



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

April 20, 2010

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on the fair hearing held January 29, 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. 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 document a diagnosis of mental retardation before the age of 22, and did document a social history which is inconsistent with the need for an ICF/MR level of care.

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
Carol Brawley, WV Bureau for Behavioral Health and Health Facilities
-----, [REDACTED] WV

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

-----,

Claimant,

v.

Action Number: 09-BOR-1871

**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 20, 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 29, 2010, on a timely appeal filed September 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

-----, [REDACTED] Claimant's Representative

Carol Brawley, Title XIX MR/DD Waiver Program Coordinator, DHHR

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 by conference call.

The Hearings Officer swore in all participants 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 August 24, 2009
- D-3 DD-2A, Physician's Evaluation of the Need for ICF/MR Level-of-Care, dated May 29, 2009
- D-4 DD-3, Comprehensive Psychological Evaluation from [REDACTED] dated July 1, 2009

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. "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) The Claimant's Case Management Agency, [REDACTED] submitted an application to determine her 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 on August 24, 2009 (Exhibit D-2). The notice explained that the reason for denial, in pertinent part, was:

The physician has not offered an eligible diagnosis for the Title XIX MR/DD Waiver program on the DD-2A. The packet lacked documentation which supports the presence of mental retardation or a related condition with concurrent substantial adaptive deficits within the developmental period. Social history, as reported in the DD-3, is inconsistent with 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 February 27, 2009 (Exhibit D-3). The Demographic Information section of this document indicated that Claimant was married and lived with her husband. (Testimony indicates she is separated at present.) The Medical Assessment section, Neurological subsection, requires the evaluating physician to indicate with a check mark areas that are normal, and with an "x" areas that are not normal, for the areas of alertness, coherence, attention span, speech, sensation, coordination, gait, muscle tone and reflexes. The evaluating physician entered a check mark in all of these areas. The Diagnostic Section of this document reported a diagnosis of anxiety and depression at Axis I, 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 [REDACTED] WV, dated July 1, 2009 (Exhibit D-4). Under the section labeled "Relevant History" the psychologist has written that Claimant would have had testing for special education placement while in school, but no prior testing was available when the assessment was completed. Under the section labeled, "Behavioral History" the psychologist has written in part,

[Claimant] received special education services while in school. She reports she completed 9th grade but dropped out when she was 16 to take care of her grandmother. She attended GED classes . . .

The Behavioral History section did not state that Claimant had a diagnosis of mental retardation before the age of 22.

Under the section labeled "Diagnosis," the psychologist has evaluated Claimant on Axis II as Mental Retardation, Mild.

Under the section labeled "Placement Recommendations" the psychologist has written,

In my opinion this individual requires the ICF/MR level of care, supervision, and training in the community as provided by the Title XIX Waiver program.

- 5) Department's witness testified that he was the psychologist consultant who evaluated Claimant's application. He testified that Claimant's physician has not offered an eligible diagnosis for the Title XIX MR/DD Waiver Program on the DD-2A. He testified that the primary reason for the denial from the DD-2A is in the diagnostic section of that document. He stated that the reviewer is looking for a diagnosis under Axis II, where the evaluating physician lists cognitive developmental conditions and personality disorders. Axis I is where a physician would list emotional or psychiatric types of disorders. However, Claimant's physician has listed a diagnosis of Axis I, anxiety and depression. There is no Axis II diagnosis. The diagnosis has to be mental retardation or a related condition other than mental illness. The Code of Federal Regulations (CFR) and State Policy eliminate eligibility for this program for individuals whose primary diagnosis is mental illness.
- 6) Department's witness testified regarding Claimant's DD-3 Psychological Evaluation that it does not document the presence of mental retardation or a related condition with concurrent adaptive deficits in the developmental period. The DD-3 does provide a social history that reflects a prior level of functioning inconsistent with an individual who needs an institutional level of care. The DD-3 indicates Claimant has been married two times and has had children. The behavioral history section of the DD-3 indicates that Claimant received Special Education services while in school. But, he stated, there are many reasons why a person may require these services. A person may have learning disabilities, mild delays, behavior problems or psychiatric issues which would necessitate their receiving these services, but Claimant's application packet did not contain the documentation to indicate to the reviewer what her Special Education services were. He stated that the DD-3 contains the statement that "Claimant would

have had testing for special education placement while in school, but no prior testing was available when the assessment was completed.” However, he added, the Title XIX MR/DD Waiver Program requires documentation that Claimant had substantial delays, especially since she has been diagnosed with depression and anxiety. The DD-3 indicates that Claimant quit school when she was 16 years old to take care of her grandmother. He stated that typically, individuals who require an ICF/MR level of care would not be able to take care of others, particularly at 16 years of age. He testified that the DD-3 indicates that Claimant was married at the age of 19 years and remained married for 14 years, had two children, divorced and remarried. He stated that this is quite inconsistent with an individual who requires an institutional level of care.

- 7) Claimant’s representative testified that her Case Management Agency completed the Title XIX MR/DD Waiver Program packet at the behest of Wellspring, the public mental health agency at which Claimant received services. Neither she nor Claimant offered substantial evidence or testimony to refute Department’s position that Claimant’s application did not meet the requirements of the Title XIX MR/DD Waiver Program.

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, with documentation to support that the diagnosis occurred before the applicant was 22 years of age. 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 it did not document that Claimant had a diagnosis of mental retardation before she was 22 years of age, and that it did document that Claimant functioned at a level that was inconsistent for an individual requiring an institutional level of care.
- 3) Claimant’s application packet contained a physician’s evaluation that clearly showed that she did not have a diagnosis of mental retardation, and there was no documentation attached to indicate that she had such a diagnosis when she was younger than 22 years of age.
- 4) Claimant’s application packet contained a psychological evaluation that clearly showed that she did not function as a person who required an institutional level of care. She had been married for 14 years and had children, and had been a caretaker for her grandmother. The psychological evaluation also did not document a diagnosis of mental retardation and concurrent adaptive deficits before the age of 22 years.

- 5) Because Claimant's application did not document a diagnosis of mental retardation before she was 22 years old, and because the historical information showed that her functioning was inconsistent with an individual who required an institutional level of care, the Department was correct to deny her Title XIX MR/DD Waiver Program 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 20th Day of April, 2010.

Stephen M. Baisden
State Hearing Officer