



State of West Virginia  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
Office of Inspector General  
Board of Review  
203 East Third Avenue  
Williamson, WV 25661

Joe Manchin III  
Governor

Patsy A. Hardy, FACHE, MSN, MBA  
Cabinet Secretary

March 9, 2010

-----For-----  
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Dear -----:

Attached is a copy of the findings of fact and conclusions of law on -----'s hearing held January 4, 2010. The hearing request was based on the Department of Health and Human Resources' denial of your application for the Title XIX MR/DD Waiver 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 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 substantiate each of the following elements: 1) a diagnosis of mental retardation with concurrent substantial deficits which require the level of care and services provided in an Intermediate Care Facility for the Mentally Retarded (ICF/MR); 2) substantially limited functioning in three or more of the major life areas of self-care, receptive or expressive language, learning, mobility, self-direction, and capacity for independent living; 3) the requirement for and ability to derive benefit from continuous active treatment; and 4) the endorsement of the need for an ICF/MR level of care from both a physician and a psychologist. (MR/DD Waiver Manual, Chapter 513 – *Covered Services, Limitations, and Exclusions for MR/DD Waiver Services*, §513.3.1).

Information submitted at the hearing established that while the claimant's application satisfied the element of substantially limited functioning (item #2 above), the application did not substantiate the need for ICF/MR level of care (item #1), the requirement for or ability to derive benefit from continuous active treatment, (item #3), or the endorsement of the need for an ICF/MR level of care from both a physician and an psychologist (item #4).

It is the decision of the State Hearing Officer to **uphold** the Department's denial of eligibility for the Title XIX MR/DD Waiver Program.

Sincerely,

Stephen M. Baisden  
State Hearing Officer  
Member, State Board of Review

cc: Erika H. Young, Chairman, WV Board of Review  
Steve Brady, WV Bureau for Behavioral Health and Health Facilities (BBHFF)

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

-----,

**Claimant,**

v.

**Action Number: 09-BOR-1453**

**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 March 9, 2010 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 4, 2010, on a timely appeal filed July 8, 2009.

**II. PROGRAM PURPOSE:**

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's mother and representative  
Carol Brawley, Title XIX MR/DD Waiver Program Coordinator, DHHR  
Linda Workman, Psychological Consultant to the WV Bureau of Medical Services

Presiding at the Hearing was Stephen M. Baisden, State Hearing Officer and a member of the State Board of Review.

All participants were sworn in at the beginning of the hearing.

**IV. QUESTION TO BE DECIDED:**

The question to be decided is whether or not the Department was correct in its decision to deny Claimant's application for the Title XIX MR/DD Waiver Program.

**V. APPLICABLE POLICY:**

MR/DD Waiver Manual, Chapter 513 – *Covered Services, Limitations, and Exclusions for MR/DD Waiver Services*, §513

**VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:**

**Department's Exhibits:**

- D-1 MR/DD Waiver Manual, Chapter 513 – *Covered Services, Limitations, and Exclusions for MR/DD Waiver Services*, §513.3.1
- D-2 Notice of denial of Title XIX MR/DD Waiver Services dated June 22, 2009
- D-3 DD-2A, Physician's Evaluation of the Need for ICF/MR Level-of-Care, dated May 13, 2009
- D-4 DD-3, Comprehensive Psychological Evaluation from [REDACTED] dated May 15, 2009
- D-5 DD-2A, Physician's Evaluation of the Need for ICF/MR Level-of-Care, dated July 10, 2009
- D-6 Notice of denial of Title XIX MR/DD Waiver Services dated July 20, 2009
- D-7 DD-3, Comprehensive Psychological Evaluation from Psychological Counseling Associates, dated August 27, 2009
- D-8 Notice of denial of Title XIX MR/DD Waiver Services dated September 17, 2009
- D-9 Individualized Education Program (IEP) from [REDACTED] County (WV) Schools

**VII. FINDINGS OF FACT:**

- 1) MR/DD Waiver Manual, Chapter 513.3.1 – *Covered Services, Limitations, and Exclusions for MR/DD Waiver Services*, §513 (Exhibit D-1) states in pertinent part,

The MR/DD State Waiver Office determines the medical eligibility for an applicant in the MR/DD Waiver Program. In order to be eligible 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). An ICF/MR

provides services in an institutional setting for persons with mental retardation or related condition.

- Verify the need for an ICF/MR Level-of-Care based on an annual medical evaluation (DD-2A), and a 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. The evaluations must demonstrate that an 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.
- Have substantially limited functioning in three (3) or more of the following major life areas: self-care, receptive or expressive language, learning, mobility, self-direction, and capacity for independent living.
- Require and would benefit from continuous active treatment.

- 2) The Claimant's parents submitted an application to determine their son's eligibility for benefits and services through the Title XIX MR/DD Waiver Services Program. The Department evaluated this request and sent a notice of denial to the Claimant on June 22, 2009 (Exhibit D-2). The notice explained that the reason for denial, in pertinent part, was:

The physician has not offered an eligible diagnosis on the DD-2A for the Title XIX MR/DD Waiver program nor certified the need for an ICF/MR level of care. Likewise, the psychologist has not endorsed the need for an ICF/MR level of care.

- 3) Claimant's application for the Title XIX MR/DD Waiver program included a DD-2A, Physician's Evaluation of the Need for ICF/MR Level-of-Care dated May 13, 2009 (Exhibit D-3). This is a three-page document, with a duplicate page 3 submitted. The first page 3 has nothing listed under Axis I, Axis II and Axis III and the item stating "I certify that this patient's developmental disability, medical condition and related health needs are as documented above and the patient requires the level of care and services provided in an ICF/MR" is not completed. The second page 3 has nothing listed under Axis I and Axis II. At Axis III, someone has written "DM II (diabetes type 2) and seasonal allergies." At the item stating "I certify that . . ." someone has checked "No." Both versions of page 3 are identically signed by the physician, but the other items seem to be completed by an individual with different handwriting.
- 4) Claimant's application for the Title XIX MR/DD Waiver program included a DD-3, a Comprehensive Psychological Evaluation completed at [REDACTED] dated May 15, 2009 (Exhibit D-4). Part of this evaluation included a Wechsler Adult Intelligence Scale (WAIS) Third Edition, which rated Claimant's verbal intelligence quotient (IQ) at 69, performance IQ at 65 and full-scale IQ at 65. According to the *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)*, an individual with an IQ in the range of 50 to 69 meets the definition of mild mental retardation. The final section of the DD-3 (Placement Recommendations) states, "This

individual does not qualify with significant deficits for the Waiver Program at this time. He may benefit from behavioral therapy but the intensity of the Title XIX Waiver Program is not warranted.”

5) After the June 22, 2009 denial, the Bureau of Behavioral Health and Health Facilities (BBHFF) received another DD-2A, ICF/MR Level of Care Evaluation, dated July 10, 2009 (Exhibit D-5), and completed by a different physician than the previous DD-2A, dated May 13, 2009. On page 3 of this evaluation, the evaluator has written at Axis I, “obsessive-compulsive disorder / ADHD,” at Axis II, “mental retardation” and at Axis III, “brittle juvenile diabetes insulin dependent with history of seizure.” The physician indicated an affirmative answer to the item stating “I certify that this patient’s developmental disability, medical condition and related health needs are as documented above and the patient requires the level of care and services provided in an ICF/MR.”

6) The Department evaluated this new information and sent a notice of denial to the Claimant on July 20, 2009 (Exhibit D-6). The notice explains that the reason for denial, in pertinent part, was:

The evaluating psychologist has not endorsed the need for an ICF/MR level of care.

7) Claimant’s parents submitted another DD-3 psychological evaluation, dated August 27, 2009, to BBHFF (Exhibit D-7). This was completed at [REDACTED] by Psychologist [REDACTED]. As part of this evaluation, the psychologist administered the Kaufman Brief Intelligence Test, second edition (KBIT 2). This test resulted in a verbal IQ of 71, a nonverbal IQ of 86, and an IQ composite of 75. All of these scores are in the below average range. In the discussion section of the test results, the evaluating psychologist has written, “The scores obtained indicate that [Claimant] is functioning in the below average range of intelligence as assessed by the KBIT 2 . . . These findings are similar to the results from the Wechsler Adult Intelligence Scale administered [in May 2009], which falls near the border of Mild Mental Retardation according to the DSM-IV (IQ level 50-55 to approximately 70). However the KBIT-2 is less thorough than the [WAIS]. Therefore, the diagnosis of Mild Mental Retardation should be retained.” In the “Recommendations” section of this evaluation, under the “Therapy/Counseling/ Behavioral Intervention” subsection, the psychologist has noted, “No active treatment is necessary at this time.” In the final section of the evaluation, “Placement Recommendations,” the psychologist has written, “This individual needs, requires, and qualifies for an ICF/MR Level of Care, which should be provided through the Title XIX Waiver Program.”

8) The Department evaluated this new information and sent a notice of denial to the Claimant on September 17, 2009 (Exhibit D-8). The notice explains that the reason for denial, in pertinent part, was:

Psycho-Metric data reported in the most current DD-3 is incompatible with the criteria for diagnosis of mental retardation. The psychologist who performed this evaluation deferred to the previously completed DD-3 (5/15/09) in which the evaluator utilized a comprehensive measure of intelligence which yielded lower results. However, the psychologist who

performed this evaluation did not endorse the need for an ICF/MR level of care for [Claimant].

- 9) The Department entered into evidence an Individualized Education Program (IEP) from ██████████ County Schools (Exhibit D-9) completed by special education teacher ----- ██████████ and completed on April 1, 2008. The IEP is an individualized education plan mandated for each special education student in the public school system. In the section labeled, "Narrative Descriptions of Present Levels of Academic Achievement and Functional Performance," the evaluator writes, "[Claimant] is a conscientious young man who attends school regularly. He worries about his grades and usually will work hard to keep his grades up. [Claimant] seems to be a happy-go-lucky young man in school, and is generally smiling. He states that he loves school and loves to do book work. ----- attends vocational school and is in the geographic printing course. He will be a senior during the 2008-2009 school year and is on schedule to graduate."
- 10) Department's witness Linda Workman testified that she was the psychologist consultant who evaluated Claimant's application. She stated that there is a four-fold eligibility criteria for the Title XIX MR/DD Waiver Program:
- a) An applicant must have an eligible diagnosis for the program, a diagnosis of mental retardation or a related condition. However, an eligible diagnosis is not sufficient for eligibility. The individual must need an institutional level of care, i.e. the level of care he or she would receive at a residential institution for mentally retarded or developmentally disabled individuals.
  - b) An applicant must have functional deficits in three out of six major life areas, which are self-care, receptive or expressive language, learning, mobility, self-direction, and capacity for independent living.
  - c) An applicant must require active treatment and be able to benefit from active treatment.
  - d) An applicant must have the endorsement of the need for an ICF/MR level of care from both a physician and a psychologist.

Department's witness stated that in most cases, an application to the Title XIX MR/DD Waiver is denied because the applicant fails to demonstrate that he or she fails to meet the requirement stated in item (b) above, functional deficits in three out of six major life areas. In Claimant's case, he meets the functional deficits aspect of the application but fails in the other three criteria. He meets the definition of mild mental retardation, but not of such a severity that he requires an ICF/MR level of care. As part of his application, he or his parents submitted two psychological evaluations. The evaluation that made the most emphatic statement that Claimant requires an ICF/MR level of care states that no active treatment is needed at this time. There is not a clear endorsement of the need for an ICF/MR level of care from both a physician and a psychologist. One physician says he needs this level of care, one says he does not. One psychologist says he needs this level of care, one says he does not. Without a clear consensus as to the need for an ICF/MR level of care, Department's witness stated that she could not approve Claimant's application. To reinforce her decision, Department's witness stated that she had the evidence of ██████████ County School's IEP, which stated Claimant was

functioning in the Special Education program at his high school, was expected to graduate, and had clearly-stated vocational goals.

- 11) Claimant's representative, his mother, testified that at Claimant's first psychological evaluation, the psychologist took everything he said at face value and did not go into detail. He really did not evaluate him properly. She added that Claimant cannot perform the simple tasks in life. He demonstrates an inability to properly monitor his insulin levels. She stated that she has to keep a close eye on him at all times. She testified that Claimant cannot comprehend dressing appropriately for the season, and he's not mentally capable of caring for himself. She said that the doctor who performed his first evaluation had been his doctor for no more than three months at the time of the May 13, 2009, evaluation. The second evaluation was done by his pediatrician who had been his primary care physician to the age of 16 to 17 years old. She testified that for the second psychological evaluation, the psychologist spent an hour and a half with Claimant. She stated she felt this evaluator understood him much better than the first psychologist did.

#### **VIII. CONCLUSIONS OF LAW:**

- 1) An application for the Title XIX MR/DD Waiver Program must meet a four-part criteria test. There must be a diagnosis of mental retardation or development disability of sufficient severity to warrant the level of care found in an institutional setting. The applicant must be functionally deficient in three out of six major life areas, which are self-care, receptive or expressive language, learning, mobility, self-direction, and capacity for independent living. The applicant must require and benefit from active treatment. The applicant must verify the need for an ICF/MR level of care with documentation from both a physician and a psychologist.
- 2) The Department did not dispute the assertion that Claimant's application for the Program demonstrates functional deficits in three out of six major life areas.
- 3) Claimant's application for the Program demonstrated a diagnosis of mental retardation but not of the severity to warrant the need for an ICF/MR level of care. This is reinforced by the IEP from Claimant's school which indicates that he was progressing in his Special Education curriculum with the expectation of high school graduation and with employment goals.
- 4) Claimant's application for the Program did not meet the requirement of requiring and benefitting from continued active treatment. One of the two submitted psychological evaluations expressly denied that active treatment was needed.
- 5) Claimant's application for the Program contained two physical evaluations, one of which substantiated the need for an ICF/MR level of care and one of which did not. The Department accepted the endorsement of the second physical evaluation and found that the application met the requirement of having a physician certify the level of care. Claimant's application also contained two psychological evaluations, one of which endorsed the need for an ICF/MR level of care and one of which did not. The first evaluation, which did not endorse the need for an ICF/MR level of care, contained results from an IQ test which scored Claimant in the Mild Mental Retardation range.

The second evaluation, which endorsed the need for an ICF/MR level of care, contained results from a different, shorter test. It scored Claimant in the low-average range of intelligence. The psychologist-evaluator in the second evaluation stated that the shorter test is less thorough than the one administered during the first evaluation, so the diagnosis of Mild Mental Retardation arrived at in the earlier evaluation should be retained. She did not, however, defer to the earlier evaluator's opinion that ICF/MR level of care was not warranted.

- 6) Claimant's application for the Title XIX MR/DD Waiver Program did not establish that Claimant required an ICF/MR level of care. Claimant's application did not consistently demonstrate the need for or benefit from continued treatment. Claimant's application did not consistently demonstrate the endorsement of a psychologist for the need for an ICF/MR level of care. Therefore, the Department was correct in its decision to deny Claimant's application.

**IX. DECISION:**

It is the decision of the State Hearing Officer to **uphold** the decision of the Department to deny Claimant's application for the Title XIX MR/DD Waiver Program.

**X. RIGHT OF APPEAL:**

See Attachment

**XI. ATTACHMENTS:**

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

**ENTERED this 9th Day of March, 2010.**

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**Stephen M. Baisden  
State Hearing Officer**