REDACTED] administered the Vineland Adaptive Behavior Scale and reported scores that further demonstrate borderline to mild delays, although the Department acknowledged that the Claimant appears to be exhibiting substantial delays in her Daily Living Skills. The information included in Dr. [REDACTED] reports, with the exception of the noted Daily Living Skills, is consistent with the diagnostic information found on the DD-2a (Exhibit D-2) – mild global delays.

- 6) Dr. _____ testified that she was verbally informed by the Department that the cutoff for Standard Scores would be 70 and below, not 55 & below and less than 1%, when determining substantial adaptive deficits from adaptive behavior scores. She stated that her daughter presents a score in the 70 range in most areas and she had her daughter reevaluated because of her understanding of the requirements. Dr. _____ cited Dr. _____ March 22, 2006 correspondence, wherein she states (page 2) - “The above test results reveal substantial deficits in the areas of self care, communication (receptive and expressive language), mobility and self direction.”
- 7) Dr. _____ contends that her daughter’s condition is a related condition because it is closely related to Spina Bifida or Cerebral Palsy and that her daughter’s delays, much like these conditions, are related to physical delays. Dr. _____ cited correspondence from _____ M.D. dated April 2, 2006 (included in Exhibit D-4) which states – “The VACTERL association is similar to Spina Bifida or spinal cord injury (both of which are listed as conditions used as examples by the state), which would qualify her for a waiver.” She believes that the VACTERL Syndrome, given the global delays it has caused her daughter, should be considered a related condition.
- 8) The Federal Code of Regulations, found at §42 CFR 435.1009(a),2 - states that a related condition is 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 or adaptive behavior similar to that of mentally retarded persons, and requires treatment or services similar to those required for these persons.
- 9) Eligibility Criteria for the MR/DD Waiver Program are outlined in Chapter 1 of the Title XIX MR/DD Home and Community-Based Waiver Program Operations Manual

I. Level of care Criteria for medical eligibility

- A. 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 conditions (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).
- 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. Tuberous 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 (22) 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 Services (OBHS) and the Bureau for Medical Services (BMS) based on the medical, psychological and social evaluations (DD-2A, DD-3, and DD-4).
- 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.

VIII. CONCLUSIONS OF LAW:

- 1) The regulations that govern the MR/DD Waiver Program require eligible individuals to have a diagnosis of Mental Retardation and/or a related condition, and require an ICF/MR Level of Care.

- 2) The Claimant has multiple congenital anomalies identified as VACTERL Syndrome/association. The evidence indicates that VACTERL Syndrome is an acronym that stands for the various anomalies through association and it is not an actual diagnosis. The clinical evidence submitted at the time of application fails to provide a diagnosis of Mental Retardation or a related condition and the evidence submitted subsequent to the application confirms the likeness of VACTERL association to Spina Bifida and spinal cord injury, however it fails to confirm that this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons. Based on the evidence, VACTERL Syndrome/association is not a related condition.
- 3) The issue of identifying three or more substantial adaptive deficits is moot without a qualifying diagnosis, however, the issue will be briefly reviewed for the purpose of this hearing. The narrative information included in Dr. [REDACTED]'s correspondence dated March 22, 2006 indicates that the Claimant demonstrates moderate level deficits in self care, communication, mobility and self direction, however, these findings are not supported by the Vineland II and the Developmental Observation Checklist System Adaptive Behavior Scores included in the same document. Testimony and documentation received on behalf of the Claimant clearly indicates that her abilities are delayed, however, there is insufficient evidence to demonstrate that the Claimant requires the level of care and services provided in an ICF/MR institutional setting.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the action of the Department in denying your application for benefits and services through the Medicaid, MR/DD Waiver 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 August, 2006

**Thomas E. Arnett
State Hearing Officer**