



STATE OF WEST VIRGINIA  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
Office of the Inspector General  
Board of Review

Jeffrey H. Coben, MD  
Interim Cabinet Secretary

Sheila Lee  
Interim Inspector General

April 11, 2023

[REDACTED]

RE: [REDACTED] v. WV DHHR  
ACTION NO.: 23-BOR-1257

Dear [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,

Lori Woodward, J.D.  
Certified State Hearing Officer  
Member, State Board of Review

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

cc: BMS, PC&A

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

██████████,

**Appellant,**

v.

**Action Number: 23-BOR-1257**

**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 ██████████. 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 April 5, 2023, on an appeal filed January 12, 2023.

The matter before the Hearing Officer arises from the November 4, 2022, decision by the Respondent to deny prior approval for Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IID) services.

At the hearing, the Respondent appeared by Charlie Bowen, PC&A. The Appellant was present but appeared by ██████████, WV DHHR Bureau of Social Services. Appearing as witnesses for the Appellant were ██████████, Disability Rights Advocates, ██████████, Southern Highland Crisis Respite Unit. Present at the hearing but not participating were, ██████████, Disability Rights Advocates, ██████████, WV DHHR Bureau of Social Services, and ██████████, PC&A. The witnesses were placed under oath and the following documents were admitted into evidence.

**Department's Exhibits:**

- D-1 Bureau for Medical Services Provider Manual §511.2, *et. seq.*
- D-2 Denial Notice, dated November 4, 2022
- D-3 West Virginia Department of Health and Human Resources ICF/IID Level of Care Evaluation (DD-2A), dated September 26, 2022
- D-4 Undated handwritten medication list
- D-5 Psychological Evaluation dated August 10, 2022 (DD-3)
- D-6 West Virginia Department of Health and Human Resources Social Assessment/Personal Profile (DD-4) dated September 28, 2022
- D-7 Notice of Eligibility Committee and/or Individualized Education Program Team Meeting dated November 8, 2013

- D-8 Individualized Education Program, Institutional Education Programs dated November 18, 2013
- D-9 Individualized Education Program, Institutional Education Programs dated November 30, 2012
- D-10 Amendment of the IEP Without Convening an IEP Team Meeting dated September 6, 2012
- D-11 Individualized Education Program [REDACTED] Schools dated December 6, 2011

**Appellant's Exhibits:**

- A-1 Independent Psychological Evaluation IPE I/DD, West Virginia I/DD Waiver dated June 24, 2014

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 is a 26-year-old who applied for prior approval for ICF/IID services.
- 2) The Appellant has a diagnosis of mild intellectual disability prior to age 22. (Exhibit D-5)
- 3) The Appellant has a diagnosis of ADHD, Major Depressive Disorder, Impulse Control Disorder, Sexual Abuse of a Child (both victim and perpetrator), Mood Disorder, Stimulant Use Disorder, and PTSD. (Exhibit D-5)
- 4) The Appellant's mild intellectual disability diagnosed prior to age 22 was not accompanied by the presence of at least 3 out of the identified 6 substantial adaptive deficits for I/DD Waiver program eligibility. (Exhibits A-1 and D-5)
- 5) At the age of 12 the Appellant was placed in several mental health facilities until she was 17 years old when she was transferred to a group home, and then at age 18 she was transferred to a treatment facility. (Exhibit D-5)
- 6) As an adult, the Appellant has been admitted to the [REDACTED] where she admitted herself a year ago. (Exhibits D-5, D-6, and A-1)
- 7) The Respondent issued a Notice of Denial on November 4, 2022 advising that prior approval for ICF/IID services was denied because the Appellant did not meet medical criteria to establish program eligibility. (Exhibit D-2)

## **APPLICABLE POLICY**

Bureau for Medical Services Provider Manual §511.2.2 states individuals must meet both medical and financial eligibility to receive ICF/IID services. Individuals seeking ICF/IID services may have their eligibility determined prior to or after their admission to an ICF/IID facility.

To establish eligibility prior to admission, a complete packet of required information must be submitted no more than 30 days prior to placement in the ICF/IID facility and placement must occur within 90 days of the date of the DD-3. To establish initial eligibility for post admission, a complete packet of required information must be submitted no more than thirty 30 days after placement in the ICF/IID facility. The DD-3 must be current (within 90 days of placement).

All submitted information must be current. The prior eligibility packet of information includes the DD-2A, DD-3, and DD-4 and must be submitted to the BMS or the ICF/IID contracted agent in order to determine eligibility for each applicant for whom payment is requested. Current is defined as:

- DD-2A (Medical Evaluation) must have been completed within 180 days of the placement date. Additionally, any Medical Evaluation dated prior to 180 days of receipt by BMS or the ICF/IID contracted agent shall be considered out of date.
- DD-3 (Psychological Report) must have been completed within 90 days of the placement date. Additionally, any psychological report dated prior to 90 days of receipt by BMS or the ICF/IID contracted agent shall be considered out of date.
- DD-4 (Social History) must have been completed within 180 days of the placement date. Additionally, any social history dated prior to 180 days of receipt by BMS or the ICF/IID contracted agent shall be considered out of date.

Upon receipt of a complete packet, an eligibility determination will be made within 30 days and the decision communicated to the applicant and/or the provider that submitted the packet. Post-admission eligibility determination requires the provider to submit a DD-1, and a complete DD-5 (IPP) within thirty 30 days after the intake to BMS or the ICF/IID contracted agent. Payment authorization for start and stop dates shall be delayed until the receipt of the DD-1, the DD- 5 (IPP) and the Inventory for Client and Agency Planning (ICAP).

BMS, through the ICF/IID contracted agent, determines the medical eligibility for an applicant in the ICF/IID Program. In order to be eligible for ICF/IID placement, the applicant must meet the following criteria:

1. The applicant must have a diagnosis of intellectual disability with concurrent substantial deficits manifested prior to age 22 or a related condition which constitutes a severe and chronic disability with concurrent substantial deficits manifested prior to age 22.
  - a. Examples of related conditions which may, if severe and chronic in nature, make an individual eligible for ICF/IID placement include, but are not limited to, the following:
    - Autism;
    - Traumatic brain injury;

- Cerebral Palsy
- Spina Bifida; and
- Any condition, other than mental illness, found to be closely related to intellectual disability, because this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of persons with an intellectual disability, and requires services similar to those required for persons with an intellectual disability.

b. Additionally, the applicant who has a diagnosis of intellectual disability or a severe related condition with associated concurrent adaptive deficits must meet the following requirements:

- Likely to continue indefinitely, and
- Must have the presence of at least three substantial deficits out of the six identified major life areas listed below.

2. The applicant must have substantial adaptive deficits in three or more of the following six major life areas:

- self-care,
- receptive and/or expressive language, (communication)
- learning, (functional academics)
- mobility,
- self-direction,
- capacity for independent living which includes the following six subdomains,
  - home living,
  - social skills,
  - employment,
  - health and safety,
  - community use
  - leisure activities.

For the capacity for independent living major life area to be met, the applicant must be substantially delayed in at least three of the six sub-domains (home living, social skills, employment, health and safety, community use and leisure activities).

Substantial adaptive deficit is defined as scores on standardized measures of adaptive behavior that are three standard deviations below the mean or less than one percentile when derived from non-ID normative populations, or in the average range or below the 75th percentile when derived from ID normative populations.

The presence of substantial deficits must be supported by the additional documentation submitted for review (e.g. Individual Education Program (IEP), Occupational therapy (OT) evaluations, narrative descriptions, etc.). Substantial deficits must be documented through both the narrative documents and the standardized measures of adaptive behavior.

3. The applicant must have a need for an ICF/IID level of care that:

- is certified by a physician (DD-2A) and,
- is documented as being required by the licensed psychologist (DD-3) and;
- is recommended by a licensed social worker (DD-4).

4. The applicant must require and would benefit from active treatment.
  - Evaluations of the applicant must demonstrate a need for intensive instruction, services, assistance, and supervision in order to learn new skills and increase independence in activities of daily living.

## **DISCUSSION**

The Appellant is a 26-year-old who applied for prior approval for ICF/IID services. On November 4, 2022, the Respondent notified the Appellant that prior approval for ICF/IID services had been denied as the submitted documentation did not support the presence of substantial delays prior to age 22; that the documentation supported delays that are primarily related more to mental health challenges rather than intellectual disability and/or related condition; that based on the results contained in the assessments, documentation did not support the requirement of active treatment typically provided in an ICF/IID facility; and that the documentation submitted does not support the presence of substantial adaptive deficits in three or more of the six major life areas identified for ICF/IID eligibility. The Appellant appeals the Respondent's decision.

The Respondent must show by a preponderance of the evidence that the documentation submitted for the ICF/IID program application did not establish that the Appellant had a diagnosis of intellectual disability with concurrent substantial deficits manifested prior to age 22 or a related condition which constitutes a severe and chronic disability with concurrent substantial deficits manifested prior to age 22.

The Appellant does have a diagnosis of mild intellectual disability prior to age 22, however, the presence of at least 3 out of the identified 6 substantial adaptive deficits for I/DD Waiver program eligibility was not established.

The Respondent's witness, Charlie Bowen, who assessed the documentation submitted for the Appellant's ICF/IID application, testified that there was no indication that the Appellant had at least three substantial adaptive deficits that accompanied her diagnosis of mild intellectual disability. Mr. Bowen testified that the April 2022 IPE narrative indicated that the Appellant was able to perform self-care needs independently or with little prompting. Additionally, the documentation noted that the Appellant recognizes common safety signs, is aware of traffic, and can make small purchases. Other activities that the Appellant is able to perform include writing notes to herself, is able to read a list, use a phone, enjoys writing songs, and chooses to be bisexual. Mr. Bowen also explained that the Appellant was able to choose to elope from an independent living arrangement. The DD-2A submitted with the Appellant's application corroborated the narrative in the April 2022 IPE.

The April 2022 IPE tests performed evaluated the Appellant's adaptive behavior by using the Adaptive Behavior Assessment System – Third Edition (ABAS-3), however the reporter for this evaluation is unknown. Substantial adaptive deficit is defined as scores on standardized measures of adaptive behavior that are three standard deviations below the mean or less than one percentile. For this test, the mean is 10 with a standard deviation of 3, which Mr. Bowen explained that scaled scores of 1 and 2 are considered substantial deficits. All of the scaled scores on the ABAS-3 were

1. However, these scores were considered invalid as they did not match the narrative when reviewing the totality of the other documentation submitted with the application, which is required for program eligibility.

Although the Appellant's June 2014 IPE was not submitted as part of the ICF/IID application, it was entered as an exhibit for the hearing. Upon review, Mr. Bowen noted that the June 2014 IPE also failed to demonstrate the presence of three substantial adaptive deficits. Mr. Bowen did concede that the 2014 IPE did show substantial adaptive deficits in the area of CIL and possibly functional learning, although he stated that it was more likely due to the Appellant's mental illness diagnoses. Nevertheless, those results still did not establish program eligibility. Mr. Bowen also noted that the Appellant's IEPs showed that she required only minimal weekly special education classes of 30 hours per week. Mr. Bowen testified that qualifying individuals for this program generally require much more.

Mr. Bowen also testified that the Appellant does not meet the policy defined requirement of needing an ICF/IID level of care. The Appellant is generally independent and is able to function with little supervision without the need for a continuous active treatment program as most individuals who are in the one percentile of the population.

The Appellant's witnesses testified about the Appellant's current level of functioning and need for prompting for tasks. However, there was no additional evidence provided to show that the Appellant's diagnosis of mild intellectual disability prior to age 22 was accompanied by substantial adaptive deficits in three of the six major life areas. Therefore, the Respondent's denial for prior approval for ICF/IID services is affirmed.

### **CONCLUSION OF LAW**

1. To be eligible for ICF/IID services an individual must have a diagnosis of intellectual disability with concurrent substantial deficits manifested prior to age 22 or a related condition which constitutes a severe and chronic disability with concurrent substantial deficits manifested prior to age 22, and the need for an ICF/IID level of care and benefit from active treatment.
2. The Respondent showed by a preponderance of evidence that the Appellant's diagnosis of mild intellectual disability manifested prior to age 22 was not accompanied by concurrent substantial deficits and that the Appellant does not have the need for and ICF/IID level of care or benefit from active treatment.
3. Because the Appellant did not meet medical eligibility for ICF/IID services, the Respondent correctly denied the Appellant's application.

**DECISION**

It is the decision of the State Hearing Officer to **UPHOLD** the decision of the Respondent to deny prior approval for ICF/IID services.

**ENTERED this 11<sup>th</sup> day of April 2023.**

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**Lori Woodward, Certified State Hearing Officer**