

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MATTHEW WYSONG,
by his mother Mary L. Ramsey,

Petitioner,

v.

MARTHA WALKER, in her official capacity as
Secretary of the West Virginia Department of
Health and Human Resources; and RAY BURL
WOODS, in his official capacity as State Hearing
Officer for the West Virginia Department of
Health and Human Resources,

Respondents.

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APR 08 2008

Attorney General's
Office

Civil Action No. 07-AA-152
Judge Louis H. Bloom

FILED
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CATHY S. BULLOCK, CLERK
KANAWHA COUNTY CIRCUIT COURT

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FINAL ORDER REVERSING ADMINISTRATIVE DECISION

On the 7th day of March, 2008, came the petitioner, Matthew Wysong through his counsel, Bruce G. Perrone, and the respondents, through their counsel, Mary McQuain, Assistant Attorney General, for oral argument on a "Petition for Certiorari and Judicial Review of State Agency Decision" filed by Matthew Wysong on October 29, 2007. Matthew Wysong seeks this Court's review of an adverse administrative decision issued on August 15, 2007, by Ray B. Woods (hereinafter "Hearing Officer Woods"), Hearing Officer for the West Virginia Department of Health and Human Resources (hereinafter "DHHR").

Upon full consideration of the oral arguments made before this Court, the memoranda of the parties, the record, and the applicable law, the Court does hereby reverse the administrative decision entered by DHHR and Hearing Officer Woods, according to the following findings of fact and conclusions of law.

FINDINGS OF FACT

DHHR's Title XIX Mentally Retarded/Developmentally Disabled Waiver Program

1. This matter involves Matthew Wysong's application to DHHR for assistance and services through DHHR's Title XIX Mentally Retarded/Developmentally Disabled (hereinafter "MR/DD") Waiver Program (hereinafter "Waiver Program").

2. The Waiver Program provides home and community-based support to assist individuals who have mental retardation and/or developmental disabilities to achieve the highest level of independence and self-sufficiency possible in their lives.¹

3. In order to be eligible for the Waiver Program, an applicant must satisfy certain medical requirements. First, the applicant must have a medical diagnosis of mental retardation and/or a related condition.² Second, the applicant must be substantially limited in functioning in three or more major life areas.³ Third, the applicant must require active treatment.⁴ Finally, the applicant must require a level of care that similarly diagnosed persons would have in an Intermediate Care Facility for the Mentally Retarded or Developmentally Disabled (hereinafter "ICF/MR").⁵

¹ Section 501, Title XIX MR/DD Home and Community-Based Waiver Program- Revised Operations Manual (hereinafter "Waiver Manual").

² Waiver Manual, Section 503.1

³ Waiver Manual, Section 503.1

⁴ Waiver Manual, Section 503.1

⁵ Persons in an ICF/MR facility are those who are in need of and who are receiving active treatment. Waiver Manual, Section 503.1.

Eligible Medical Diagnosis

4. First, an applicant must have an eligible medical diagnosis, which includes mental retardation and other related conditions, such as autism, cerebral palsy, and epilepsy.⁶

5. If an applicant has an eligible diagnosis, he or she must also demonstrate that said medical diagnosis is a) a severe chronic disability, b) that manifested before the applicant reaches twenty-two years of age, and is c) likely to continue indefinitely.⁷

Functionality

6. Second, this medical diagnosis must also substantially limit the applicants' functioning in three or more areas of major life areas. Those major life areas include:

- i. Self-Care;
- ii. Receptive and/or Expressive Language (communication);
- iii. Learning (functional academics);
- iv. Mobility;
- v. Self-direction; and
- vi. Capacity for Independent Living (home living, social skills, health and safety, community use, leisure).⁸

Active Treatment

7. Third, the applicant must require and benefit from active treatment.

8. The term "active treatment" is used but is not defined in the MR/DD Waiver Manual, however, DHHR regulations governing ICF/MR define "active treatment" as "aggressive,

⁶ Waiver Manual, Section 503.1

⁷ Waiver Manual, Section 503.1

⁸ Waiver Manual, Section 503.1

consistent implementation of a program of specialized and generic training, treatment and health services.”⁹ DHHR regulations further state that “[a]ctive treatment does not include services to maintain generally independent members who are able to function with little supervision or in the absence of a continuous active treatment program.”¹⁰

9. Federal regulations issued by the Department of Health and Human Resources concerning ICF/MR Programs similarly state that “active treatment” is:

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 (A) The acquisition of behaviors necessary for the client to function with as much self determination and independence as possible, and (B) The prevention or deceleration of regression or loss of current optimal functional status.¹¹

ICF/MR Level of Care

10. Finally, the applicant must qualify for an “ICF/MR level of care”.

11. An “ICF/MR level of care” is not defined in the MR/DD Waiver Manual, however DHHR regulations governing ICF/MR state that to be eligible for services in a ICF/MR, an applicant must require and benefit from “active treatment”, meaning that “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.”¹²

⁹ DHHR Provider Policy Manual, Chapter 500, Volume 11, “Covered Services, Limitations, and Exclusions for ICF/MR Services.” (hereinafter “ICF/MR Policy Manual”)

http://www.wvdhhr.org/bms/sManuals/bms_manuals_main.htm

¹⁰ ICF/MR Policy Manual, Section 505.4

¹¹ 42 C.F.R. § 483.440(a)

¹² ICF/MR Policy Manual, Section 505.4

Application Process and Evaluations

12. The determination of whether or not an applicant is medically eligible for the MR/DD Waiver Program is made by the Bureau for Behavioral Health and Health Facilities (hereinafter "BHHF") and the Bureau for Medical Services (hereinafter "BMS") and is based on medical, psychological, and social evaluations provided by the applicant during the application process.¹³

13. The medical evaluation upon which the medical eligibility determination is based consists of an annual comprehensive exam conducted by a West Virginia licensed medical or osteopathic physician.¹⁴ The physician is required to report, among other things, his or her diagnosis and prognosis for the applicant, as well as a determination as to whether the applicant requires and ICF/MR level of care.¹⁵

14. The psychological evaluation upon which the medical eligibility determination is based consists of an annual psychological evaluation and a triennial comprehensive evaluation.¹⁶ These evaluations should include a determination of whether an ICF/MR level of care is required and such determination should be based on evaluation results which indicate that home and community-based services are appropriate.¹⁷

15. The psychological evaluation includes the applicant's scores on an examination called the Adaptive Behavior Scale (hereinafter "ABS").¹⁸ The ABS instrument is used to determine how deficient an individual is in his or her major life activities as compared to other individuals, either with or without mental retardation or a related condition. In order to be "substantially

¹³ Waiver Manual, Section 503.1.

¹⁴ Waiver Manual, Section 507.16.1

¹⁵ Waiver Manual, Section 507.16.1

¹⁶ Waiver Manual, Sections 507.16.2 through 507.16.4

¹⁷ Waiver Manual, Section 507.16.4

¹⁸ Waiver Manual, Section 507.16.4

limited” in a major life area, an ABS score must be “three (3) standard deviations below the mean or less than one (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.”¹⁹

16. The social evaluation upon which the medical eligibility determination is based consists of an annual report by a West Virginia licensed social worker who is expected to gather the individual’s social history in order to form an opinion as to whether the individual requires an ICF/MR level of care and services and that the home and community-based services are appropriate.²⁰

17. Based upon the medical, psychological, and social evaluations, the Office of Behavioral Health Services (OBHS) and BMS determine if the applicant is medically eligible for the Waiver Program and services.²¹

Matthew Wysong's Application for MR/DD Waiver Program

18. In June 2006, DHHR denied Matthew Wysong’s application for the MR/DD Waiver Program. BMS denied his application on the basis that the submitted evaluations did not support a finding that Matthew Wysong’s condition is severe; the evaluations did not support the presence of substantial adaptive deficits in three or more of the major life areas; and the psychological evaluation did not indicate a need for active treatment.

19. Matthew Wysong timely appealed the DHHR decision and administrative hearings were held before Hearing Officer Woods on May 31, 2007 and August 1, 2007.

¹⁹ Waiver Manual, Section 503.1

²⁰ Waiver Manual, Section 507.17

²¹ Applicants must also meet certain financial eligibility requirements in order to qualify for services through the MR/DD Waiver Program.

Evidence Produced Before Hearing Officer Woods

Linda Workman

20. Linda Workman (hereinafter "Ms. Workman"), is a licensed psychologist, who works as a consultant for BMS. She provides a number of services to BMS, including certification of individuals for the ICF/MR Group Home Program.²²

21. On May 31, 2007, Ms. Workman testified in this matter on behalf of BMS. Her testimony was based on a review of the medical, psychological, and social evaluations submitted in Matthew Wysong's application. She did not personally evaluate Matthew Wysong.

22. Ms. Workman acknowledged that Matthew Wysong had an diagnosis of cerebral palsy and seizure disorder, which are related conditions that could render him "potentially" eligible for services through the MR/DD Waiver Program.²³ Further, she agreed that Matthew Wysong's cerebral palsy and seizure disorder manifested before age twenty-two.²⁴

23. In her opinion, however, Ms. Workman stated that she did not believe Matthew Wysong's condition qualified as "severe" because "he is ambulatory, expresses himself through language and can perform basic self-care activities."²⁵ Ms. Workman acknowledged, however, that the MR/DD Waiver Manual does not define or set forth criteria for the term "severe."²⁶ Further, she admitted that there was a difference between Matthew Wysong's abilities to perform activities of daily living and those of the general population; that his condition is more than just a slight abnormality when compared to the general population; and that the differences are not just

²² Transcript of May 31, 2007 Hearing, page 6 (hereinafter "Tr.I 6").

²³ Tr.I 15

²⁴ Tr.I 15

²⁵ Tr.I 7-8, 15

²⁶ Tr.I 15-16

minimal.²⁷

24. Regarding Matthew Wysong's limitations in the major life area of "capacity for independent living", Ms. Workman noted that Matthew's psychological evaluation found that he needed training programs "designed to increase his efforts and abilities in domestic activities, vocation [sic] activities and social engagement."²⁸ She also noted that his social skills were another area of "capacity for independent living" that would "perhaps... meet our criteria."²⁹

25. Concerning the major life area of "self-direction", Ms. Workman testified that Matthew Wysong did not have substantial limitation of functioning, because he does not "just sit and do nothing for hours at a time."³⁰ She did not provide any reference to a rule or regulation which sets forth that the applicant must just "sit and do nothing." Further, she acknowledged that there was no written policy or rule that set forth this criterion.³¹

26. When discussing Matthew Wysong's abilities and limitations for "self-care," Ms. Workman focused on Matthew's physical abilities to perform self-care for himself.³²

27. In concluding her direct testimony Ms. Workman stated that Matthew Wysong did not qualify for the MR/DD Waiver Program essentially because he did not "need a twenty-four hour program of intense training, supervision...to learn the most basic of human activities."³³

²⁷ Tr.I 16

²⁸ Tr.I 11

²⁹ Tr.I 14

³⁰ Tr.I 14, 17

³¹ Tr.I 17

³² Tr.I 13

³³ Tr.I 14

Sandi Kiser-Griffith

28. At the August 1, 2007 hearing, psychologist Sandi Kiser-Griffith (hereinafter "Ms. Kiser-Griffith") testified regarding Matthew Wysong's abilities and limitations. Ms. Kiser-Griffith performed the psychological evaluation of Matthew Wysong. In order to perform this evaluation, Ms. Kiser-Griffith met with Matthew and his mother, Mary Ramsey, to conduct testing and obtain information regarding Matthew's abilities and limitations.

29. Ms. Kiser-Griffith has a Master's Degree in clinical psychology; has been licensed by the state of West Virginia as a practicing psychologist since 1998; and has completed all course work for a doctorate in psychology at Marshall University.³⁴

30. First, Ms. Kiser-Griffith stated that Matthew Wysong had a Global Assessment of Functioning score of 60, meaning that "he has pretty substantial deficits in at least several areas."³⁵ She testified that Matthew Wysong "has a very significant impairment" by comparison to the general population.³⁶

31. Regarding Matthew Wysong's limitations in major life areas, Ms. Kiser-Griffith testified that Matthew Wysong's scores on the ABS domain for "self-direction" were in the average range for people with mental retardation.³⁷ She gave examples of this limitation, explaining that "he can wash his hands, but he doesn't do it. ...He can brush his teeth. He could physically do the act, but again, he would not self-initiate that."³⁸ She testified that he would benefit from training in the steps required to conduct basic personal hygiene, how to self-initiate

³⁴ Transcript of August 1, 2007 Hearing, page 8 (hereinafter "Tr.II 8").

³⁵ Tr.II 14

³⁶ Tr.II 15

³⁷ Tr.II 18

³⁸ Tr.II 18

basic personal hygiene, and how to handle money³⁹

32. Concerning the major life area of "capacity for independent living", Ms. Kiser-Griffith testified that Matthew Wysong's scores on the ABS domains for "domestic activity", "independent functioning", and "social functioning" were in the average range for people with mental retardation.⁴⁰ She explained Matthew's limits in these areas by providing the following example: "He can't manage any of his finances, he cannot manage his medications.... He would not bathe and he would not wear clean clothing consistently."⁴¹ Further, she testified that he would benefit from supervision or instruction activities to help him develop better abilities in those areas.⁴²

33. In the major life area of "self-care", Ms. Kiser-Griffith testified that Matthew Wysong's functioning would be substantially limited by all the same deficits as related to independent living because his scores on the ABS domains for "domestic activity", "independent functioning", and "social functioning" were in the average range for people with mental retardation.⁴³ She described both his physical and cognitive limitations, and stated that "he can physically do a lot of the tasks if someone is kind of talking him through it or reminding him to do it," but otherwise he would not self-initiate any of those activities of self-care.⁴⁴

34. Finally, although Ms. Kiser-Griffith did not specifically recommend that Matthew Wysong required services through the MR/DD Waiver Program, she testified that Matthew

³⁹ Tr. II 20

⁴⁰ Tr. II 23

⁴¹ Tr. II 23

⁴² Tr. II 23

⁴³ Tr. II 24-25

⁴⁴ Tr. II 27

needs "intensive instruction, services, assistance, and supervision."⁴⁵

Hearing Officer's Findings and Conclusions

35. Hearing Officer Woods issued a Decision on August 15, 2007, upholding DHHR's denial of services.

36. Hearing Officer Woods found that although Matthew Wysong has an eligible related condition of cerebral palsy, and that it was manifested before the age of twenty-two, Matthew Wysong 1) did not require active treatment; 2) did not require that level of care and services provided in an ICF/MR facility; 3) and did not have substantial adaptive deficits in three or more major life areas.⁴⁶

37. Matthew Wysong now seeks relief from Hearing Officer Woods's Decision through his "Petition for Certiorari and Judicial Review of State Agency Decision", which was timely filed on October 29, 2007.

STANDARD OF REVIEW

1. "The Court may grant an appeal and may determine anew all questions submitted to it on appeal from the decision or determination of the State Hearing Officer." WV DHHR

*Common Chapters Manual, Hearings, Ch. 790(A).*⁴⁷

2. When a circuit court reviews a decision of a state hearing officer on a writ of certiorari, it must make an independent review of law and fact, and make findings of fact and

⁴⁵ Tr.II 44-47.

⁴⁶ Hearing Officer Woods did not make a finding as to whether or not Matthew Wysong's medical diagnosis of cerebral palsy is severe.

⁴⁷ The Common Chapters Manual contains administrative procedures that apply to all programs operated by the West Virginia DHHR as mandated by federal law and rules and regulations. The manual contains chapters that address hearings and appeals. The Common Chapters Manual was incorporated by reference as a legislative rule in W. Va. Code St. R. § 78-8-2.

conclusions of law on all issues. *Harrison v. Ginsberg*, 169 W.Va. 162, 175 (1982).

3. Upon reviewing a writ of certiorari as provided for in W.Va. Code ' 53-3-3, the circuit court is reviewing both law and fact, and is vested with the power to enter a proper judgment in consideration of both. *Snodgrass v. Board of Educ.*, 114 W.Va. 305 (1933); *State ex. rel. Davis v. Hix*, 141 W.Va. 385 (1955).

CONCLUSIONS OF LAW

1. Based upon a review of the medical, psychological, and social evaluations provided in Matthew Wysong's application for the MR/DD Waiver Program, as well as testimony provided during the administrative hearings before Hearing Officer Woods, this Court finds and concludes that Matthew Wysong has an eligible medical diagnosis, has substantial limitations in three major life areas, requires active treatment, and requires a level of care that similarly diagnosed persons would receive in an ICF/MR facility. Accordingly, the Decision of the DHHR and Hearing Officer Woods must be reversed.

Eligible Medical Diagnosis

2. Based on the evaluations provided by Matthew Wysong, this Court finds and concludes that Matthew Wysong has an eligible medical diagnosis of cerebral palsy, that manifested itself before he reached the age of twenty-two, and is likely to continue indefinitely.

3. Further, this Court concludes that Matthew Wysong's condition of cerebral palsy is "severe." Although this term is not defined in the MR/DD Waiver Manual, both Ms. Workman, the DHHR psychologist, and Ms. Kiser-Griffith, Mr. Wysong's evaluating psychologist, testified that Matthew Wysong's condition caused him significant impairments, was more than just

minimal, and was more than just a slight abnormality.⁴⁸ Accordingly, the Court finds that his condition is severe.

Functionality

4. Regarding the medical eligibility criteria of functionality, this Court concludes that Matthew Wysong is substantially limited in functioning in three major life areas.

5. First, Matthew Wysong has a substantial limitation of function in the major life area of "capacity for independent living." Both Ms. Workman and Ms. Kiser-Griffith testified that Matthew Wysong's ABS scores in areas related to "independent living" were qualifying scores because they met the MR/DD Waiver Program requirement of being in the "average" range when compared to individuals with mental retardation.⁴⁹

6. Second, the Court concludes that Matthew Wysong has a substantial limitation of function in the major life area of "self-direction." Although Ms. Workman testified that Matthew did not have a limitation of function in this area because he did not "just sit and do nothing for hours at a time", this Court finds that Matthew's inability to self-initiate a wide range of daily activities, such as personal hygiene and handling money, actually do constitute a substantial limitation of function in the area of "self-direction".

7. Finally, the Court concludes that Matthew Wysong has a substantial limitation of function in the major life area of "self-care." Ms. Workman testified that Matthew did not have a substantial limitation in this area because he was physically capable of performing self-care activities, however, even if Matthew can physically perform some activities, it is clear that Matthew Wysong has a deficit in the ability to self-initiate these activities and that he cannot

⁴⁸ See Tr.I 16; Tr.II 14-15.

⁴⁹ Tr.II 23

perform these activities without assistance and training.

Active Treatment

8. This Court concludes that Matthew Wysong requires active treatment. Ms. Kiser-Griffith agreed during the August 1st hearing that Matthew Wysong was in need of “intensive instruction, services, assistance, and supervision.”⁵⁰ Further, she specifically testified that Matthew Wysong would benefit from training and services in each of the three major life areas where he has substantially limited functioning. Specifically, in the “Placement” section of Ms. Kiser-Griffith’s psychological evaluation, she states:

[Matthew] will benefit from participation in training programs designed to enhance his abilities in social skill areas, domestic activities, money management and vocational activities. Participation in training programs designed to address his adaptive deficits are recommended.

9. Therefore, this Court finds and concludes that Matthew Wysong is not a “generally independent” person who is “able to function with little supervision.” Rather, this Court finds that Matthew Wysong needs “a program of specialized and generic training, treatment, and health services” directed toward “learning new skills and increasing his independence in activities of daily living.”⁵¹

ICF/MR Level of Care

10. Finally, this Court concludes that Matthew Wysong meets the requirements for ICF/MR level of care.

11. As demonstrated with regard to the active treatment requirement, Ms. Kiser-Griffith wrote in her report and testified to the specific instruction, services, assistance, and supervision

⁵⁰ Tr.II 47-48

⁵¹ ICF/MR Policy Manual, Section 505.4

that Matthew Wysong requires.⁵² Her report and testimony demonstrate that Matthew Wysong does require active treatment, and thus he does meet the requirements for ICF/MR level of care.

12. Without the services and training and supervision which Ms. Kiser-Griffith testified that Matthew needs, he certainly will not "learn new skills" or "increase independence in activities of daily living." Although Ms. Workman testified that Matthew did not meet the ICF/MR level of care because he did not need 24-hour care and supervision, this Court finds that DHHR regulations do not require 24-hour care and supervision for participation in the MR/DD Waiver Program. Further, if Matthew Wysong were not living at home with his mother's care currently, he would have to be placed in a 24-hour care setting with services, training, and supervision.

DECISION

Accordingly, the decision of the State Hearing Officer upholding the Decision of the DHHR to deny Matthew Wysong's eligibility for the Title XIX Medicaid Waiver Services Program is hereby **REVERSED**. There being nothing further, this action is hereby **DISMISSED** and **STRICKEN** from the docket of this Court.

The objection of any party to this Order is noted and preserved.

The Clerk of this Court is **DIRECTED** to send certified copies of this Order to counsel of record.

ENTERED this 7th day of April 2008.

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA: 85
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT,
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS
DAY OF April 2008.
CATHY S. GATSON
CLERK OF CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA


Judge Louis H. Bloom

4/7/08
Date: 4/7/08
Certified copies sent to:
— counsel of record
— parties
— other
By: [Signature]
Other directives accomplished:
[Signature]

See Comprehensive Psychological Examination at pages 6-7; Tr.II 8-10, 14-15.