



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 17, 2005

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held April 29, 2005. Your hearing request was based on the Department of Health and Human Resources' action to terminate your MR/DD Waiver Services.

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: _____ does 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 terminate services.

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., Bureau for Behavioral Health and Health Facilities
[REDACTED] Behavioral Health Advocate – Legal 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 17, 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 April 21, 2004 on a timely appeal filed October 22, 2003. It was rescheduled at the request of the Claimant for December 2, 2004. Legal Aid of West Virginia did not appear at the hearing and requested to reschedule. The hearing finally convened on April 29, 2005.

It should be noted here that the Claimant is not receiving benefits under the MR/DD Medicaid Waiver Program and, a pre-hearing conference was not held between the parties.

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

_____, Mother of Claimant

_____, Claimant

_____, Behavioral Health Advocate – Legal Aid of West Virginia, Inc.

_____, Service Coordinator – FMRS (_____)
(_____) Health Systems

_____, M. A., Programs Operations Coordinator – Office of Behavioral Health
(Provided testimony by conference call)

Mr. Richard Workman, M. A., Psychologist - Bureau of Medical Services (Provided testimony by conference call)

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

V. APPLICABLE POLICY

The Code of Federal Regulations § 435.1009 *Institution for the mentally retarded or persons* and; 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 Psychological Evaluation dated 08/14/03
- D-2 Psychological Evaluation dated 08/25/04
- D-3 Psychological Evaluation dated 02/21/05
- D-4 Annual Medical Evaluation dated 01/28/04
- D-5 Annual Medical Evaluation dated 03/17/03
- D-6 Social History dated 10/07/04
- D-7 Notice of Denial dated 10/02/03
- D-8 Scheduling Notice dated 01/31/05
- D-9 Scheduling Notice dated 09/28/04
- D-10 Scheduling Notice dated 01/15/04
- D-11 Request for Hearing dated 10/21/03
- D-12 GroupWise Messages re: Scheduling 04/07/04 – 11/23/04

CLAIMANT'S EXHIBITS:

- C-1 Psychological Evaluations
- C-2 Letter from FMRS to State Hearing Officer dated 04/13/04 re: Request for Continuance
- C-3 Letter from Legal of WV dated 12/02/04 re: Missing scheduled hearing

VII. FINDINGS OF FACT

_____ testified that all individuals receiving MR/DD Waiver services must be certified on an annual basis. This begins with the DD-2A (Medical Evaluation) and whether the physician

has indicated a need for ICF/MR level of care. The next step would be a Psychological Evaluation that supports the eligibility criteria as well as, the Licensed Psychologists recommendation that the individual requires an ICF/MR level of care

A Psychological Report was received from FMRS Health Systems, Inc. on September 11, 2003. Mrs. [REDACTED] read the following statement for the record, "Please find attached the most recent DD-3 for _____. Our psychologist had difficulty making a recommendation for the ICF/MR level of care for _____. Your office has already received her most recent DD-2A. We are requesting that your office please review and provide clarification. Thank you for your clarification." The Psychological Report and Medical Evaluation were forwarded to the Department's Psychology Consultant.

On October 2, 2003, The Bureau for Medical Services sent a termination of services letter to Ms. _____. It stated in part, "Documentation submitted for review does not indicate substantial deficits in three or more life areas nor the need for an ICF/MR level of care. An ICF/MR level of care is not recommended by the evaluating psychologist. Termination date for eligibility will be effective 3-03." Waiver services have been continued through the fair hearing process. Mrs. [REDACTED] then reviewed the Level of Care Criteria for Medical Eligibility.

Mr. Richard Workman, reviewed Ms. _____'s application packet and determined she did not meet the eligibility requirements.

_____ is under the age of twenty-two (22) and does not need an institutional ICF/MR level of care. In addition she does not demonstrate substantial deficits or have a recommendation from the psychologist who did the evaluation. _____ does have an eligible related condition of Spina Bifida.

The August 14, 2003 Psychological Evaluation completed by [REDACTED] M. A. and, [REDACTED] M. S., Supervised Psychologist was reviewed by Mr. Workman in the following manner:

Psychomotor Behaviors – _____ is able to propel her wheelchair with ease in all setting. _____ is able to manipulate buttons, snaps, zippers, and ties with ease and independently. Mr. Workman stated _____ meets the definition of Mobility;

Self-Help Behaviors – _____ is able to feed herself independently as well as drink from a cup without considerable spillage. She is able to dress herself with relative ease as well as choose her own clothing based upon weather conditions. _____ is predominately independent in her personal hygiene. She is currently working on budgeting, comparative shopping, and check writing along with maintaining a checkbook. _____ is aware of common safety issues such as street and stranger safety. Mr. Workman stated that these are well developed skills.

Language – _____ is able to verbalize her needs and wants with ease. She is able to read and write on a twelfth grade level. _____ is in regular education classes with the exception of two classes. _____ is scheduled to graduate with a regular diploma this spring and plans to attend

college the fall of 2004. According to Mr. Workman, these are incompatible for someone needing an institutional level of care.

Mental Status – _____ was oriented to time place and person and situation. _____ was able to recall three subjects after five minutes as well as complete serial threes and sevens. Mr. Workman stated that, it would be difficult for someone in an ICF/MR level of care to perform these tasks.

Other Behaviors – _____ enjoys attending her high school basketball games which she assists in keeping scores and data logs. She also enjoys talking to her friends and going shopping. _____ is hoping that in the near future that she is able to obtain her driver's license and attend college in the fall of 2004. According to Mr. Workman this indicates self direction.

The Part One Domain Scores were obtained by utilizing non-mental retardation norms. The Instrument used was the AAMR Adaptive Behavior Scale – School: Second Edition (ABS-S:II). According to Mr. Workman, the scores would generally be considered for individuals up to the age of eighteen (18) years of age. _____ was almost seventeen (17) years of age at the time of the evaluation. Mr. Workman stated that standard scores of 1 and below would be considered eligible when compared to others without mental retardation. _____ was not considered eligible based upon the following standard scores: Independent Functioning (15); Physical Development (5) Mobility Issues come into play; Economic Activity ((6); Language Development ((9); Self-Direction (5); Responsibility (9) and; Socialization (10). Mr. Workman believes _____ has the ability to be employed.

Psychologist Prognosis – _____ is not expected to require an ICF/MR level of service in order to be maintained in the community.

Psychologist Placement Recommendations – _____ does not meet the criteria C-4 in chapter 1 as listed in the Title XIX Home and Community Based Waiver manual revised June 1, 2001 by having three or more deficits in major life areas.

Mr. Workman reviewed the Psychological Evaluation completed on February 21, 2005 by _____ M. A. Licensed Psychologist and, _____ M. A. LSW, Supervised Psychologist in the following manner:

Prior Psychological Testing was conducted on 08/25/04. The examiner evaluated _____ utilizing the Slosson Intelligence Test-Revision Three (SIT-R3). _____ obtained a Total Standard Score of 76. (It should be noted that the Results on the 08/25/04 Evaluation were not reported correctly on the 02/21/05 Evaluation. According to the 08/25/04 Evaluation, _____ obtained a basal Score of 76 and a Total Standard Score (TSS) of 67). The Diagnosis rendered was Borderline Slow Learner.

The Current Behaviors Section of the 02/21/05 Evaluation were characterized by Mr. Workman as being a little less positive. As an example, the Scores reported on the Part One Domain were lower and possibly incorrect.

The Psychologists Placement Recommendations state, “_____ does not and has not to this examiners knowledge ever received a diagnosis of mental retardation; therefore recommending a level of habilitative service equivalent to that found at the ICF/MR level provided through the Title XIX Home and Community Based Waiver program is extremely difficult due to her not meeting the criteria A-1 for both a diagnosis of mental retardation and/or related condition and an ICF/MR level of care as listed in the manual.”

The physician completing the Annual Medical Evaluations (DD-2a) on February 3, 2004 and March 20, 2003, respectively, recommended that _____ requires an ICF/MR level of care.

Ms. _____ stated that _____ has trouble with some of the Self-Help areas. _____ needs assistance with bathing, she is unable to wash dishes, take care of her checkbook. _____ also needs assistance with balancing when toileting.

_____ received special education while attending school. According to _____, assistance was needed with Social Studies and Language.

Ms. _____ stated that _____ receive a regular education diploma but, could not remember what percentage of the time was spent in special education classes.

Ms. _____ provided clarification regarding the ABS Scores on the two different evaluations. The 2004 ABS was done with the psychologist and _____’s responses to the questions. The ABS Scores obtained in 2005 were obtained at the client’s home with the responses provided by the mother perceptions of what _____ could do.

The medical documentation does not support continued services for _____ under the Title XIX MR/DD Home and Community Based Waiver Program.

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)

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).

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.

IX DECISION

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 terminate the MR/DD Waiver services was proper and correct.

X. RIGHT OF APPEAL

See Attachment.

XI. ATTACHMENTS

The Claimant's Recourse to Hearing Decision.

Form IG-BR-29.