



**State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
P.O. Box 6165
Wheeling, WV 26003**

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

September 19, 2008

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held September 5, 2008. 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 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 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, 11-1-04).

The information, which was submitted at the hearing, revealed that you do not 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 uphold the action of the Department to deny medical eligibility for the Title XIX MR/DD Waiver Services Program.

Sincerely,

Melissa Hastings
State Hearing Officer
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review
Steve Brady, BHMF
Rick Workman, BMS

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

_____,
Claimant,

v.

Action Number: 08-BOR-1582

**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 5, 2008 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 5, 2008 on a timely appeal, filed June 19, 2008.

It should be noted here that the claimant's benefits have been denied pending a hearing decision.

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:

_____, Claimant

_____, Claimant's Aunt

Steve Brady, BHHF

Rick Workman, Psychologist Consultant, BMS

Presiding at the Hearing was Melissa Hastings, State Hearing Officer and a member of the State Board of Review.

Note: All parties participated telephonically

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 (revised November 1, 2004)

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 MR/DD Waiver Services Manual Chapter 500

D-2 Notice of Denial dated March 17, 2008

D-3 West Virginia Department of Health and Human Resources ICF/MR Level of Care Evaluation dated February 19, 2008

D-4 West Virginia Department of Health and Human Resources Psychological Evaluation Dated February 15, 2008

VII. FINDINGS OF FACT:

- 1) The claimant filed an application on or about February 20, 2008 under the Title XIX MR/DD Waiver Services Program. The Bureau of Behavioral Health reviewed the application packet and determined that the documentation provided did not provide an eligible diagnosis nor did the psychologist completing the psychological evaluation recommend an ICF/MR level of care. Both of these items are required for program eligibility.
- 2) A notice of denial (D2) was issued to the claimant on March 17, 2008 indicating the following:

Your Waiver application is hereby denied.

Your application was denied because:

Miss _____ has not been awarded an eligible diagnosis for the Title XIX MR/DD Waiver program and the psychologist has not indicated that she required an ICF/MR level of care.

- 3) The Initial ICF/MR level of Care Evaluation (D3) completed by the claimant's physician on February 19, 2008 listed the claimant's diagnoses as major depression, congenital blindness, obesity and gall bladder disease. The physician does however certify that the claimant's medical condition would require the level of care and services provided in an intermediate care facility for individuals with mental retardation and/or related condition.
- 4) The Psychological Evaluation (D4) completed February 15, 2008 notes a diagnostic impression of Dysthymic Disorder (a type of depression) and Congenital Blindness.
- 5) The Psychological Evaluation (D4) provides the following placement recommendations:

Because of the above physical limitations, _____ requires a level of care for individuals with a severe physical disability (blindness). She is not capable of living on her own at this time, and is highly dependent on others. She is functioning cognitively in the average range. _____ has maintained her functioning in her current setting with family members, but is interested in a placement where she could live in a supervised, apartment-like environment. This may be available at a facility such as Ash Grove, Aspen Manor or an **assisted living facility for the physically impaired**.

_____ would benefit from Case Management, Residential Habilitation, respite Care, and periodic medical and psychological re-assessment.

- 6) Testimony received from the Department's Psychologist who reviewed the application packet submitted on behalf of the claimant indicates he found that claimant did not meet the qualifications of having an eligible diagnosis based on the medical evaluation completed by the physician. An eligible diagnosis would require a diagnosis of mental retardation and/or a related condition. The diagnoses of major depression, congenital blindness, obesity and gall bladder disease does not meet this definition. In addition the testimony of the department's psychologist indicates that the program requires a recommendation that the claimant requires an ICF/MR level of care. The psychologist report did not make this recommendation. The psychological report recommends an assisted living facility for the physically impaired. However, the medical evaluation completed by her physician does indicate a need for this type of placement.
- 7) Testimony received from the claimant and her representative indicates that the claimant's childhood was less than ideal. She was raised in an institutional setting for the school for the blind in [REDACTED] While she is capable of learning as evidenced by her

attendance at a local community college she does have psychological and dependency issues which make it difficult to live on her own.

- 8) Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500, November 2005 states, in part:

“Medical Eligibility Criteria

The MR/DD State Waiver Office determines 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 monitoring, supervision, training, and supports.
- MR/DD State Waiver Office determines the level of care (medical eligibility) based on the Annual Medical Evaluation (DD-2A), Psychological Evaluation (DD-3), and verification if not indicated in the DD-2A and DD-3, that documents that the mental retardation and/or related conditions with associated concurrent adaptive deficits were manifested prior to the age of 22, and are likely to continue indefinitely. Other documents, if applicable and available, that can be utilized include the Social History IEP for school age children, Birth to Three assessments, and other related assessments..

The evaluations must demonstrate that the applicant has a diagnosis of mental retardation 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 not only by the relevant test scores, but also the narrative descriptions contained in the documentation.

- * Must have a diagnosis of mental retardation, with concurrent 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 and requires services similar to those required for persons with mental retardation..

- * Autism

- * Traumatic brain injury

- * Cerebral Palsy

- * Spina Bifida

- * Tuberous Sclerosis

Additionally, mental retardation and/or related conditions with associated concurrent adaptive deficits:

- * were manifested prior to the age of 22, and

- * are likely to continue indefinitely

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, maintain current level of 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 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).

9) 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

10) 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 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 medical or the psychological evaluations completed on the claimant does not provide such a diagnosis.
- 2) Regulations require that an applicant require the level of care and services provided in an Intermediate Care Facility for the Mentally Retarded. The ICF/MR Level of Care Evaluation completed by the claimant's physician makes this recommendation but the psychological report does not. Based on the testimonies received from the department's psychologist, the claimant and her representative the claimant does need a structured, supportive environment however she is not mentally retarded but physically and psychologically impaired. As a result the psychological evaluation appears to be the best recommendation for the claimant.
- 3) Documentation and testimony provided are clear that the claimant does not meet the program requirement of having an eligible diagnosis for the program or a required placement recommendation.

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 19th Day of September, 2008.

**Melissa Hastings
State Hearing Officer**