



**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

April 18, 2007

By _____

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held April 16, 2007. 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).

The information which was submitted at the hearing revealed that your daughter does 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
Stephen Brady, BHHF
Linda Workman, BMS

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

_____,

Claimant,

v.

Action Number: 07-BOR-645

**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 16, 2007 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 16, 2007 on a timely appeal, filed January 26, 2007.

It should be noted here that the claimant's benefits have been denied pending a hearing decision. It should also be noted that the hearing was convened as a telephone conference hearing at claimant's request.

II. PROGRAM PURPOSE:

The Program entitled Title XIX MR/DD Waiver 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 and representative.
2. Stephen Brady, Program Coordinator, BHHF.
3. Linda Workman, Psychologist Consultant, BMS.

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, Chapter 500.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 Copy of regulations from Title XIX MR/DD Waiver Manual (6 pages).
- D-2 Copy of notification letter dated 12-20-06.
- D-3 Copy of Annual Medical Evaluation dated 11-06-06 (4 pages).
- D-4 Copy of Psychological Evaluation 10-20-06 (16 pages).
- D-5 Copy of Positive Behavior Support Plan 11-17-06 (3 pages).
- D-6 Copy of letter from [REDACTED] M. D. 3-3-04.
- D-7 Copy of Social History 10-23-06 (3 pages).
- D-8 Copy of Individual Program Plan 10-20-06 (12 pages).
- D-9 Copy of report from [REDACTED] 12-2-05 (3 pages).
- D-10 Copy of Individualized Education Plan 10-12-05 (8 pages).
- D-11 Copy of Psychoeducational Evaluation Report 9-29-05 (7 pages).

(It should be noted that additional documents were submitted by the Department which were not used or entered as evidence. These documents are marked as "Not admitted" for identification purposes only.)

Claimant's Exhibits:

None.

VII. FINDINGS OF FACT:

- 1) The claimant was an applicant for the Title XIX MR/DD Waiver Services Program when an application packet was submitted by [REDACTED] to the MR/DD Waiver Program on 12-1-06 for consideration of medical eligibility (Exhibits #D-3 through #D-11).
- 2) The packet was reviewed and the claimant was denied for medical eligibility with notification issued on 12-20-06 which stated that the application packet lacks an evaluation which supports the diagnosis offered (Autism Mental Retardation), that the packet is inconsistent and does not support the presence of substantial adaptive deficits in three or more of the six major life areas, and that the IEP submitted is outdated.
- 3) The claimant's hearing request was received by the Bureau for Medical Services (BMS) on 1-26-07, by the Board of Review on 2-1-07, and by the State Hearing Officer on 2-5-07 and the hearing was convened on 4-16-07.
- 4) Mr. Brady testified regarding the medical eligibility criteria listed in Chapter 500 (Exhibit #D-1).
- 5) Annual Medical Evaluation dated 11-6-06 (Exhibit #D-3) gives mental diagnosis as autism, states that claimant is ambulatory, not toilet trained, feeds self, needs total care with personal hygiene, has irrational behavior and needs close supervision, and certifies the case for ICF/MR level of care.
- 6) Comprehensive Psychological Evaluation dated 10-20-06 by [REDACTED] (Exhibit #D-4) states that the claimant's current diagnosis is Axis I: Autistic Disorder and Oppositional Defiant Disorder, Axis II diagnosis as Severe Mental Retardation, that she cannot use a fork or spoon, needs help getting dressed, and is uncooperative in getting dressed or with hygiene, that she has expressive language and receptive language is adequate, that she does not play well with other children, that the WPPSI was attempted on 3-3-06 but the claimant's symptoms prevented completion, that he estimated the claimant to be in the severe range of MR, that Vineland Adaptive Behavior Scales were used and showed an eligible score of 55 in daily living skills, that communication was 62, socialization was 56, motor skills were 59, and composite score was 65, and the recommendation for ICF/MR level of care is made.
- 7) Letter from [REDACTED] M. D. dated 3-3-04 (Exhibit #D-6) gives a provisional diagnosis of Pervasive Developmental Disorder (PDD).
- 8) Testimony from Ms. Workman purported that the documentation showed that the claimant has diagnoses of autism and PDD but no testing was provided which supported the diagnoses, that the claimant did have an eligible score of 55 in daily living skills and does meet the criteria under self-care but does not meet the criteria under any other major life area, that the claimant does not have substantial limitations in mobility as he is ambulatory, that the claimant does not have substantial limitations in learning, that the claimant does not meet the criteria in receptive and expressive language, that it cannot be determined from the documentation whether the claimant meets the criteria for capacity for independent living, and that the documentation shows that the claimant does have some self-direction skills and does not meet the criteria for a deficit in that area.

- 9) Testimony from Ms. _____ purported that she does not understand why the documentation is conflicting, that the pediatrician said it was autism and so did the others, that her daughter has a leg problem but has adjusted to it, that behavior is her main problem and she was moved into more special classes, that she bites and kicks and got over the head-banging but still is a danger to herself, that she can learn but is not normal, that there is a history of mental illness in the family, and that she receives SSI benefits due to seizures.
- 10) Title XIX MR/DD Home and Community Based Waiver Program Revised Operations Manual, Chapter 500 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 supports.

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

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

* Tubercous 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).

11) 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."

12) 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."

13) The areas of dispute involve whether the claimant has an eligible diagnosis and whether she meets the criteria of substantial limitations in three (3) of the daily living areas of self-care, receptive or expressive language, learning, mobility, self-direction, and capacity for independent living. The documentation shows differing diagnoses in autism and PDD. No documentation of autism testing was provided to give a definitive diagnosis and the diagnosis of PDD was a provisional one provided by Dr. [REDACTED] (Exhibit #D-6). Thus, the Department was correct in stating that there is no clear and precise diagnosis. The documentation was also conflicting in the major life areas and did not give a clear picture of the claimant's deficits. However, the documentation does show that there is no substantial limitation with mobility, learning, language, and self-direction. The claimant met the criteria for substantial limitation in self-care. Her age precluded a definitive finding in the area of capacity for independent living. The Department contended that eligibility could not be confirmed in any major life area except for self-care. The State Hearing Officer finds that the Department was correct in the determination that eligibility could not be established in three (3) major life areas based on the documentation provided.

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 documentation did not give a clear and precise diagnosis of MR or a related condition.

- 2) Regulations require that substantial limitations in functioning must exist in three (3) or more of the major life areas. The claimant did meet the criteria for substantial limitations in the major life area of self-care but did not meet the criteria for a substantial deficit in the areas of mobility, learning, language or self-direction. The documentation also did not show that the claimant met the criteria for substantial limitations in capacity for independent living.

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 18th Day of April, 2007.

Thomas M. Smith
State Hearing Officer