



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

October 4, 2005

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held September 23, 2005. 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, 11-1-04).

The information which was submitted at the hearing revealed that you 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 reverse 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
Richard Workman, BMS

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

____,

Claimant,

v. **Action Number:** _____

**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 September 23, 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 September 23, 2005 on a timely appeal, filed June 14, 2005.

It should be noted here that the claimant's benefits have been denied pending a hearing decision. It should also be noted that the Department's representatives testified by speaker phone from Charleston, WV on agreement of claimant.

II. PROGRAM PURPOSE:

The Program entitled Title XIX MR/DD Wavier 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 waiv 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.
2. _____, Claimant's mother.
3. _____
4. _____, Claimant's Landlord.
5. Stephen Brady, Acting Program Coordinator, BHHF (participating by speaker phone).
6. Richard Workman, Psychologist Consultant, BMS (participating by speaker phone).

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 November 1, 2004.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 Copy of notification letter dated 3-16-05.
- D-2 Copy of Chapter 500 regulations (10 pages).
- D-3 Copy of MR/DD Waiver Application Packet Cover Sheet (4 pages).
- D-4 Copy of Annual Medical Evaluation 12-3-04 (4 pages).
- D-5 Copy of Psychological Evaluation 11-30-04 (9 pages).
- D-6 Copy of Initial Social History (5 pages).
- D-7 Copy of Individual Program Plan (12 pages).
- D-8 Copy of Cost Estimate Worksheet (2 pages).
- D-9 Copy of Informed Consent (2 pages).
- D-10 Copy of fax with Federal Regulations Sections 435.1009 & 483.440 (2 pages).

It should be noted that the claimant stated that she did not receive the packet of evidence marked as Exhibits #D-1 through #D-9 and the claimant was provided with a copy of the packet by the State Hearing Officer prior to proceeding with the hearing and was afforded the opportunity to either review the evidence packet prior to convening the hearing or to have the hearing rescheduled. The claimant chose to review the packet prior to convening the hearing and to proceed with the hearing.

VII. FINDINGS OF FACT:

- 1) The claimant was an initial applicant for the Title XIX MR/DD Waiver Services Program when an application packet was sent by [REDACTED] to the MR/DD Waiver Program on 2-8-05 for consideration of medical eligibility (Exhibits #D-3 through #D-9).
- 2) The packet was reviewed and the claimant was denied for medical eligibility with notification issued on 3-16-05 (Exhibit #D-1).
- 3) The claimant requested a hearing on 5-3-05 and the hearing was convened on 9-23-05.
- 4) Mr. Brady testified regarding the medical eligibility criteria listed in Chapter 500 (Exhibit #D-2).
- 5) Mr. Workman testified that the claimant met the diagnostic criteria of mental retardation (MR) but did not require ICF/MR level of care, that Federal Regulations in Section 483.440 states that the eligible individual must require institutionalization for active treatment and the claimant does not require such treatment, that Federal Regulations in Section 435.1009 states that the treatment is provided in a protected setting and cannot be for Mental Illness (MI) and the claimant has some psychiatric issues, that the claimant lives independently in the community with the support and care of her mother, that the Annual Medical Evaluation (DD-2A) is marked normal for most things and shows the claimant is ambulatory and does not meet the mobility criteria, that she is continent and can feed herself and did not indicate the level of MR, that the Psychological Evaluation (DD-3) showed behavioral difficulties throughout the claimant's lifetime, that she has good receptive and expressive language skills, that she can read and write, that her memory is good as to person, place, and time, that she handles self-care with reminders and does not meet the criteria for self-care, that she can access the internet, that the ABS scores are within the range of criteria but her skills are greater than the scores indicate, that her standard scores are age equivalent, that the scores are inconsistent as shown by Independent Functioning (4-9) while Self-Care is <3, that the claimant has behavioral and cognitive difficulties but Impulse Control Disorder may be the cause of her problems, that she is in an assisted living arrangement but is still able to live there, that the Psychologist does recommend ICF/MR level of care, that the Social History (DD-4) shows that the claimant engages in risky behavior, that she travels to distant places, that she lives in a support apartment, that she had tried to kill herself three (3) times, that she has run away to [REDACTED] and [REDACTED] that she can dial phone numbers, that she gave birth to a son, that she does have self-direction skills, that the Individual Program Plan shows the same skills with ambulation, continence, good language skills, and self-direction skills, and that the claimant does not require ICF/MR level of care.
- 6) Ms. ____ testified that her daughter does not live independently, that she is constantly caring for her, that the landlord reports things to her, that she has to do everything for her daughter, that she got her in the apartment but she is not allowed to cook as she caught the toaster on fire twice, that she does not comprehend what she reads, that she has to cook for her daughter and do her grocery shopping, arrange doctor appointments, pay her bills, do her laundry, clean her apartment, that she does use the Internet but gets in trouble with it, that people on the Internet tell her to kill her mother, that she takes care of both her daughter and her grandson and has to work, that her daughter is not MI but is MR, that she is diabetic and cannot fix the right foods, that she goes to the

hospital all the time, that she has accused her of stealing her son but she had to get custody of him, and that her daughter is like a lost puppy.

- 9) Ms. ____ testified that her building is not one that provides the type of care the claimant needs, that she has six (6) autism tenants and all of them can access the internet, that the claimant calls 911 every day, that she set the microwave on fire and came running for her, and that a curfew of 10:00 had to be set for her.
- 10) Ms. ██████████ testified that she saw the claimant at her apartment, that it was dirty and the claimant was placed on eviction status, that the claimant was unable to tell her what medications she took or what they were for, that she comes across more capable than she is, that 49 Full-Scale IQ was the highest she has, that she cannot get or keep a job and is not economically self-sufficient, that she cannot manage her finances, that she was letting homeless people stay with her, that some of the hospitalizations were because her mother could not deal with her any longer, that she needs 24 hour supervision, and that 3-4 people came to do things for her when she was there.
- 11) 1. Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500, October 1, 2003 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).

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 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."

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."

14. The areas of dispute involve whether the claimant meets the criteria of functionality including substantial limitations in the daily living areas of self-care, self-direction, and capacity for independent living. Other areas of dispute include whether the claimant requires active treatment and qualifies for ICF/MR level of care and whether MI is the cause of her limitations rather than MR. Mr. Workman testified that the claimant's ABS scores were eligible scores but that the narrative was inconsistent with the scores. The claimant scored under the 75th %ile in Independent Functioning, Economic Activity, Domestic Activity, Self-Direction, Responsibility, and Socialization. Thus, the ABS scores show that the claimant meets the criteria for substantial limitations in Self-Care, Self-Direction, and Capacity for Independent Living. Mr. Workman argued that the claimant lives independently (albeit in an assisted living setting) and exhibits abilities for self-care, self-direction and capacity for independent living. However, the testimony on behalf of the claimant shows that she needs 24 hour supervision (Ms. [REDACTED]), that she is not allowed to cook because she is a danger to herself and

others (Ms. ____), that the assisted living apartment is not one which provides the type of care the claimant needs (Ms. ____), that the claimant calls 911 every day (Ms. ____), that she was not able to state what medications she was on or what they were for (Ms. _____), that she cannot manage her finances and lets homeless people in her apartment all the time (Ms. _____), that she is unable to shop for groceries, do laundry, or clean her apartment (Ms. _____). The testimony of the claimant's witnesses convinces the State Hearing Officer that the claimant is in need of active treatment and needs intensive instruction, services, assistance and supervision in order to learn new skills and increase independence in activities of daily living and requires ICF/MR level of care. In regard to the question of whether MI or MR is the cause of the claimant's limitations, Ms. _____ testified that the claimant's highest IQ was 49 although the composite IQ from the Kaufman Test showed a score of 50. Ms. _____ also diagnosed the claimant with Impulse Control Disorder NOS but recommended ICF/MR level of care. It was unclear from the evidence and testimony whether MI or MR was the cause of the claimant's limitations, but it cannot be ruled out that the MR is the cause of the claimant's limitations in activities of daily living.

VIII. CONCLUSIONS OF LAW:

- 1) Regulations require that a diagnosis of MR or related condition exists which must be severe and chronic and have been manifested prior to age 22 and is likely to continue. The claimant meets this criteria as she has a diagnosis of moderate MR which manifested prior to age 22 and is likely to continue.
- 2) Regulations require that substantial limitations in functioning must exist in three (3) or more of the major life areas. The claimant has substantial limitations in the major life areas of self-care, self-direction, and capacity for independent living.
- 3) Regulations require that the individual requires active treatment and would benefit from continuous active treatment. The claimant requires and would benefit from active treatment.
- 4) Regulations require that the individual needs intensive instruction, services, assistance, and supervision in order to learn new skills and increase independence in activities of daily living and needs the same level of care provided in an ICF/MR facility. The claimant needs such services.

IX. DECISION:

It is the decision of the State Hearing Officer to reverse 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 4th Day of October, 2005.

Thomas M. Smith
State Hearing Officer