



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
150 Maplewood Avenue
Lewisburg, WV 24901

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

February 16, 2007

for _____

Dear Ms. ____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held January 29, 2007. Your hearing request was based on the Department of Health and Human Resources' action to deny services under the Title XIX 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 for the MR/DD Home and Community-Based Waiver Program is based on current policy and regulations. Policy states that in order to be eligible for the Title XIX MR/DD Home & Community-Based Waiver Program, an individual must have a diagnosis of mental retardation and or related condition. A related condition would be any condition, other than mental illness, found to be closely related to mental retardation if this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons. The condition must be severe and chronic with concurrent substantial deficits that require the level of care and services provided in an Intermediate Care Facility for the Mentally Retarded (ICF/MR facility). (Chapter 500 of Title XIX MR/DD Home and Community Based Waiver Program Revised Operations Manual, November 2005).

The information, which was submitted at the hearing, did not substantiate 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 Hearing Officer to **uphold** the action of the Department to deny services under the Title XIX MR/DD Waiver Services Program.

Sincerely,

Margaret M. Mann
State Hearing Officer
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review
Stephen Brady, BBHHF

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

____,

Claimant,

v.

Action Number: 06-BOR-3249

**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 January 29, 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 January 29, 2007 on a timely appeal, filed October 23, 2006.

II. PROGRAM PURPOSE:

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

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.

West Virginia's MR/DD Waiver Program provides for individuals who require an ICF/MR level of care, and who are otherwise eligible for participation in the program, to receive certain services in a home and/or community-based setting for the purpose of attaining independence, personal growth, and community inclusion.

III. PARTICIPANTS:

_____, Social Service Supervisor, DHHR

The Claimant, _____, was not present at the hearing. As the Department is _____'s Guardian, Ms. _____ and Ms. _____ acted on her behalf.

Department's Witnesses:

Susan Hall, Bureau of Behavioral Health & Health Facilities (By telephone)

Linda Workman, Psychologist Consultant, BMS (By telephone)

Observing:

John Sassi, Bureau of Behavioral Health & Health Facilities (By telephone)

Presiding at the Hearing was Margaret M. Mann, 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 (November, 2005)

The Code of Federal Regulations – 42 CFR 435.1009 and 42 CFR 483.440

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

D-1 Title XIX MR/DD Waiver Program Revised Manual Chapter 500

D-2 Annual Medical Evaluation dated 04/14/2006

D-3 Psychological Evaluation dated 02/17/2006

D-4 Initial Waiver Program Social History

D-5 Notification Letter dated 08/04/2006

D-6 Letter dated 07/31/2006 from _____ Service Coordinator, _____

D-7 Notification Letter dated 06/12/2006

D-8 Medical Assessment dated 07/18/1996

D-9 Social Evaluation 08/16/1995

D-10 Physician Evaluation 08/13/2003

D-11 Individual Program Plan 05/01/2006

Claimant's Exhibit:

C-1 Claimant's Summary

VII. FINDINGS OF FACT:

- 1) The Claimant is an applicant for services under the Title XIX MR/DD Waiver Program. The Bureau of Behavioral Health reviewed the documents submitted for evaluation and determined that she did not qualify medically for the program.
- 2) The Department sent a notification letter dated June 12, 2006 (Exhibit D-7) stating, "Your Waiver Application is hereby denied. Your application was Denied because: Additional documentation is requested. Please submit documentation supports that the Claimant was diagnosed with mental retardation with associated substantial adaptive deficits within the developmental period. Also, please clarify the Claimant's history following the death of her mother in 1996. Additional information regarding her functional status and academic achievement level is requested."
- 3) Additional information was provided and reviewed. A notification letter dated August 4, 2006 (Exhibit D-5) was sent which reads in part: "Your Waiver Application is hereby denied. Additional documentation submitted does not substantiate the presence of mental retardation with associated substantial adaptive deficits within the developmental period. Documentation submitted indicates that the Claimant has lived alone for 20 years (DD-4) which is inconsistent with a need for an ICF/MR level of care."
- 4) The Annual Medical Evaluation dated April 14, 2006 (Exhibit D-2) reads in part: Under Problems Requiring Special Care – Mobility: Ambulatory; Continence Status: Incontinent; Feeding: Feeds Self; Personal Hygiene: Needs Assistance; and Mental and Behavioral Difficulties: Alert. Recommends speech and physical therapy. Diagnosis: Mental Retardation, History of Abusive Relationships. The physician did certify ICF/MR level of care.
- 5) A Psychological Evaluation was completed February 17, 2006. (Exhibit D-3) The report reads in part that the Claimant is 48 years old who has some difficulty managing daily affairs and taking care of her personal needs. The Claimant graduated from [REDACTED] High School in [REDACTED]. She had difficulty in school and received "special services". She does not have a work history. She receives SSI/SSD benefits. She received outpatient mental health services in the 1990's.
- 6) The Kaufman Brief Intelligence Test, Second Edition (K-BIT-2) scores were: Verbal Standard Score – 60, Non-verbal Standard Score – 48, and K-BIT-2 IQ Composite – 52. The resultant composite score of 52 falls in the lower extreme range. The probability is 90 out of 100 that the Claimant's true IQ score falls in the lower extreme range. The ABS-RC:2, a measure of adaptive functioning levels, shows standard scores of 11 under independent functioning, physical development, economic activity, numbers and time and domestic activity. There was a standard score of 13 in language development, 8 prevocational/vocational activity, 10 in self-direction, 11 in responsibility and a 13 socialization. (Exhibit D-3) Discussion: The Claimant scored one standard deviation below the mean in social engagement and disturbing interpersonal behavior. She was

above average in language development. All other domains fall in the average range for people the Claimant's age (48) with Mental Retardation. The Claimant has difficulty keeping her home clean and she does not take care of personal hygiene. She needs assistance with shopping and accessing community resources. She needs transportation services since she does not drive. She needs assistance in accessing medical care. Axis II Diagnosis: Moderate Mental Retardation. The psychological was not done in the DD-3 format.

- 7) The Social History (Exhibit D-4) reads in part that there is no birth or early information available due to her mother dying in 1986 (?) (Father died when she was an infant). Her guardian reports the Claimant is very social, almost to her detriment because she is easily taken advantage of. She was originally placed in an apartment in [REDACTED] following her mother's death, but due to the deplorable conditions she was transferred to [REDACTED] County. Once she was placed in a trailer, the guardian and DHHR realized she was really unable to live alone without their intense support. The Claimant attempts to cook, clean, and complete basic personal hygiene but her guardian reports she needs supervision and prompting in all steps to achieve a fair function of these abilities. When the Claimant initially came to this county they were told she was able to complete these tasks but since then they feel she needs verbal, physical and modeling to get basic tasks completed. She is unable to complete basic self-help skills, understand all receptive requests, functional academics, mobility, both physical and out in the community due to transportation issues. She is unable to be self-directive and has significant delay in the area of independent living. There are many issues regarding her ability to appreciate dangerous situations as well as safety responses. The Social Worker recommended ICF/MR level of care.
- 8) The Department requested additional information. It is highly unusual to receive an application for an individual who has reached the age of 48 who has not required an ICF/MR level of care to this point and live alone. They needed to know if there was an MR diagnosis during the developmental period, about her functional history after the death of her mother, additional information about her functional status, and her academic achievement levels. (Exhibit D-7) The information provided did not answer the above questions.
- 9) A statement from the Service Coordinator at [REDACTED] dated July 31, 2006 reads in part that "Since the Claimant's mother passed away in 1996 she has lived alone in a trailer in [REDACTED]. She relies on others to help her with paying the bills, transporting her to appointments, and verbal and physical prompts to complete personal hygiene and basic daily skills. Occasionally, a neighbor transports her to church. Church is the only socialization she receives with exception of appointments." (Exhibit D-6) There was also a Pre-Admission Screening (PAS) which was completed in July 1996. (Exhibit D-8) There was a diagnosis of mental retardation. A Social Evaluation (Exhibit D-9) completed in 1996 reads in part that the "Client needs help w/personal hygiene, transportation, paying bills and help maintaining home. Is MR. Personal Care services is recommended." The physician assessment completed in 2002 (Exhibit D-10) reads in part that "the Claimant functions at the level of 10-12 y/o child mentally". Testimony from the Department's consulting psychologist revealed that in ICF/MR group homes she visits, the typical age functioning level is for residents is in the range of 6-7 and sometimes under three years of age. It is recommended in this report that the

“patient’s best interest to be placed in a private home with a caretaker if she is agreeable to this. If she is not agreeable to this, she can continue to live in HUD available housing with any services she may be eligible for provided in the home.”

- 10) It is the Department’s argument that there is no evidence that the MR was established in the developmental period. The doctor and psychologist recommended ICF/MR level of care. While the ABS scores suggest functional eligibility, the Claimant has lived alone for many years, she has no problem with understanding language, there was no information provided about learning, capacity for independent living – the Claimant lives alone, and self-direction was not addressed. The Claimant has reached the age of 48 without receiving active treatment.
- 11) Testimony from the Claimant’s Guardian revealed that they have tried to get past records and have been unsuccessful. When the Claimant was in school, it was in another state. Past records from FMRS were destroyed in a fire. The only information about MR from birth was what the doctor had noted in the capacity hearing. (Exhibit D-10) They have found through the community that the Claimant did receive some kind of services related to mental retardation through [REDACTED] [REDACTED] has since gone out of business. The local DHHR records have been purged. They have reviewed them and she received services in the counties of [REDACTED] and the worker who handled the case would have had waiver cases. The Claimant lives on her own but she has never been on her own. In [REDACTED] County, her representative payee or the representative payee family member were in the home continuously day in and day out. They were instructing the Claimant to get in/out of the bathtub, have to cut off the stove, etc. This still does not appear to be enough. She currently has personal care services through [REDACTED] and the case manager from [REDACTED] has generally been in the Claimant’s home on a weekly basis. When an earlier apartment caught on fire, the Claimant did not know to get out. If someone had not been there to drag her out, she would not have made it. She is very easily manipulated and abused. The Claimant does not know how to think through processes.
- 12) Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500, November 2005 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 support.

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

- * 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

- * Tuberous 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).

13) 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 mean 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

14) **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.

VIII. CONCLUSIONS OF LAW:

- (1) Regulations require that a diagnosis of mental retardation or related condition exists which must be severe and chronic and have been manifested prior to age 22 and is likely to continue. Documentation presented at this hearing shows that the Claimant has a diagnosis of mental retardation. There is no current information to show that this was manifested prior to age 22.
- (2) Regulations require that along with a qualifying diagnosis, substantial limitations in functioning must exist in three (3) or more of the six (6) major life areas. Functionality – stipulates that substantial limits are defined on standardized measures of adaptive behavior scores. Policy further states that the presence of substantial deficits must be supported by the documentation submitted for review, i.e., the IEP, Occupational Therapy evaluation, narrative descriptions, etc.
- (3) The Claimant has a current qualifying diagnosis of mental retardation; however, the clinical evidence fails to demonstrate that the Claimant was diagnosed with mental retardation with associated substantial adaptive deficits in three (3) or more of the major life areas within the developmental period. While it is clear that the Claimant requires prompting and supervision in some areas of functionality, she does not require the level of care and active treatment that is routinely provided in an ICF/MR facility
- (4) Based on the evidence, eligibility for the MR/DD Waiver Program cannot be established.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the action of the Department to deny services under 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 16th Day of February, 2007.

Margaret M. Mann
State Hearing Officer