



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

**Bill J. Crouch
Cabinet Secretary**

**BOARD OF REVIEW
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**Jolynn Marra
Interim Inspector General**

February 18, 2020



RE: [REDACTED], A MINOR v. WVDHHR
ACTION NO.:20-BOR-1040

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,

Danielle C. Jarrett
State Hearing Officer
Member, State Board of Review

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

cc: Linda Workman, [REDACTED] Representative

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

██████ A MINOR,

Appellant,

v.

Action Number: 20-BOR-1040

**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 Minor. 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 February 5, 2020, on an appeal filed January 7, 2020.

The matter before the Hearing Officer arises from the December 18, 2019 decision by the Respondent to deny medical eligibility 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 appeared by his mother, ██████. Both witnesses were sworn and the following documents were admitted into evidence.

Department's Exhibits:

- D-1 Bureau of Medical Services (BMS) § 526
- D-2 Notice of Denial, dated December 18, 2019
- D-3 Level of Care Evaluation (CDCSP-2A), dated November 7, 2019
- D-4 Psychological Evaluation (CSCSP-3), dated November 21, 2019
- D-5 Diagnosis list from ██████, M.D., dated September 20, 2019
- D-6 Letter from ██████ M.D., dated September 9, 2019

Appellant's Exhibits:

- A-1 Letter from ██████, Kindergarten Teacher at ██████, dated January 22, 2020
- A-2 ██████ County Schools Eligibility Committee Report, dated January 29, 2020; and Eligibility Determination Checklist, dated January 29, 2020

- A-3 [REDACTED] County Schools Specific Learning Disabilities (SLD) Team Report, dated January 29, 2020; [REDACTED] County Schools Screening: Health/Speech-Language, dated November 21, 2019; [REDACTED] County Schools Evaluation Report: Teacher, dated January 15, 2020; [REDACTED] County School District, [REDACTED] DIBELS Composite Scores; Reading Intervention Data Log, dated January 28, 2020; and [REDACTED] County Schools Parent Information Report, dated November 21, 2019
- A-4 Letter from [REDACTED], M.D., dated January 30, 2020; and Letter from [REDACTED], M.D., dated September 9, 2019
- A-5 [REDACTED] County Schools Education Evaluation Report, dated January 27, 2020; [REDACTED] County Schools Occupational Therapy Eligibility Report from [REDACTED], OTR/L; [REDACTED] County Schools Prior Written Notice of District's Proposal/Refusal, dated January 29, 2020; [REDACTED] County Schools Notice of Eligibility Committee and/or Individualized Education Program Team Meeting, dated January 15, 2020; Student Observation Form; and [REDACTED] County Schools Psychoeducational Evaluation, dated January 29, 2020

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 applied for CDCSP services based on an ICF/IDD level of care. (Exhibit D-3)
- 2) Psychological Consultation & Assessment (PC&A) is contracted through BMS to perform eligibility determinations for CDCSP.
- 3) On December 18, 2019, PC&A issued a notice of denial for the Appellant's application for CDCSP. (Exhibit D-2)
- 4) The Appellant was denied as documentation submitted does not support the presence of an eligible diagnosis of intellectual disability or a severe related condition and documentation failed to demonstrate at least three (3) substantial adaptive deficits in the six (6) major life areas identified for program eligibility. (Exhibit D-2)
- 5) The Appellant's Cerebral Palsy and Seizure Disorder diagnoses were not severe enough to be considered eligible diagnoses for the CDCSP at the time of application. (Exhibit D-4)
- 6) On November 21, 2019, an ABAS-3 administered as part of the Psychological Evaluation on the Appellant did not show that the Appellant had substantial adaptive deficits in any of the six (6) major life areas as defined by policy. (Exhibit D-4)

- 7) ABAS-3 results were derived from a parent questionnaire completed by the Appellant's mom. (Exhibit D-4)
- 8) The Appellant scored a one (1) in *Health and Safety*. *Health and Safety* is a sub-domain of the major life area of capacity for independent living. Scores for other adaptive domains and sub-domains ranged from 3 to 10. (Exhibit D-4)
- 9) The narrative section in the Psychological Evaluation was consistent with the ABAS-3 results regarding the Appellant's adaptive functioning. (Exhibits D-2 and D-4)

APPLICABLE POLICY

BMS CDCSP Manual §§ 526.2.1 and 526.5.2 states that medical eligibility for CDCSP services is comprised of two components:

1. The applicant must meet the level of care stated in the application for one of the three following medical facilities:

- Nursing Facility; OR
- ICF/IID; OR
- Acute Care Hospital; AND

2. The cost of medical care the applicant incurred in the 12 months prior to application are less than the costs that would have been incurred in the medical facility level of care (Nursing Facility, ICF/IID, or Acute Care Hospital) during the same period.

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.

BMS CDCSP Manual § 526.5.2.1 **Diagnostic Criteria** – explains 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. Examples of related conditions which may, if severe and chronic in nature, may make a child eligible for this program 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 a person with an intellectual disability, and requires services similar to those required for persons with intellectual disabilities. Additionally, intellectual disability and/or related conditions with associated concurrent adaptive deficits are likely to continue indefinitely.
- Level of care (medical eligibility) is based on the Annual Medical Evaluation (CDCSP-2A), the Psychological Evaluation (CDCSP-3) and verification, if not indicated in the CDCSP-2A and CDCSP-3, and documents that the intellectual disability and/or related conditions with associated concurrent adaptive deficits, are severe, and are likely to continue indefinitely. Other documents, if applicable and available, that can be utilized include the Individualized Education Program (IEP) for a school age child and Birth to Three assessments.

BMS CDCSP Manual § 526.5.2.2 **Functionality Criteria** - reads that the child must 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.).

DISCUSSION

The CDCSP is an optional Medicaid program which provides community-based services for program eligible children as an alternative to placement in an Acute Care Hospital, Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IDD) or a Nursing Facility (NF).

On November 7, 2019, an application was submitted on behalf of the Appellant for CDCSP services. On December 18, 2019, PC&A issued a notice denying the Appellant's application for the CDCSP, as documentation submitted for review does not support the presence of an eligible diagnosis of intellectual disability or a severe related condition. The notice indicated that the Appellant failed to demonstrate substantial adaptive deficits in three (3) or more of the six (6) major life areas identified for ICF/IDD level of care eligibility. The Appellant was not awarded a substantial adaptive deficit in any of the six (6) major life areas (*self-care, understanding and use of language, learning, mobility, self-direction, and capacity for independent living*). The Appellant's mother contested that the Appellant should be awarded deficits in *mobility, self-care, understanding and use of language, and learning*.

The Respondent must prove by a preponderance of evidence that the Appellant did not establish medical eligibility in his application for CDCSP services under an ICF/IDD level of care. The Respondent testified that there are two components required to establish an eligible diagnosis for an ICF/IDD level of care: the diagnostic component and the functionality component. The Respondent testified Cerebral Palsy and Seizure Disorders are both potentially eligible diagnoses when symptoms are severe enough to impact adaptive functioning levels in such a way that they would require an ICF/IDD level of care. The Respondent did not contest that the Appellant had two potentially eligible diagnoses. However, evidence did not support that his functionality met the severity criteria to be awarded an eligible diagnosis.

The Respondent testified during the hearing that they rely on the ABAS-3 scores and narratives in the psychological evaluation to determine functionality. On November 21, 2019, an ABAS-3 parent instrument was utilized to assess the Appellant's adaptive behaviors. The Appellant's mother was the rater for the ABAS-3. The Appellant received scores ranging from one (1) to ten (10) in the areas of *communication*, *community use*, *functional academics*, *home living*, *leisure*, *self-care*, *self-direction*, and *social skills*. The areas of *community use*, *home living*, *leisure*, *social skills*, and *health and safety* are sub-domains of the category *capacity for independent living*. The Appellant scored a one (1) in the sub-domain of *health and safety*, but scores ranged from five (5) to ten (10) in the other four (4) sub-domains of *capacity for independent living*. Policy requires a minimum of three (3) sub-domains be substantially limited to receive a deficit in the area of *capacity for independent living*.

The ABAS-3 scores did not indicate that the Appellant had functional deficits of three (3) standard deviations below the mean or less than one (1) percentile when derived from a normative sample of same-aged peers in any of the six (6) major life areas. While scores reflected that the Appellant scored low to average in all six (6) major life areas, policy defines a substantial deficit as three (3) standard deviations below the mean, or less than one percentile. Only *health and safety* had a standardized score of three standard deviations below the mean, however because it is only one (1) of the five (5) sub-domains of *capacity for independent living*, the Appellant had no eligible scores on the ABAS-3. The narratives, found in the psychological evaluation, supported the standardized scores on the ABAS-3.

Mobility

The Appellant's mother contended that the Appellant requires physical assistance with walking. The Appellant's mother testified the Appellant wears a leg brace at home in the evenings because he is embarrassed to wear it to school during the day. The Appellant's mother indicated the Appellant has trouble transitioning from the floor to his chair. The Appellant's mother also indicated that the Appellant is unable to carry his food tray at school and unable to walk up the stairs by himself. The Appellant's mother further testified the Appellant receives Physical Therapy (PT) and Occupational Therapy (OT). The Respondent testified that the Appellant does require physical assistance with walking, and he could cruise around furniture. Although the Appellant wears a leg brace and has some difficulty with mobility, the Appellant can move from one place to another by cruising around furniture and therefore the Appellant does not meet the severity level required to establish a substantial deficit in the area of *mobility*.

Self-Care

The Appellant's mother testified that the Appellant requires physical assistance with feeding, drinking, bathing, and toileting. The Appellant's mother testified the Appellant uses his fingers to eat because he is unable to hold his silverware correctly. The Respondent agreed that the Appellant may require physical assistance with feeding, drinking, bathing, and toileting, but that the degree of functionality was not severe enough. Policy explains that the Appellant must have severe impairments relating to *self-care*. While the Appellant does require assistance with some self-care needs, his self-care is more age-appropriate than someone who would meet eligibility in the area of *self-care*.

Language

The Appellant's mother testified that the Appellant uses sign language to communicate with her when he is having a rough day. The Appellant's mother indicated that the Appellant learned sign language before he was speaking. The Respondent testified the Appellant can speak in sentences of up to six words and that he responds to simple questions. The Respondent testified the Appellant can express his wants, needs, and feelings. The Respondent also testified that the Appellant does not require assistive communication devices. Because the Appellant is able to communicate using sign language and verbal communication, he does not fall into the less than one (1) percentile of his peers to be eligible in the area of *language*.

Learning

The Appellant's mother testified that the Appellant requires an adaptive pencil to write, has a special chair, is unable to hold his papers without tape to hold them in place, and uses special scissors at school. The narrative section of the psychological evaluation indicates the Appellant received services from Birth to Three and receives special education services at his school. The psychological evaluation also revealed that the Appellant can count to 20 and recite the alphabet. The Respondent stated that eligibility for Birth to Three services are different and less strict than eligibility for the CDCSP. The Respondent also testified that the Appellant had an Individualized Education Program (IEP) that was changed to a 504 Plan. The Appellant's mother testified that the Respondent was incorrect about the Appellant's 504 Plan. According to the Appellant's mother, the Appellant has a 504 Plan and is currently being evaluated for an IEP, but documentation was not finalized at the time of the hearing. The Respondent questioned the Appellant's mother about what exceptions were being considered by ██████ County Schools and the Appellant's mother indicated that the IEP was being established for other health impairment. As the IEP was submitted as evidence, it is acknowledged that the Appellant is transitioning from a 504 plan to an IEP. The Respondent testified that an IEP is more restrictive than a 504 Plan. The implementation of an IEP and other evidence shows that the Appellant has significant learning needs, and although the psychological narrative mixed up the IEP and 504 Plan, the ABAS-3 score did not meet eligibility requirements in the life area of *learning*.

The Appellant's mother submitted documentation from ██████ County Schools as evidence into the hearing. The Hearing Officer is unable to give the documentation weight as the evaluation was

conducted on January 15, January 21, January 29, and January 30, 2020, after the denial for CDCSP was processed.

The Appellant's mother was unable to demonstrate that the Appellant should be awarded any substantial adaptive deficits. Evidence presented by the Respondent proves by a preponderance of evidence that the Appellant did not establish medical eligibility in his application for CDCSP.

CONCLUSIONS OF LAW

- 1) Pursuant to policy, the Appellant must demonstrate substantial adaptive deficits in at least three (3) of the six (6) major life areas.
- 2) The Appellant failed to demonstrate substantial deficits in any of the six (6) the major life areas.
- 3) Because the Appellant did not meet the functionality component, medical eligibility could not be established.

DECISION

It is the decision of the State Hearing Officer to **UPHOLD** the Department's denial of the Appellant's application for CDCSP services.

ENTERED this _____ day of February 2020.

Danielle C. Jarrett
State Hearing Officer