



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

January 13, 2012

----- for -----

Dear -----:

Attached is a copy of the Findings of Fact and Conclusions of Law on the Fair Hearing held December 14, 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, now known as the I/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 psychological evaluation portion of Claimant's application did not document substantial adaptive deficits in at least three major life areas.

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
-----, APS Healthcare

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

-----,

Claimant,

v.

ACTION NO.: 11-BOR-2156

**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 13, 2012 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 December 14, 2011, on a timely appeal filed October 17, 2011.

II. PROGRAM PURPOSE:

The Medicaid Home and Community-Based MR/DD Waiver Program, now known as the I/DD Waiver Program (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 Mother

-----, APS Healthcare, Department's Representative
Linda Workman, Psychological Consultant to the WV Bureau of Medical Services,
Department's witness

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

The hearing was convened 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 September 29, 2011.
- D-3 DD-2A, Physician's Evaluation of the Need for ICF/MR Level-of-Care, dated October 13, 2011.
- D-4 DD-3, Comprehensive Psychological Evaluation from West Virginia Birth to Three, dated August 6, 2011.
- D-5 Notice of denial of Title XIX MR/DD Waiver Services dated November 9, 2011.

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 the [REDACTED] submitted an application to determine his eligibility for benefits and services through the Title XIX MR/DD Waiver program. The Department evaluated this request and sent a notice of denial to Claimant's parents on September 29, 2011. (Exhibit D-2.) The notice explained that the reason for denial, in pertinent part, was:

The physician's statement is undated on the DD-2A [physician's certification of the need for ICF/MR Level-of-Care form]. The psychological evaluation (DD-3) was outdated (beyond 90 days) upon receipt of the Waiver application.

Department's witness testified that the initial application for the MR/DD Waiver program included a DD-2A that was not dated by the evaluating physician and a DD-3 that was completed a year before the application was submitted.

- 3) Claimant's parents resubmitted the application with a properly dated medical evaluation and a new psychological assessment. The Department evaluated this request and sent another notice of denial to Claimant's parents on November 9, 2011. (Exhibit D-5.) The notice explained that the reason for denial was that "the psychological report lacked the ABAS II score summary."
- 4) Claimant's resubmitted application for the MR/DD Waiver program included a DD-2A, Physician's Evaluation of the Need for ICF/MR Level-of-Care, dated October 13, 2011. (Exhibit D-3). The evaluating physician entered in the diagnostic section of this document a diagnosis at Axis I of autism spectrum disorder and at Axis II of developmental delay, and has indicated that he/she certifies the need for an ICF/MR level of care for Claimant.
- 5) Claimant's application for the Title XIX MR/DD Waiver program included a DD-3, a Comprehensive Psychological Evaluation completed by West Virginia Birth to Three, dated August 6, 2011. (Exhibit D-4.) The DD-3 indicates that three psychological evaluations were given to Claimant, the Developmental Profile 3 (DP-3), the Childhood Autism Rating Scale (CARS), and the Adaptive Behavior Assessment System, second edition (ABAS II.) Page 5 of the DD-3 states, "Adaptive Behavior Scale (ABAS II): [Claimant] evidences significant adaptive delays. He obtained the following scores on the ABAS II." The rest of the page is blank. The DD-3 concludes by stating that the evaluating psychologist certifies the need for an ICF/MR level of care for the Claimant.
- 6) Department's witness testified that she was the psychologist consultant who evaluated Claimant's application. She testified that the primary reason for the second denial of Claimant's application was that the results of the ABAS II were not included in the DD-3. She stated that the ABAS II measures all of the six major life areas identified for the MR/DD Waiver Program eligibility, including all of the components of capacity for independent living. She testified that she and Department's Representative tried diligently to obtain the ABAS II results from the WV Birth to Three staff, up to the day the hearing was held, but were unable to obtain a copy. She stated that without these results, the DD-3 narrative section documented a substantial limitation only in the life area of receptive or expressive language. Therefore, she added, the documentation did not demonstrate substantial limitations in three of the six major life areas.
- 7) Claimant's representative, his mother, testified that she did not receive the second letter of denial. (Exhibit D-5.) She testified that if she had, she would have obtained the ABAS II results herself and submitted them to the Department. Department's representative stated that the second denial letter was sent to Claimant's parents by certified letter, but the letter was not claimed at the family's post office.

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 psychological evaluation was missing the results of the ABAS II, an assessment tool which measures all of the six major life areas that the MR/DD Waiver Program evaluator examines in considering an application. Without these results, the psychological evaluation did not document adaptive deficits in three of the six major life areas.
- 3) Because Claimant's application did not contain documentation of adaptive deficits in at least three of the six major life areas of self-care, language, learning, mobility, self-direction, and capacity for independent living, 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 13th Day of January, 2012.

**Stephen M. Baisden
State Hearing Officer**