



STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
OFFICE OF INSPECTOR GENERAL

Martha Yeager Walker
Secretary

Joe Manchin III
Governor

Board of Review
4190 West Washington Street
Charleston, West Virginia 25313
Email: raywoods@wvdhhr.org

June 2, 2005

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held April 6, 2005. Your hearing request was based on the Department of Health and Human Resources' action to deny your application for the MR/DD Waiver Services 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 and benefit levels for the Medicaid Home and Community Based MR/DD Waiver Program are determined based on current regulations. One of these regulations states, in part:

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)
(WVDHHR Title XIX MR/DD Home and Community Based Waiver Program Operations
Manual, Chapter 1 Section I. C).

The information submitted at the hearing revealed that you do not meet the medical criteria for the MR/DD Waiver Program. It is the decision of the State Hearing Officer to UPHOLD the action of the Department to deny the MR/DD Waiver application.

Sincerely,

Ray B. Woods, Jr., M.L.S.
State Hearing Officer
Member, State Board of Review

cc: State Board of Review
Susan Hall, M. A. – Office of Behavioral Health and Health Facilities
Alva Page III, Esq., Assistant Attorney General - Bureau for Medical Services
[REDACTED] Esq., Legal Aid of West Virginia, Inc.

WEST VIRGINIA DEPARTMENT OF HEALTH & HUMAN RESOURCES

SUMMARY AND DECISION OF THE STATE HEARING OFFICER

I. INTRODUCTION

This is a report of the State Hearing Officer resulting from a fair hearing concluded on June 2, 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. The fair hearing was originally scheduled for November 8, 2004 on a timely appeal filed August 13, 2004. The hearing was rescheduled because the Department did not have available Counsel. It finally convened on April 6, 2005.

It should be noted here that the Claimant is not receiving benefits under the MR/DD Medicaid Waiver Program. All persons giving testimony were placed under oath.

II. PROGRAM PURPOSE

The program entitled the Home and Community Based MR/DD Waiver Program is set up cooperatively between the Federal and State Government and administered by the West Virginia Department of Health and Human Resources.

Under Section 2176 of the Omnibus Budget Reconciliation Act of 1981, states were allowed to request waiver from the Health Care Financing Administration (HCFA) so that they could use Medicaid (Title XIX) funds for home and community based services. The program's target population is individuals with Mental Retardation or related conditions (ICF/MR) who would otherwise be placed in an intermediate care facility (if not for the waiver services).

III. PARTICIPANTS

_____, Claimant

_____, Esq., Legal Aid of West Virginia, Inc.

_____, Qualified Mental Retardation Professional – REM Community Options

_____, Caregiver - Loved Ones In Home Care

Alva Page III, Assistant Attorney General – Bureau for Medical Services

Richard Workman, M. A., Licensed Psychologist - Bureau for Medical Services

Susan Hall, M. A., Program Operations Coordinator - Bureau for Behavioral Health and Health Facilities

Presiding at the hearing was Ray B. Woods, Jr., M.L.S., State Hearing Officer and, a member of the State Board of Review.

IV. QUESTION(S) TO BE DECIDED

Does _____ meet the medical eligibility for the Medicaid Home and Community Based MR/DD Waiver Program?

V. APPLICABLE POLICY

WVDHHR Title XIX MR/DD Home and Community Based Waiver Program Operations Manual, Chapter 1 Section I. C. *LEVEL OF CARE CRITERIA FOR MEDICAL ELIGIBILITY.*

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

DEPARTMENT'S EXHIBITS

- D-1 Denial letter from Bureau for Medical Services dated June 8, 2004
- D-2 Letter from REM Community Options to Ms. _____ dated July 21, 2004
- D-3 West Virginia Rehabilitation Center Guidelines
- D-4 Initial Psychological Evaluation by _____ M.A., Licensed Psychologist dated March 1, 2004
- D-5 Social History Update dated March 25, 2004
- D-6 42 CFR 483.440 Condition of participation: Active treatment services
- D-7 Additional Supporting Documentation
- D-8 Mr. Page's "Closing Argument of Respondent, Bureau for Medical Services"

CLAIMANT'S EXHIBITS:

- C-1 Mr. _____ "Initial Closing Argument"
- C-2 E-mail dated November 18, 2004 – Objecting to a continuance

VII. FINDINGS OF FACT

1. Mrs. Susan Hall's testimony on the Application and Eligibility Process were stipulated as stated in the 2001 Waiver Manual. Mr. Perrone had no objections.
2. Mr. Richard L. Workman has been a Licensed Psychologist since 1981. He holds a Masters Degree in Clinical Psychology from Marshall University. He has also served on the Board of Psychologists. Mr. Workman began doing consulting work with the WV Department of Health and Human Resources in 1983 and, conducted Eligibility Reviews for ICF/MR Facilities around the State. In 1985 Mr. Workman began doing Eligibility Reviews for the initial ICF/MR Waiver Program.
3. Mr. Workman reviewed Mrs. _____' application packet and determined that she did not meet the eligibility requirements for an ICF/MR Level of Care. He addressed the documentation that supported the Department's decision.

4. The Denial Letter, (Exhibit D-1), dated June 8, 2004 stated in part, “Your application was Denied because: The packet lacked a DD-2A. Also, Mrs. _____’ history is incompatible with an ICF/MR level of care in that she has lived alone and has custody of her son. The results of the ABS-RC: 2 do not support the presence of substantial deficits in three or more major life areas. Documentation supports the need for assistance, not active treatment.” The DD-2A was later submitted and reviewed by Mr. Workman.
5. Additional information was received which included a letter from Mr. [REDACTED] dated July 21, 2004, (Exhibit D-2). Mr. Workman addressed three points in the letter that supported the Department’s denial:
 - _____ resided with her mother until 1999, she became a resident at the Vocational Rehabilitation Center in Institute for about six months. While there she participated in the Personal Adjustment Program (life skills) and Work Adjustment Program. Thus, during this period she was still being staffed and not living independently;
 - While residing at DRS she met her first husband. After leaving DRS she moved in with him, they got married in 2000 and had their son the same year and;
 - _____ lived with her husband until April 2002. During this entire period her husband attended to her personal needs. _____ moved out due to being physically abused by her ex-husband.
6. The West Virginia Rehabilitation Center Guidelines Section 4402.2 “Ability to Participate” (Exhibit D-3), provides examples of inappropriate applicants or persons that include:
 - With either behavioral, intellectual, or emotional problems too severe to be supervised or treated appropriately in the Center’s open setting, considering current staffing levels (i.e., individual exhibiting self-injurious behavior or those behaviors constituting a threat to the health, safety and welfare of other students or staff, and/or those individuals requiring one on one supervision);
 - Requiring twenty-four hour supervision other than medical;
 - Who cannot bathe or attend to personal toileting needs other than medical or;
 - Unable to direct an attendant in performing activities of daily living and other attendant care tasks.
7. According to Mr. Workman, individuals eligible to live at the Rehabilitation Center must live independently and, not require the level of care found in an ICF/MR facility.

8. The Initial Psychological Evaluation, (Exhibit D-4), was performed by [REDACTED] M.A., Licensed Psychologist on March 1, 2004. Mr. Workman addressed the highlights of the Evaluation:

- [REDACTED] is a 24 year old, Divorced, Caucasian female who resides alone in Charleston, West Virginia.
- She graduated from [REDACTED] in [REDACTED]. She was a resident at the Vocational Rehabilitation Center in Institute for about six months in [REDACTED].
- After separating from her husband, she lived alone in the [REDACTED] in [REDACTED] West Virginia. She had difficulty meeting her needs and her mother came to her home every day to assist Mrs. [REDACTED].
- Mrs. [REDACTED] obtained a Verbal IQ of 80 on the WAIS-R Evaluation. That evaluation provides a diagnosis of Borderline Intellectual Functioning. This indicates that Cognitive Delays are not present.
- Psychomotor - The Department does not dispute the fact that Mrs. [REDACTED] has substantially limiting functioning in the area of Mobility.
- Self-help – Mrs. [REDACTED] has a homemaker for four hours a day. She requires assistance to bathe and dress. The Waiver Program is for active treatment and not personal assistance.
- Language – Mrs. [REDACTED] is able to speak in full sentences that are easily understandable. She is able to read simple stories for entertainment. Mrs. [REDACTED] does not meet the areas for substantial delays for Language.
- Mental Status – She understood the purpose of the evaluation and was observed to put forth good effort. She spoke in complete sentences that were easily understandable. Speech was spontaneous, relevant, coherent and clear. She was alert and oriented and was able to provide background information. No substantial delays.
- Others (Social interactions, use of time, leisure activities) – Mrs. [REDACTED] enjoys watching television, community outings, and visiting with friends. She is able to initiate leisure/recreation activities independently. No Substantial Delays in self-direction.
- Mrs. [REDACTED] received a Verbal IQ of 77 which is in the borderline range. Mr. Workman stated that the Verbal IQ score is outside the range for mental retardation. Ms. [REDACTED] does not have mental retardation and would not be appropriate for her.

- The Department would look at Standard Scores of 12 and below, with an Average Rating for eligibility. Mrs. _____ received such scores in Independent Functioning (11); Physical Development (7) and; Domestic Activity (10).
- Under the Part One Factor Scores: The Personal Self-Sufficiency score of 95 (Average) would be considered but, scores in Community Self-Sufficiency of 111 (Above Average) and Personal Self Sufficiency of 125 (Superior) would not be eligible.
- A Wide Range Achievement Test (WRAT-3) was administered and Mrs. _____ scored a 67, which indicated the equivalent of Third Grade. This would suggest a mild level in functional academics.
- The Evaluation states, "Requires assistance and training to maintain semi-independent living and acquire vocational skills." According to Mr. Workman, the Waiver Program is for twenty-four hour supervision and support. The Evaluation does not reflect that Mrs. _____ needs that level of support.
- The Developmental Findings/Conclusions indicate Mrs. _____ is a 24 year old female who lives alone. The Waiver Program states that you must manifest substantial delays prior to the age of 22.

9. The Social History Update, (Exhibit D-5), was completed on March 25, 2004. Mr. Workman addressed some of the highlights:

- _____ is easy to understand. Successfully initiates conversations and requires no verbal communication devise, etc.
- [She is] On the Waiver Program for the Aged and Disabled. She has a homemaker who takes her shopping, prepares her meals and assists with her toileting, bathing, dressing, etc. The MR/DD Waiver Program is not for personal assistance but active treatment. Mrs. _____ has the skills that would not require the most restrictive placement in an ICF/MR facility.
- _____ got married and had a son in 2000. Presently _____ has custody of her son although she allows him to live with his father because her son is more active than what she is able to control. _____ and _____ (fiancé) have plans to own a home through the "Home of Your Own" program. _____ hopes to have her son live with her again at that point. According to Mr. Workman, it would be rare for someone needing an ICF/MR level of care to take care of someone else, especially a child.
- _____ graduated from Capitol High School where she received her diploma. After graduation _____ participated in Life Skills at the employment training through the Department of Rehabilitation for 5 months at age 20. She was also in the Work Adjustment Program at _____

- Under Functional Status, it gives examples of Mrs. _____' needing assistance in the areas of: Getting out of bed; Bathing, Toileting, Tying shoes, Combing and styling hair; Meal preparation; Medication administration and; Transfers.
 - _____ reports she would like to be able to work part time one day. She believes she could do something with phones and computers. This shows self-direction.
 - RECREATION/LEISURE ACTIVITIES – _____ is able to get out of her apartment to shop with assistance. She spends a lot of time with her fiancé and enjoys the chances she gets to spend time with her son. She is hoping to take a trip out of state with her fiancé. _____ reports that if she had more assistance she would like to participate in more of the “normal” leisure activities that, most people enjoy such as going bowling, swimming, going for walks, and going fishing which she especially enjoys. Mr. Workman stated that Mrs. _____ understands the institution of marriage and, has a fiancé which is a very high level of thinking. This would be characterized as goal and self-directed behavior.
10. Mr. Workman referred to 42 CFR 483.440 (2) Condition of participation: Active treatment services, (Exhibit D-6) which states in part, “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.” Mr. Workman stated that, “Mrs. _____ is able to function with little supervision according to the documentation received. That is how they came to the conclusion.”
 11. Mr. Workman reviewed the DD-2A although the State did not submit it as an Exhibit. He recognized that Mrs. _____ is substantially limited in the area of Mobility.
 12. On cross-examination by Mr. _____ Mr. Workman does not remember ever meeting Mrs. _____ other than through the MR/DD Waiver documentation.
 13. The MR/DD Waiver Manual does not define the criteria for a level of care, or any of the life areas.
 14. Mr. _____ is employed by _____ West Virginia. He is a QMRP Level II. He is responsible for developing training schedules and plans for persons on the Waiver Program. REM Options provides services to people on the MR/DD Waiver Program. The services include Nursing, Case Management and, Support and Employment.
 15. Mr. _____ recommended that Mrs. _____ met the criteria for the MR/DD Program based upon substantial deficits in Self-Care; Mobility and; Capacity for Independent Living.
 16. Mr. _____ sees Mrs. _____ two to three times a month when he visits her fiancé, his client.

17. According to Mr. [REDACTED]'s testimony, Mrs. _____ was not living independently at the Vocational Rehabilitation Center without supportive services. The Center was working on job training, providing active treatment for transferring, being more independent in bathing and, all areas of her life. Mrs. _____ tried to live independently for two months, with assistance from volunteers.
18. Under further questioning by Mr. [REDACTED] Mr. [REDACTED] addressed Mrs. _____' major life activities:
- Self-Care – Requires assistance with cutting up her food, cooking and drinking;
 - Personal Hygiene – Needs assistance with all aspects. This is reflected on the DD-2A which states she needs assistance with bathing, dressing and, toileting. She has lost the ability to transfer, if she ever had it.
 - Independent Living – Needs assistance with getting pills out of the bottle and when to take it, unable to assist in shopping, laundry and banking. Residential habilitation would provide active treatment and community situations to assist with banking and pre-vocational skills
 - Economic Self-Sufficiency – The records indicate Mrs. _____ would not be employed at a productive wage level because of gross and fine motor deficits. She would require training to learn those skills. Mrs. _____ could benefit through Physical and Occupational Therapy. These should help her retain what she has.
19. Ms. [REDACTED] is a homemaker employed by [REDACTED] Care. She has been employed since May, 2004. Ms. Huffman provides twenty-five hours of care per week seven days a week. She is the mother of Mrs. _____' fiancé.
20. Ms. [REDACTED] described Mrs. _____' major life activities:
- Self-Care – Must cut up the meats because Mrs. _____ has been known to choke. She needs total assistance with bathing because her knees buckle and cannot stand. She must be lifted in and out of the tub. Assistance is needed with brushing her teeth because she is unable to do it. Must lift Mrs. _____ in and out of the wheelchair for toileting. Must assist with dressing. Unable to make the bed. Show Mrs. _____ how to do her exercises to rid of some of the spasticity. Falls from the toilet several times a week and must call for assistance. Does not understand about shopping. Will select too much of an item and must be counseled. She can get on the bus but does not know how to tell the driver to get back. Tried writing checks one time. Does not know about putting the correct checks in the envelopes. There is a problem with writing checks, unable to read her writing. _____ does not understand that she must pay bills every month.

21. It should be noted that Mr. [REDACTED] objected to the rescheduled hearing in an e-mail message dated November 8, 2004 (Exhibit C-2). Mr. [REDACTED] stated that the continuance creates a substantial hardship for Mrs. _____.

22. According to Mr. [REDACTED] The West Virginia Department of Health and Human Resources Child Protective Services has custody of her child. The child has not been in Mrs. _____ custody for approximately two years. The Guardian Ad Litem would be in favor of returning the child to Mrs. _____, if certain supportive services are in place. The support could be a Waiver Program or Family Support for Respite. Other possible services for the child could also be available.

VIII. CONCLUSIONS OF LAW

WVDHHR Title XIX MR/DD Home and Community Based Waiver Program Operations Manual, Chapter 1 Section I. C states:

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 condition(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).

Definition

An Intermediate Care Facility provides services in an institutional setting for persons with mental retardation or related conditions. The primary purpose of the institution is to provide health and rehabilitative services. The institution provides services to individuals who are in need of and who are receiving active treatment.

- 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.

XI. DECISION

The documentation indicates Mrs. _____ has an eligible related condition of Cerebral Palsy. It does not support the level of care and services provided in an ICF/MR facility. With the exception of Mobility, Mrs. _____ requires assistance in the major life areas, instead of active treatment. I based my conclusion on the following:

Mrs. _____ graduated from High School; Has been married and divorced; Lived alone; Attended Vocational Rehabilitation Training; Attended the Work Adjustment Program at Goodwill Industries; Plans to remarry and own her own home through the "Home of your Own" program and; Hopes to be reunited with her son.

Therefore, it is the decision of this State Hearing Officer that _____ does not meet the eligibility criteria for the MR/DD Waiver Program. The Department's action to deny the MR/DD Waiver Application was proper and correct.

X. RIGHT OF APPEAL

See Attachment.

XI. ATTACHMENTS

The Claimant's Recourse to Hearing Decision.

Form IG-BR-29.