



**STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
OFFICE OF INSPECTOR GENERAL**

**Bill J. Crouch
Cabinet Secretary**

**BOARD OF REVIEW
Raleigh District DHHR
407 Neville Street
Beckley, WV 25801**

**M. Katherine Lawson
Inspector General**

August 29, 2018

[REDACTED]

RE: [REDACTED] v. WV DHHR
ACTION NO.:18-BOR-1914

Dear Ms. [REDACTED]

Enclosed is a copy of the decision resulting from the hearing held in the above-referenced matter.

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.

You will find attached an explanation of possible actions you may take if you disagree with the decision reached in this matter.

Sincerely,

Kristi Logan
State Hearing Officer
Member, State Board of Review

Encl: Appellant's Recourse to Hearing Decision
Form IG-BR-29

cc: Psychological Consultation and Assessment; Bureau for Medical Services

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

[REDACTED],

Appellant,

v.

Action Number: 18-BOR-1914

**WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,**

Respondent.

DECISION OF STATE HEARING OFFICER

INTRODUCTION

This is the decision of the State Hearing Officer resulting from a fair hearing for [REDACTED]. This hearing was held in accordance with the provisions found in Chapter 700 of the West Virginia Department of Health and Human Resources' Common Chapters Manual. This fair hearing was convened on August 9, 2018.

The matter before the Hearing Officer arises from the May 22, 2018, decision by the Respondent to deny the Appellant eligibility for Long Term Care (nursing facility) services.

At the hearing, the Respondent appeared by [REDACTED], Licensed Psychologist with Psychological Consultation and Assessment (PC&A). The Appellant appeared by her healthcare surrogate, [REDACTED]. Appearing as witnesses for the Appellant were [REDACTED], Adult Protective Services Supervisor and [REDACTED], Adult Protective Services Worker. All witnesses were sworn and the following documents were admitted into evidence.

Department's Exhibits:

- D-1 Bureau for Medical Services Provider Manual Chapter 514: Nursing Facility Services §514.6
- D-2 Notice of Denial dated June 25, 2018
- D-3 Memorandum from Psychological Consultation and Assessment to [REDACTED] dated June 25, 2018
- D-4 Pre-Admission Screening dated June 22, 2018
- D-5 Medical Records from [REDACTED] dated April 22, 2018, May 9, 2018, and June 22, 2018

- D-6 Memorandum from Psychological Consultation and Assessment to [REDACTED] dated May 8, 2018
- D-7 Level II Pre-Admission Screening and Resident Review (PASRR) Evaluation dated July 27, 2018

Appellant's Exhibits:

- A-1 Notice of Final Filing and Adoption of Legislative Rule Authorized by the West Virginia Legislature dated June 29, 2015
- A-2 Legislative Rules Title 64 §64-13-1
- A-3 Code of Federal Regulations – 42 CFR §431.51

After a review of the record, including testimony, exhibits, and stipulations admitted into evidence at the hearing, and after assessing the credibility of all witnesses and weighing the evidence in consideration of the same, the Hearing Officer sets forth the following Findings of Fact.

FINDINGS OF FACT

- 1) The Appellant was evaluated for medical eligibility for Long Term Care (nursing facility) services on June 22, 2018.
- 2) A Pre-Admission Screening (PAS), the assessment tool utilized by the Respondent to determine medical eligibility for nursing facility services, completed on June 22, 2018, awarded the Appellant thirteen (13) deficits (Exhibit D-4).
- 3) The June 2018 PAS indicated that the Appellant met the medical eligibility for nursing facility services, and that a Level II PASRR evaluation was required (Exhibit D-4).
- 4) The Level II PASRR desk review completed by [REDACTED], Clinical Psychologist, on June 25, 2018, determined that the Appellant's needs would be best met in an Intermediate Care Facility for Individuals with Intellectually Disability (ICF/IID) based on diagnoses of intellectual disability, cerebral palsy and seizure disorder (Exhibit D-3).
- 5) The Respondent notified the Appellant's healthcare surrogate on June 25, 2018, that the PAS was not approved for nursing facility services due to the determination that the specialized services the Appellant requires would be met in a ICF/IID setting (Exhibit D-2).

APPLICABLE POLICY

Bureau for Medical Services Provider Manual Chapter 514: Nursing Facility Services §§514.6.2 and 514.6.3 states pre-admission screening for medical necessity of nursing facility services is a two-step process. The first step (Level I) identifies the medical need for nursing facility services based on evaluation of identified deficits and screens for the possible presence of a major mental

illness, intellectual disability, and/or developmental disability. The second step (Level II) identifies if the individual needs specialized services for a major mental illness, mental retardation, and/or developmental disability.

To qualify medically for the nursing facility Medicaid benefit, an individual must need direct nursing care 24 hours a day, 7 days a week. The Bureau for Medical Services (BMS) has designated a tool known as the Pre-Admission Screening form (PAS)) to be utilized for physician certification of the medical needs of individuals applying for the Medicaid benefit.

An individual must have a minimum of five deficits identified on the PAS. These deficits will be determined based on the review by BMS/designee in order to qualify for the Medicaid nursing facility benefit. These deficits may be any of the following:

- #24: Decubitus: Stage 3 or 4
- #25: In the event of an emergency, the individual is c) mentally unable or d) physically unable to vacate a building. a) and b) are not considered deficits.
- #26: Functional abilities of the individual in the home.
 - Eating: Level 2 or higher (physical assistance to get nourishment, not preparation)
 - Bathing: Level 2 or higher (physical assistance or more)
 - Grooming: Level 2 or higher (physical assistance or more)
 - Dressing: Level 2 or higher (physical assistance or more)
 - Continence: Level 3 or higher (must be incontinent)
 - Orientation: Level 3 or higher (totally disoriented, comatose)
 - Transfer: Level 3 or higher (one person or two persons assist in the home)
 - Walking: Level 3 or higher (one person assist in the home)
 - Wheeling: Level 3 or higher (must be Level 3 or 4 on walking in the home to use, Level 3 or 4 for wheeling in the home.) Do not count outside the home.
- #27: Individual has skilled needs in one these areas – (g) suctioning, (h) tracheostomy, (i) ventilator, (k) parenteral fluids, (l) sterile dressings, or (m) irrigations.
- #28: Individual is not capable of administering his/her own medications.

All individuals admitted or requesting admission to a Medicaid certified nursing facility must be screened for the possible presence of a major mental illness, and/or an intellectual/developmental disability (MI/I/DD). This review is identified as the Level I evaluation. Any individual identified with the possible presence of mental health issues must be further evaluated.

Bureau for Medical Services Provider Manual Chapter 514: Nursing Facility Services §514.6.6 states that if the Level I evaluation found the possible presence of MI and/or I/DD, further evaluation of the individual must be completed to obtain a definitive diagnosis and the need for specialized services for the mental health condition. This evaluation is identified as a Level II evaluation and must be completed by an individual identified by BMS as an approved Level II evaluator. All Level II evaluators are either licensed psychologists or Board certified psychiatrists.

It is the responsibility of the facility in which the PAS is completed, to arrange for the Level II evaluation. This evaluation must be completed, including a report of the mental health status and whether specialized services are needed, within seven to nine days following the referral. The

Level II must be completed prior to the individual's admission into a nursing facility. Upon completion of the evaluation, both the referring entity and the PASARR Level II evaluator must provide the complete mental health evaluation and the original Level I evaluation to the receiving nursing facility. Additionally, the results of the evaluation shall be sent to Psychological Consultants and Assessment (PC&A).

Bureau for Medical Services Provider Manual Chapter 514: Nursing Facility Services §§514.6.7 and 514.6.8 states that specialized services for an individual identified as I/DD are a continuous program for an individual requiring aggressive, consistent implementation of a program of specialized and generic training, treatment, health and related services developed by an IDT that is directed towards:

- The acquisition of the behaviors necessary for the individual to function with as much self-determination and independence as possible; and
- The prevention or deceleration of regression or loss of their current optimal functional status.

These services are generally provided in an intermediate care facility for persons with I/DD or a related condition. If the resident is presently residing in a nursing facility when the Level II is completed and specialized services for I/DD is indicated, and the responsible party refuses this recommendation, this refusal must be documented in the resident's record and readdressed with the responsible party on a continuing quarterly basis or until a Level II recommends otherwise.

Specialized services for an individual with an acute exacerbation of a major mental illness are the continuous and aggressive implementation of an individualized plan of cares that:

- Is developed under and supervised by a physician in conjunction with an IDT which includes qualified mental health professionals;
- Prescribes specific therapies and activities for the treatment of persons experiencing an acute episode of a major mental illness which necessitates supervision by trained mental health professionals; and
- Is directed toward reducing the individual's acute psychotic symptoms that adversely affect the person's ability to perform their activities of daily living. The long-term goal of the specific therapies is to improve the individual's level of independent functioning and to achieve a functional level that permits reduction in the intensity of mental health services at the earliest possible time.

These services may only be provided in an acute psychiatric facility. If the resident or responsible party refuse this service, if it is recommended during the Level II review, the individual cannot be admitted to the nursing facility or continue to reside in the facility.

DISCUSSION

According to policy, the screening process for medical necessity for nursing facility services is a two-step process. The first step, referred to as Level I, identifies the medical need for nursing

facility services based on an evaluation of identified deficits and screens for the possible presence of a major mental illness, intellectual disability, and/or developmental disability. The second step, Level II, identifies if the individual needs specialized services for a major mental illness, intellectual disability, and/or developmental disability.

To qualify medical for nursing facility services, a minimum of five (5) deficits must be present as derived from the PAS assessment tool. The Appellant was found to have thirteen (13) deficits as a result of the June 2018 PAS. The Appellant's diagnoses of intellectual disability, cerebral palsy and seizure disorder "triggered" the referral for a Level II evaluation.

The Respondent contended that it was the recommendation of the Level II evaluator that the Appellant would be better served in an ICF/IID facility rather than a nursing home. Based on this recommendation, nursing facility services for the Appellant were denied. A second Level II evaluation was completed by another Level II evaluator on July 27, 2018. It was the recommendation of the second Level II evaluator that the Appellant's needs would best be met in an ICF/IID placement rather than a nursing facility.

██████████, the Respondent's witness, testified that due to the Appellant's young age of thirty-three (33), the least restrictive environment for her would be that of an ICF/IID facility rather than a nursing facility. In an ICF/IID setting, the Appellant would be with peers her own age, and would receive community integration and training specifically tailored for her intellectual disability and related conditions. Ms. ██████████ did not dispute that the Appellant met the nursing facility criteria of at least five (5) deficits, however the Appellant did not have any acute medical conditions and that all of her deficits were attributed to the intellectual disability and related conditions of cerebral palsy and seizure disorder.

The Appellant's healthcare surrogate testified that the Appellant had been residing in an assisted living facility with her grandmother until the facility was closed. The Appellant's grandmother has since been admitted to a nursing facility, while the Appellant has been in the hospital for over a month awaiting placement in a long-term care facility. Ms. ██████████ testified that she does not want the Appellant placed in an ICF/IID facility, and that she needs to be in the same nursing facility as her grandmother, with whom she previously resided. Ms. ██████████ stated that the Appellant has been agitated ever since their separation, and as a result, the hospital keeps her sedated. Ms. ██████████ does not feel the Appellant would benefit from an ICF/IID placement, of which there are no facilities close to her or the Appellant's other family members.

Policy requires that an individual must be evaluated for specialized services if there is a presence of a major mental illness or intellectual disability. Specialized services for an individual with a major mental illness are provided in an acute psychiatric facility. If the Level II evaluator recommends specialized services for an individual with a major mental illness, and the individual's representative refuses the services, then the individual cannot be admitted or continue to reside in a nursing facility. There is no such exclusion in policy that requires an individual with intellectual disability to receive specialized services in an ICF/IID setting or that specifically prohibits the individual from admission to a nursing facility.

While it is Respondent's recommendation that the Appellant would benefit from an ICF/IID placement, rather than a nursing facility, the Appellant meets the criteria for nursing facility services and deference is given to the healthcare surrogate's wishes that the Appellant be placed in a nursing facility instead of an ICF/IID placement.

CONCLUSIONS OF LAW

- 1) Policy requires the presence of five (5) deficits as derived from the PAS assessment tool for eligibility for nursing facility services.
- 2) If an individual is found to be medically eligible for nursing facility services, and the possible presence of a major mental illness or intellectually disability is identified from the PAS, a referral for an evaluation for specialized services is made.
- 3) Based on the Appellant's diagnoses of intellectual disability, cerebral palsy and seizure disorder, a Level II evaluation for specialized services was completed, and the recommendation of placement in an ICF/IID setting was given.
- 4) Policy does not prohibit an individual from a nursing facility placement if the specialized services for intellectual disability is refused, and the medical criteria for nursing facility services is otherwise met.

DECISION

It is the decision of the State Hearing Officer to **reverse** the decision of the Respondent to deny the Appellant Long-Term Care (nursing facility) services.

ENTERED this 29th day of August 2018

**Kristi Logan
State Hearing Officer**