



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

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Jolynn Marra
Interim Inspector
General

October 29, 2020



RE: [REDACTED] v. WVDHHR
ACTION NO.: 20-BOR-2153

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 Board of Review 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 that may be taken if you disagree with the decision reached in this matter.

Sincerely,

Tara B. Thompson, MLS
State Hearing Officer
State Board of Review

Enclosure: Appellant's Recourse
Form IG-BR-29

cc: Kelly Coen, Child Care Resource Center
Brittany Lucci, Child Care Resource Center

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

██████████,

Appellant,

v.

ACTION NO.: 20-BOR-2153

**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' (DHHR) Common Chapters Manual. This fair hearing was convened on October 14, 2020 an appeal filed September 14, 2020.

The matter before the Hearing Officer arises from the September 14, 2020 determination by the Respondent to terminate the Appellant's eligibility for child care services.

At the hearing, the Respondent appeared by Kelly Coen (Ms. Coen), Child Care Resource Center. Appearing as witnesses on behalf of the Respondent were Brittany Lucci, Director —Child Care Resource Center, and Denise Richmond (Ms. Richmond), Child Care Specialist —Division of Early Care and Education. The Appellant appeared *pro se*. All witnesses were sworn and the following documents were admitted into evidence.

Department's Exhibits:

- D-1 Child Care Parent Services Agreement, dated September 11, 2019
- D-2 Child Care Resource Center Policy Exception Form, submitted August 14, 2019
- D-3 DHHR Child Care Certificate, issued September 26, 2019
- D-4 Letter by ██████████, M.D., ██████████, dated February 20, 2020
- D-5 Letter by Appellant, received February 25, 2020
- D-6 DHHR Child Care Certificate, issued March 2, 2020
- D-7 DHHR Child Care Certificate, issued June 16, 2020
- D-8 Child Care Subsidy Policy, November 1, 2019
- D-9 Child Care Subsidy Policy, November 1, 2019
- D-10 **

- D-11 DHHR Child Care Parent Notification Letter Notice of Denial or Closure, created on September 1, 2020
- D-12 DHHR Provider Notification Letter, dated September 1, 2020
- D-13 DHHR Child Care Certificate, issued September 1, 2020
- D-14 Request for pre-hearing conference, dated September 1, 2020; Appellant letter, dated September 1, 2020; and letter by [REDACTED], M.D., [REDACTED], dated September 1, 2020

Appellant's Exhibits:

None

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 following Findings of Fact are set forth.

** Evidence label D-10 skipped in error when labeling evidence during the hearing.

FINDINGS OF FACT

- 1) The Appellant and her husband, [REDACTED] (Mr. [REDACTED]), have been recipients of child care services benefits for their two mutual minor children, [REDACTED] and [REDACTED], since September 11, 2019 (Exhibits D-1, D-3, D-6, D-7, and D-13).
- 2) The Appellant's minor children, [REDACTED] and [REDACTED], are under the age of six (Exhibits D-6, D-7, and D-13).
- 3) On September 1 and September 14, 2020, the Respondent issued notices advising the Appellant that she was no longer eligible for child care services, effective September 14, 2020, because her policy exception had expired and Mr. [REDACTED] was not participating in a qualifying activity (Exhibit D-11).
- 4) The September 1, 2020 notice advised the Appellant to provide verification of employment, school, or documentation verifying WV Works placement/ SPOKES class for Mr. [REDACTED] by September 14, 2020 (Exhibit D-11).
- 5) No policy sections regarding the expiration of the Appellant's policy exception or the denial of the policy exception request were included on the September 1 and September 14, 2020 notices (Exhibit D-11).
- 6) The Appellant is the head of household for her family.
- 7) The Appellant's employment and Mr. [REDACTED] ongoing terminal illness prevent them from providing care and supervision of the children in the household while the Appellant is working (Exhibits D-1 through D-3).

- 8) Since July 26, 2019, Mr. [REDACTED] has a [REDACTED] record of ongoing cancer diagnosis and treatment for astrocytoma of the spinal cord, a central nervous system tumor which creates neurological physical impairment that causes significant pain, weakness, numbness, and affects his ability to perform major life activities including self-care, lifting, working, and independently providing child care (Exhibits D-2, D-4, and D-14).
- 9) On February 25 and September 1, 2020 Mr. [REDACTED] was receiving chemotherapy treatment expected to continue until at least February 2021 and was receiving ongoing oncologic care “for the foreseeable future” (Exhibits D-4 and D-14).
- 10) On August 14, 2019, February 25, and September 1, 2020, the Appellant submitted written requests for continuation of child care assistance due to Mr. [REDACTED] ongoing illness complications, lack of informal child care, and necessity for the Appellant to work to provide financially for the family (Exhibits D-2, D-5, and D-14).
- 11) At the time of the Appellant’s February 25 and September 1, 2020 requests, Mr. [REDACTED] specific cancer diagnosis was cervical intradural intramedullary grade 2 diffuse astrocytoma tumor (Exhibits D-4, D-5, and D-14).
- 12) The Respondent approved the Appellant’s August 14, 2019 and February 25, 2020 requests for an illness exception to the policy requirement that both parents in the household participate in a qualifying activity to be eligible for child care services (Exhibits D-2, D-3, D-6, and D-7).
- 13) The Appellant’s child care services benefits were continued during the pendency of the fair hearing.

APPLICABLE POLICY AND REGULATION

West Virginia Child Care Subsidy Policy & Procedures Manual (WVCCSPP) § 1.0.2 provides:

The primary goal of child care services is to provide experiences to children which will foster their healthy development while enabling their parents to participate in work or educational activities. Child care supplements the care and protection that a child receives from his parents.

WVCCSPP § 3.2.3 provides in part:

If both parents are in the home, child care services cannot be approved for work related needs unless both are participating in a qualifying activity such as working or attending school/training.

WVCCSPP §§ 3.0 and 4.0 provide in part:

To be eligible for child care assistance, the family must verify the identity of the head of household, meet WV residence requirements, income requirements, and activity requirements. To be eligible for child care assistance, families must demonstrate a need for care. In general that means that the head of household must be involved in a qualifying activity that prevents a parent from providing care and supervision of the children in the household during the time the parent is participating in the activity. If there are two parents in the home, both must be involved in a qualifying activity.

WVCCSPP § 1.1.37 provides in part:

A waiver is a declaration that a certain rule is inapplicable in a particular circumstance.

WVCCSPP §§ 13.3 – 13.3.20 provide in part:

Child care regulatory specialists in county offices regulate informal and relative family child care homes, family child care homes, and family child care facilities, and ensure that programs that are legally exempt from regulation by WV state law meet health and safety standards required for receipt of federal funding. The child care regulatory specialist is responsible for submitting requests to DHHR supervisors for waivers, variances, and policy exceptions for family child care and exempt programs.

WVCCSPP §§ 4.7 – 4.7.2 provide in part:

Policy exceptions shall be reviewed by the CCR&R supervisor for approval and then forwarded to the Division of Early Care and Education via FACTS. In certain extraordinary situations—including medical treatment for a terminal illness, child care may be approved for children under the age of six. Exceptions are granted in order to give the family time to prepare a plan for coping with the illness and the effects of treatment and finding alternate child care arrangements/ assistance.

WVCCSPP §§ 4.7.2.4 provides in part:

Exceptions may be approved for a terminally ill patient undergoing treatment provided there is a physician's statement describing the medical condition and that the condition and/ or treatment prevents the care and supervision of children. The approval period will not exceed 6 months. This category of policy exception is for one time only per child care case or family. Child care may be approved if the illness or condition prevents the parent from providing minimal care and supervision of the children. A signed and dated medical statement from a licensed physician must describe how the medical condition prevents child care.

WVCCSPP §§ 6.5.2- 6.5.2.5 provide in part:

In unusual, extraordinary circumstances, exceptions to policy can be requested. Exceptions will be granted on an individual basis and only in situations where the circumstances of the client are so different from the norm that the policy is unfair or inappropriate when applied to the individual. Consideration is given to factors such as the age of the child, the child's ability for self-care, the amount of supervision or hands-on care required for the child, and if there are other household members present who can aid in the supervision of the child.

If denied, the case manager shall notify the parent in writing that the exception was not approved and the parent is responsible for payment to the provider. (See Chapter 4, for additional exception requirements based on a medical condition.)

WVCCSPP §§ 11.2-11.2.1.3 provide in part:

The notice must include the action or proposed action to be taken, the reasons for the action provided in terms readily understandable by the applicant, and citation of relevant policy sections supporting the action taken or proposed.

DISCUSSION

The Appellant protested the Respondent's September 14, 2020 termination of the Appellant's child care services benefits. The Appellant argued that Mr. [REDACTED] is unable to participate in qualifying activities or provide child care and that without child care services she would be unable to provide financially for her family. The Appellant requested relief from the Respondent's determination that she is ineligible for child care services. During the hearing, Ms. Richmond testified that the Respondent wanted "wholeheartedly" to grant the Appellant's illness exception request but could not because the policy did not permit granting any additional illness policy exceptions. Ms. Richmond testified that she would like to be able to help the Appellant more. Ms. Coen testified that the policy does not align with the Appellant's situation due to Mr. [REDACTED] rare form of cancer and requested a state-level review of the Appellant's circumstances to determine whether any changes could be made specifically for the family.

The Board of Review lacks the authority to alter the Respondent's policy to specifically provide relief in the Appellant's matter. This Hearing Officer can only determine if the Respondent's termination of the Appellant's child care benefits was conducted according to policy. The Respondent bears the burden of proof and had to prove by a preponderance of evidence that Mr. [REDACTED] was ineligible for an illness related exception from the policy requirement that both parents participate in qualifying activities to be eligible for child care.

ELIGIBILITY FOR POLICY EXEMPTION

The policy specifies that a primary goal of child care services is to enable parents to participate in work and supplement the care and protection that a child receives from his parents. The policy

specifies that to be eligible for child care services, both parents in the household are required to participate in a qualifying activity.

During the hearing, the Appellant testified that she was required to return to work to provide for her family financially when her husband became ill. The Appellant testified that Mr. [REDACTED] has an extremely rare form of cancer on the base of his brain and brainstem which has grown around his spinal cord. She testified that due to his illness, Mr. [REDACTED] has lost 75% of mobility in his neck, cannot stand longer than 10-15 minutes, experiences pain when sitting, has difficulty looking down, and has limited mobility of his hands and feet. The Respondent did not contest the Appellant's assertions regarding Mr. [REDACTED] illness-related limitations. The evidence reflected a medical record of Mr. [REDACTED] ongoing cancer diagnosis and treatment which create neurological physical impairment that causes significant pain, weakness, numbness, and affects his ability to perform major life activities including self-care, lifting, working, and independently providing child care. The evidence established that there is no anticipated end to Mr. [REDACTED] illness related limitations.

The policy specifies that the child care regulatory specialist is responsible for submitting requests to DHHR supervisors for waivers, variances, and policy exceptions. While no definition of exception is provided in the policy manual, waiver is defined as a declaration that a certain rule is inapplicable in a particular circumstance.

Exceptions

Although a definition of exception is not provided, the policy stipulates that, for children under the age of six, when a parent's physician submits a statement verifying that the parent is receiving medical treatment for terminal illness and the illness or condition prevents the parent from providing minimal care and supervision of the children, a one-time six-month policy exception is granted to give the family time to plan for coping with the illness and find alternate child care arrangements. The Appellant argued that due to lacking informal supports, no alternate child care arrangements were possible and that the loss of child care services would result in the Appellant losing her job and render her unable to provide for the family's basic needs.

The policy sections § 4.7.2.4 and § 6.5.2 inconsistently apply the terms *exceptions* and *exception*, but the meaning of the section is made clear by the narrative specifying that only one illness policy exception may be granted in unusual, extraordinary circumstances. Exceptions to eligibility policy can be requested and that exceptions will be granted on an individual basis and only in situations where the circumstances of the client are so different from the norm that the policy is unfair or inappropriate when applied to the individual client. The evidence verified that the Appellant received one now-expired six-month policy exception.

Pursuant to § 6.5.2.5, the Respondent was required to issue a notice stating that the Appellant's September 1, 2020 policy exception request was denied, the reasons for the denial in terms readily understandable by the Appellant, and citation of relevant policy sections supporting the denial of the policy exception. No evidence was entered to verify that a notice was issued to advise the Appellant of the Respondent's decision regarding her September 1, 2020 request for illness policy exception. Instead, the Respondent issued a notice of denial or closure upon the Appellant's

September 1, 2020 request for continuation of child care services—which did not reflect any policy sections regarding the expiration of the Appellant’s policy exception or the denial of the policy exception request. While the Respondent failed to issue a denial notice in response to the Appellant’s September 1, 2020 policy exception request or include applicable policy citations on the September 14, 2020 child care services termination notice, the Appellant was found not to have been prejudiced by the Respondent’s error as the matter of the denial of the Respondent’s September 1, 2020 policy exception request and the related policy sections were addressed at the hearing. Although the Appellant’s September 14, 2020 notice of termination of child care services did not provide the Appellant with advanced notice, the September 1, 2020 notice issued by the Respondent advised the Appellant that child care services would be terminated September 14, 2020.

The evidence verified that following the Appellant’s August 14, 2019 and February 25, 2020 written requests for continuation of child care assistance, the Appellant was approved for ongoing child care services. There are no policy provisions permitting extension of policy exceptions. During the hearing, Ms. Richmond testified that child care policy exception extensions were granted because of coronavirus disease 2019 (COVID-19) related agency issues receiving documentation. The Appellant did not contest the Respondent’s past action to extend her policy exception.

Waivers

While this Hearing Officer cannot grant the Respondent’s request to apply policy changes to provide relief in the Appellant’s matter, upon *de novo* review, this Hearing Officer finds that the policy specifies that the child care regulatory specialist is responsible for requesting a policy waiver—which would declare a certain rule as inapplicable to a particular circumstance if approved.

The issue of the Respondent’s termination of child care services was whether Mr. [REDACTED] was eligible for an illness policy exception and not his eligibility for a waiver. However, because the Respondent’s policy is silent regarding procedures for submitting, assessing, approving, and denying a policy waiver, the Respondent should determine whether Mr. [REDACTED] is appropriate for consideration of policy waiver eligibility.

CONCLUSIONS OF LAW

- 1) To be eligible for child care services, both parents in the household must participate in a qualifying activity or be eligible for a policy exemption.
- 2) When a parent has a physician record of terminal illness and the illness prevents the parent from providing minimal care and supervision of the children, the parent may be granted a one-time six-month policy exception.
- 3) The evidence verified that the Appellant’s one-time six-month policy exception had expired.

- 4) The Respondent's action to terminate the Appellant's child care services because the Appellant's policy exception had expired was correct.

DECISION

It is the decision of the State Hearing Officer to **UPHOLD** the Respondent's decision to terminate the Appellant's child care services.

ENTERED this 29th day of October 2020.

Tara B. Thompson, MLS
State Hearing Officer