



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

**Bill J. Crouch  
Cabinet Secretary**

**Board of Review  
PO Box 1247  
433 Mid Atlantic Parkway  
Martinsburg, West Virginia 25402**

**M. Katherine Lawson  
Inspector General**

June 13, 2019

[REDACTED]

RE: [REDACTED] A JUVENILE v. WV DHHR  
ACTION NO.: 19-BOR-1640

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, State Hearing Official  
Member, State Board of Review

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

cc: Bureau of Medical Services

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

■, A JUVENILE,

**Appellant,**

v.

**ACTION NO: 19-BOR-1640**

**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 ■, A JUVENILE. 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 June 6, 2019, on an appeal filed April 26, 2019.

The matter before the Hearing Officer arises from the April 1, 2019 decision by the Respondent to deny the Appellant's request for services under the Children with Disabilities Community Services Program (CDCSP).

At the hearing, the Respondent appeared by Linda Workman, consulting psychologist for the Bureau of Medical Services (BMS). The Appellant was represented by his mother, ■. All witnesses were sworn, and the following documents were admitted into evidence.

**Department's Exhibits:**

- D-1 CDCSP Initial Application Eligibility Determination dated March 15, 2019
- D-2 Bureau of Medical Services Policy, Chapter 526, Children with Disabilities Community Services Program (CDCSP), §526.5, ICF/IID Level of Care
- D-3 West Virginia Department of Health and Human Resources Children with Disabilities Community Services Program (CDCSP) Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IID) Level of Care Evaluation (CDCSP-2A), dated March 1, 2019
- D-4 Psychological Evaluation dated February 11, 2019

**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 Hearing Officer sets forth the following Findings of Fact.

### **FINDINGS OF FACT**

1. The Appellant is a 10 year-old child diagnosed with Autism. (Exhibits D-3, D-4)
2. A CDCSP ICF/IID Level of Care application was made on behalf of the Appellant on March 1, 2019. (Exhibit D-3)
3. Linda Workman, a licensed psychologist contracted by the Bureau of Medical Services, reviewed the Appellant's application and supporting documentation.
4. A Psychological Evaluation (PE) administered to the Appellant on February 11, 2019 by [REDACTED] M.A., a licensed psychologist, was submitted as part of the CDCSP application. (Exhibit D-4)
5. The Respondent conceded that the Appellant's diagnosis of Autism met the diagnostic requirement for program eligibility due to its severity.
6. The Respondent conceded that the Appellant has substantial deficits in two (2) major life areas of self-care and self-direction.
7. The Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) showed the Appellant as having a Full Scale IQ of 100, indicating an average range of intellectual ability. (Exhibit D-4)
8. The Wide Range Achievement Test-Fifth Edition (WRAT-5) revealed scores in the 70's, indicating intellectual functioning within the average range. (Exhibit D-4)
9. The information gleaned for the Adaptive Behavior Assessment System-3 (ABAS-3) was from the Appellant's mother. The ABAS-3 showed scaled scores of one (1) in the areas of communication, functional academics, health and safety and self-care, and scaled scores of two (2) in the areas of self-direction and social.
10. The narrative and other test scores did not substantiate the low scaled scores on the ABAS-3 in the areas of communication, health and safety, or in the area of functional academics. (Exhibit D-4)
11. The Respondent notified the Appellant on March 15, 2019, that his application for CDCSP services had been denied, stating 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. Specifically, the documentation failed to demonstrate

substantial limitations in the following major life areas: Learning, Receptive or Expressive Language, Mobility, or Capacity for Independent Living.” (Exhibit D-1).

### **APPLICABLE POLICY**

The policy under the CDCSP ICF/IID Level of Care is found in the Bureau for Medical Services (BMS) Manual, Chapter 526.5.

BMS Manual §526.5.1, **Medical Eligibility for ICF/IID Level of Care**, in part, instructs that to be medically eligible, the child must require the level of care and services provided in an ICF/IID as evidenced by required evaluations and other information requested and corroborated by narrative descriptions of functioning and reported history. Evaluations of the child must demonstrate:

- A need for intensive instruction, services, assistance, and supervision in order to learn new skills, maintain current level of skills, and/or increase independence in activities of daily living; AND
- A need for the same level of care and services provided in an ICF/IID.

The child must meet the medical eligibility criteria in this section and in each of the following sections 526.5.2 and its subparts in order to be eligible for this program.

BMS Manual §526.5.2, **Medical Necessity for ICF/IID Level of Care**, explains that Medical Necessity for ICF/IID Level of Care is determined by the evaluation of the child’s diagnosis, functionality and need for active treatment as defined in this Section and its subparts.

BMS Manual §526.5.2.1, **Diagnosis for ICF/IID Level of Care**, states, in part, that the applicant must have a diagnosis of intellectual disability with concurrent substantial deficits manifested prior to age 19 or a related condition which constitutes a severe and chronic disability with concurrent substantial deficits manifested prior to age 19.

BMS Manual §526.5.2.2, **Functionality for ICF/IID Level of Care**, requires that the child have substantial deficits in three (3) of the six major life areas as listed below and defined in the 42 CFR §435.1010 of the CFR. Substantial deficits associated with a diagnosis other than intellectual disability or a related condition do not meet eligibility criteria. Additionally, any child needing only personal care services does not meet the eligibility criteria for ICF/IID Level of Care.

- **Self-care** refers to such basic activities such as age appropriate grooming, dressing, toileting, feeding, bathing, and simple meal preparation.
- **Understanding and use of language** (communication) refers to the age appropriate ability to communicate by any means whether verbal, nonverbal/gestures, or with assistive devices.
- **Learning** (age appropriate functional academics).
- **Mobility** refers to the age appropriate ability to move one’s person from one place to another with or without mechanical aids.

- **Self-direction** refers to the age appropriate ability to make choices and initiate activities, the ability to choose an active lifestyle or remain passive, and the ability to engage in or demonstrate an interest in preferred activities.
- **Capacity for Independent living** refers to the following 6 sub-domains:
  - home living,
  - social skills,
  - employment,
  - health and safety,
  - community use,
  - leisure activities.

At a minimum, 3 of these sub-domains must be substantially limited to meet the criteria in this major life area.

Substantial deficits are defined as standardized scores of three (3) standard deviations below the mean or less than (1) one percentile when derived from a normative sample that represents the general population of the United States or the average range or equal to or below the seventy-fifth (75) percentile when derived from MR normative populations when intellectual disability has been diagnosed and the scores are derived from a standardized measure of adaptive behavior. The scores submitted must be obtained from using an appropriate standardized test for measuring adaptive behavior that is administered and scored by an individual properly trained and credentialed to administer the test. The presence of substantial deficits must be supported by not only the relevant test scores, but also the narrative descriptions contained in the documentation submitted for review, i.e., psychological, the IEP, Occupational Therapy evaluation, narrative descriptions, etc.).

BMS Manual §526.5.2.3, **Active Treatment for ICF/IID Level of Care**, requires that the child/legal representative submits documentation that supports that the child would benefit from continuous active treatment typically provided by a facility whose primary purpose is to furnish health and habilitation services to persons with intellectual disability or related conditions (i.e. ICF/IID). Active treatment includes aggressive and consistent implementation of a program of specialized and generic training, treatment, health services, and related services. Active treatment does not include services to maintain generally independent individuals who are able to function with little or no supervision or in the absence of a continuous active treatment program.

## **DISCUSSION**

One of the requirements for medical eligibility for the CDCSP is that the child needs the level of care provided by either an Acute Care Hospital, Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IID), or Nursing Facility (NF).

The Appellant requested CDCSP consideration under the ICF/IID Level of Care. This level of care under the CDCSP is appropriate for a child with a diagnosis of intellectual disability with concurrent substantial deficits manifested prior to age 19 or a related condition which constitutes a severe and chronic disability, with concurrent substantial deficits. The child must have substantial deficits in three (3) of the six (6) major life areas of self-care, understanding and use of language, learning, mobility, self-direction, and three sub-domains of capacity for independent

living of home living, social skills, employment (if applicable), health and safety, community use and leisure activities. Policy requires that the child show a need for the level of care and services provided in an ICF/IID as evidenced by evaluations and corroborated by narrative descriptions of functioning and reported history.

The Respondent's witness, Linda Workman, evaluated the Appellant's application and supporting documentation which included a PE administered on February 11, 2019 by [REDACTED], M.A., a licensed psychologist. Ms. Workman conceded that the Appellant's diagnosis of Autism is severe and is considered an eligible diagnosis for program eligibility. However, Ms. Workman found substantial adaptive deficits in only two (2) of the six (6) major life areas identified for ICF/IID eligibility: *self-care* and *self-direction*. Therefore, the Appellant's application was denied. Notification of the denial was sent to the Appellant on March 15, 2019. The Appellant's mother, [REDACTED], proffered that substantial adaptive deficits should have been awarded in the areas of *learning, receptive or expressive language, mobility, and capacity for independent living*.

#### Learning

Ms. Workman noted that the WISC-V and WRAT-5 tests revealed scores which suggested that the Appellant was functioning within the average range of ability. Ms. Workman testified that these scores are consistent with the narrative and with the ABAS-3 scores. Ms. [REDACTED] proffered that the Appellant's test scores are reflective of his great teacher with whom he is currently working. Ms. [REDACTED] testified that the Appellant has difficulty retaining information when he is on break from school, and quickly forgets what he has learned. The test scores and narrative do not indicate a substantial adaptive deficit in the area of learning.

#### Receptive or Expressive Language

Regarding the Appellant's functional ability in the area of receptive or expressive language, the narrative indicated that the Appellant's receptive language seems relatively well developed and that he is able to communicate basic wants and needs. Ms. Workman testified that the fact that the Appellant was able to participate in the tests administered to him during the PE along with a score of 111 on the WISC-V test indicating his level of functioning in this area was above average, does not show a substantial adaptive deficit in the area of receptive or expressive language.

#### Mobility

Ms. [REDACTED] testified that the Appellant was fitted for leg braces the previous week due to a rapid decline with his ability to walk. Ms. Workman testified that the application and the PE both noted the Appellant was ambulatory with no noted deficits in mobility. The narrative in the PE specifically noted that the Appellant "has effective use of all limbs and is fully ambulatory." Ms. Workman further testified that the need for leg braces would not rise to the level of being considered a substantial delay in the area of mobility because the Appellant still has the ability to transfer and get from one place to another and is able to feed and groom himself.

#### Capacity for Independent Living

To receive a substantial deficit in the area of Capacity for Independent Living (CIL), an individual must show substantial deficits in at least three (3) of the subdomains of home living, social skills, health and safety, community use, leisure activities and employment (if applicable). The ABAS-

3 scores (gleaned from responses from the Appellant's mother) showed potentially qualifying scaled scores of 1 in the subdomain of health and safety and 2 in the area of social skills. The other subdomain area scaled scores were: home living – 5; community use – 5; and, leisure activities – 3. Ms. [REDACTED] stated that she answered the test questions with a positive outlook about what the Appellant can do as opposed to what he cannot do. Therefore, she believed the scores were higher on the ABAS-3 than what they actually should be. Ms. Workman testified that in reviewing the application and PE narratives and tests, there were no other qualifying scores found in the CIL subdomains.

The Respondent proved by a preponderance of evidence that the evaluations and narratives considered in reviewing the Appellant's CDCSP application under the ICF/IID Level of Care showed that although the Appellant met the diagnostic criteria for ICF/IID eligibility, only two (2) substantial adaptive deficits in the major life areas of *self-care* and *self-direction* were identified. The Respondent correctly denied the Appellant's application for the CDCSP.

### **CONCLUSION OF LAW**

1. The Appellant must meet diagnostic, functionality, and active treatment criteria to establish program eligibility under the CDCSP ICF/IID Level of Care.
2. The Appellant's diagnosis of Autism met the diagnostic requirement for program eligibility due to its severity.
3. Policy requires that the Appellant have at least three (3) substantial deficits of the six (6) major life areas.
4. The Appellant was found to have only two (2) substantial deficits in functional abilities in the areas of *self-care* and *self-direction*.
5. Because the Appellant did not meet the functionality requirement for medical eligibility, the Respondent correctly denied the Appellant's application for the CDCSP ICF/IID Level of Care benefits.

### **DECISION**

It is the decision of the State Hearing Officer to **uphold** the Department's action to deny the Appellant's application for services under the CDCSP.

**ENTERED this 13<sup>th</sup> June 2019.**

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Lori Woodward, State Hearing Officer