



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

Earl Ray Tomblin
Governor

Michael J. Lewis, M.D., Ph.D.
Cabinet Secretary

April 21, 2011

-----For-----

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on the fair hearing held April 15, 2011. 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. An application must document that the diagnosis of mental retardation occurred before the age of 22. (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 the Claimant's application did not include an instrument which measured the severity of claimant's autistic disorder.

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
Jennifer Eva, APS Healthcare

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

-----,

Claimant,

v.

Action Number: 11-BOR-532

**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 April 21, 2011 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 (DHHR.) This fair hearing was convened on April 15, 2011, on a timely appeal filed January 27, 2011.

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 Representative and Father

-----, Claimant's Witness and Mother

Jennifer Eva, APS Healthcare

Richard 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.

The hearing took place at the [REDACTED] County office of the WV DHHR, with departmental representative and witnesses appearing by telephone conference call.

The Hearings Officer placed all participants under oath 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 November 4, 2010.
- D-3 Notice of denial of Title XIX MR/DD Waiver Services dated November 30, 2010.
- D-4 Notice of denial of Title XIX MR/DD Waiver Services dated January 10, 2011.
- D-5 Notice of denial of Title XIX MR/DD Waiver Services dated February 15, 2011.
- D-6 DD-2A, Physician's Evaluation of the Need for ICF/MR Level-of-Care, dated January 26, 2011.
- D-7 DD-3, Comprehensive Psychological Evaluation from [REDACTED] Area Mental Health, dated October 11, 2010.
- D-8 Psychological Evaluation from Psychological Associates of [REDACTED] dated February 9, 2011.
- D-9 Individualized Education Program (IEP) from [REDACTED] County Schools, dated December 20, 2010.

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 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: any condition (other than mental illness) found to be closely related to mental retardation, autism, traumatic brain injury, cerebral palsy, spina bifida, and tuberous sclerosis.
- 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. "Substantially limited" is defined on standardized measures of adaptive behavior scores as three standard deviations below the mean or less than one percentile when derived from non MR normative populations or in the average range or equal to or below the 75th percentile when derived from MR normative populations. The presence of substantial deficits must be supported not only by the relevant test scores, but also the narrative descriptions contained in the documentation submitted for review.
- Require and would benefit from continuous active treatment.

2) Claimant's parents and [REDACTED] Area Mental Health [REDACTED] submitted an application to determine his 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 Claimant's parents on November 4, 2010. (Exhibit D-2.) The notice explained that the reason for denial, in pertinent part, was:

Additional documentation is requested. Please submit a current assessment for autism such as the CARS (Childhood Autism Rating Scale) or GARS (Gilliam Autism Rating Scale), Tomblin's current IEP and the most current psychoeducational assessments conducted by the school system.

Claimant's parents and [REDACTED] resubmitted the application with additional information. The Department evaluated this request and sent another notice of denial to

Claimant's parents on November 30, 2010. (Exhibit D-3.) The notice explained that the reason for denial, in pertinent part, was:

The IEP submitted is outdated. Please submit ----'s current IEP and any current assessments conducted by the school system. Please submit an assessment for autism.

Claimant's parents and [REDACTED] again resubmitted the application with additional information. The Department evaluated this request and sent another notice of denial to Claimant's parents on January 10, 2011. (Exhibit D-4.) The notice explained that the reason for denial, in pertinent part, was:

The [application] packet lacked assessments in support of neither [sic] the Axis I nor Axis II diagnoses. Therefore, degree of severity cannot be ascertained and so diagnostic eligibility cannot be established.

Claimant's parents and [REDACTED] resubmitted the application a fourth time, with additional information. The Department evaluated this request and sent another notice of denial to Claimant's parents on February 15, 2011. (Exhibit D-3.) The notice explained that the reason for denial, in pertinent part, was:

The [application] packet does not contain an assessment specific to autism such as the Childhood Autism Rating Scale or Gilliam Autism Rating Scale. These assessments are required so that the degree of severity of autism can be determined. Pleas not[e] that these assessments have been requested on three previous Notices of Denial as have school assessments. To date, no assessments in support of mental retardation or autism have been submitted. Therefore, diagnostic eligibility cannot be established.

- 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 January 26, 2011. (Exhibit D-3). The evaluating physician entered in the diagnostic section of this document a diagnosis at Axis I of autistic disorder and at Axis II of mild mental retardation and ADHD (attention deficit and hyperactivity disorder) and has indicated that he/she certifies the need for an ICF/MR level of care for Claimant.
- 4) Claimant's application for the Title XIX MR/DD Waiver program included a DD-3, a Comprehensive Psychological Evaluation completed at LMAMH, dated October 11, 2010. (Exhibit D-7.) Under the section labeled "Prior Psychological Testing" the psychologist has written that Claimant had been diagnosed with autism in 2007, 2009 and May 2010, but in none of these evaluations was severity indicated. Under the section labeled "Current Evaluations" the psychologist has indicated that she attempted to administer the Wechsler Preschool and Primary Scale of Intelligence (WPPSI), but wrote, "Due to [Claimant's] behaviors and his limitation in communication he could not orient to the testing situation and the testing could not be completed." Later the psychologist adds, "Based on history of evaluations, behavioral history, and observation he does appear to be functioning within the mild mentally retarded range of intellectual abilities. He also appears to meet criteria for autistic disorder." Under the section

labeled “Diagnosis” the psychologist has listed the Axis I diagnosis of autistic disorder and the Axis II diagnosis of mild mental retardation. The psychologist also certifies the need for an ICF/MR Level of Care.

- 5) Claimant’s application included additional testing undertaken at Psychological Associates of ████████ WV. (Exhibit D-8.) On the diagnostic section of this document, the evaluator has diagnosed Claimant at Axis I with autistic disorder and ADHD, and at Axis II has written “no diagnosis.”
- 6) Department’s witness testified that he was the psychologist consultant who evaluated Claimant’s application. He testified that the primary reason for the denial of Claimant’s application was that there were no submitted psychological or medical evaluations which documented the severity of Claimant’s autism. He stated that there were several evaluations which diagnosed autistic disorder, but there was nothing in these evaluations to determine if they met the definition of “a related condition which constitutes a severe and chronic disability with concurrent substantial deficits” as required by policy. He stated that each of the application denial letters, Exhibits D-2 through D-5, communicated to Claimant’s parents that a measure of the severity of Claimant’s autism needed to be submitted, and Exhibits D-2 and D-5 specifically suggested two instruments, the CARS and the GARS. He added that, if these tests were administered to Claimant, they would provide the needed measure of the severity of his disorder, but that neither the CARS or GARS, nor any other measure of severity of Claimant’s autism was submitted.
- 7) Claimant’s representative, his father, testified that his son needed help, and anyone who knew him knew he needed help. He stated that from the time they obtained custody of him, they have followed the guidance of physicians and psychologists in order to help him make the progress he has made. Claimant’s witness, his mother, testified that Claimant has no self-direction, and she needed to feed him, bathe him and brush his teeth. Neither Claimant’s father nor his mother made substantial rebuttals to Department’s testimony or evidence.

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 a related condition 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 denied Claimant’s application for the Title XIX MR/DD Waiver Program because the application did not document that Claimant’s autism met the policy definition of a related condition to mental retardation which constitutes a severe and chronic disability with concurrent substantial deficits.

- 3) Claimant's application documents to the Title XIX MR/DD Waiver Program contained several evaluations that provided the diagnosis of autism, but nothing to document the severity of his disorder.
- 4) Because Claimant's application did not contain documentation of the severity of his autism, the Department could not determine if Claimant's disorder constitutes a severe and chronic disability as required by policy. Therefore, the Department was correct to deny Claimant's application to the Title XIX MR/DD Waiver Program.

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 21st Day of April, 2011.

Stephen M. Baisden
State Hearing Officer