



**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**

May 31, 2023

[REDACTED]

RE: [REDACTED] A JUVENILE v. WVDHHR
ACTION NO.: 23-BOR-1376

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,

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

Encl: Decision Recourse
Form IG-BR-29

CC: Kerri Linton, Psychological Consultation and Assessment
Stacy Broce, Bureau for Medical Services

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

■, A JUVENILE,

Appellant,

v.

Action Number: 23-BOR-1376

**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 March 21, 2023.

The matter before the Hearing Officer arises from the Respondent's February 28, 2023 decision to deny the Appellant medical eligibility for the Children with Disabilities Community Services Program (CDCSP).

At the hearing, the Respondent appeared by Linda Workman, Psychologist, Psychological Consultation and Assessment (PC&A). Observing for the Respondent was Jordan Mitchell, Psychologist, PC&A. The Appellant was self-represented. All witnesses were sworn and the following documents were admitted into evidence.

Department's Exhibits:

- D-1 Bureau for Medical Services (BMS) Manual Chapter 526
- D-2 Notice, dated February 28, 2023
- D-3 Amended Notice, dated March 14, 2023
- D-4 Children with Disabilities Community Services Program (CDCSP) Level of Care Evaluation, physician signed on January 20, 2023
- D-5 ■ Children's Developmental Assessment, dated November 17, 2022
- D-6 CDCSP Cost Estimate Worksheet
- D-7 Social Security Administration (SSA) Notice
- D-8 CDCSP Level of Care Evaluation, signed, January 20, 2023

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.

FINDINGS OF FACT

- 1) On February 28, 2023, the Respondent issued a notice advising the Appellant her application for CDCSP eligibility was denied because the documentation submitted did not support the presence of an eligible diagnosis (Exhibit D-2).
- 2) The February 28, 2023 notice stipulated, "While autism is considered to be a related condition, it must be severe (Level 3) in order to meet the policy requirements. In this case, Autism Level 2 was diagnosed. It is also noted that no formal assessment for autism was included in the evaluation" (Exhibit D-2).
- 3) The Respondent's February 28, 2023 decision was based upon "1/20/23 CDCSP 2A, 11/17/22 [REDACTED] Developmental Assessment, 11/17/21 [REDACTED] Comprehensive Psychological Evaluation, Cost Estimate, 2/23/23 SSI Denial Letter, 1/11/23 Partial CDCSP 2B" (Exhibit D-2).
- 4) The Appellant does not have a diagnosis of Intellectual/Developmental Disability, Cerebral Palsy, or Epilepsy (Exhibits D-4 and D-5).
- 5) On May 14, 2023, the Respondent issued an amended notice reflecting the corrected spelling of the Appellant's name and date of birth (Exhibit D-3).
- 6) On January 20, 2023, a CDCSP Level of Care Evaluation (LOC) was completed to determine the Appellant's initial eligibility for CDCSP (Exhibit D-4).
- 7) The LOC Medical Assessment was completed by a physician (Exhibit D-4).
- 8) The Appellant has a history of diagnoses including Autism Spectrum Disorder, Level 2, and Speech Delay (Exhibit D-4).
- 9) The LOC Medical Assessment indicated the Appellant had abnormal coherence, attention span, sensation, and coordination related to her Autism Spectrum Disorder diagnosis (Exhibit D-4).
- 10) The LOC Medical Assessment indicated the Appellant had abnormal speech related to her speech delay (Exhibit D-4).
- 11) The LOC Medical Assessment indicated that the Appellant was ambulatory (Exhibit D-4).

- 12) The LOC Medical Assessment indicated that the Appellant's continence status was "not toilet trained" (Exhibit D-4).
- 13) The LOC Medical Assessment indicated the Appellant required assistance at mealtimes (Exhibit D-4).
- 14) The LOC Medical Assessment indicated the Appellant required assistance with personal hygiene/self-care (Exhibit D-4).
- 15) The LOC Medical Assessment indicated the Appellant was alert and required close supervision (Exhibit D-4).
- 16) The LOC Medical Assessment indicated the Appellant had limited communication (Exhibit D-4).
- 17) The LOC Medical Assessment diagnostic section included diagnoses of "Unspecified disruptive, impulse control, conduct disorder," "Autism Spectrum Disorder, Speech Delay, Developmental Coordination Disorder" (Exhibit D-4).
- 18) The LOC Medical Assessment's physician prognosis and recommendations for further care reflected, "Good, special education, OT, speech therapy" (Exhibit D-4).
- 19) The physician signed, by signature, that the Appellant's developmental disability, medical condition, and/or related health needs are as documented above, and she requires the level of care provided in an ICF/IID and could be alternatively served by CDCSP (Exhibit D-4).
- 20) The LOC Medical Assessment did not indicate the administration or review of any specific diagnostic or functionality testing (Exhibit D-4).
- 21) On January 17, 2022, a Developmental Assessment was completed with the Appellant by [REDACTED] PsyD (Exhibit D-5).
- 22) The Developmental Assessment narrative contained information provided by the Appellant's mother and indicated that the Appellant is not toilet trained (Exhibit D-5).
- 23) The Developmental Assessment narrative contained information provided by the Appellant's mother and indicated that the Appellant can use a fork and a spoon but prefers to eat with her hands (Exhibit D-5).
- 24) The Developmental Assessment narrative contained information provided by the Appellant's mother and indicated the Appellant has difficulty communicating her wants and needs and is not able to engage in back-and-forth conversation (Exhibit D-5).
- 25) The Developmental Assessment Behavioral Observation indicated that the Appellant had a variable understanding of directions; easily understood full sentences; and that her conversation was spontaneous, goal-directed, and talkative. (Exhibit D-5).

- 26) During the administration of the Developmental Assessment, [REDACTED] considered information provided on the Adaptive Behavior Assessment System, Third Edition (ABAS-3) Parent Form, completed by the Appellant's mother (Exhibit D-5).
- 27) The ABAS-3 Parent Form indicated scaled scores of 1 in the areas of *self-direction, leisure, social, community use, home living, health and safety, and self-care* (Exhibit D-5).
- 28) The ABAS-3 Parent Form indicated scaled scores of 2 in *communication* (Exhibit D-5).
- 29) The Developmental Assessment reflected diagnoses of Autism Spectrum Disorder, Developmental Coordination Disorder, and Unspecified Disruptive, Impulse-Control, and Conduct Disorders (Exhibit D-5).
- 30) On November 17, 2021, [REDACTED] PsyD, completed a Comprehensive Psychological Evaluation with the Appellant (Exhibit D-5).
- 31) [REDACTED] previously, on December 15, 2021, administered a Developmental Profile -4th Edition (DP-4) with the Appellant (Exhibit D-5).
- 32) The DP-4 is a structured parent interview (Exhibit D-5).
- 33) The Appellant's DP-4 results indicated standard scores in the average range for *communication* (Exhibit D-5).

APPLICABLE POLICY

Code of Federal Regulations 42 CFR § 435.225 *Individuals under age 19 who would be eligible for Medicaid if they were in a medical institution* (February 2023) provides in relevant parts:

- (a) The agency may provide Medicaid to children 18 years of age or younger who qualify under section 1614(a) of the Act, who would be eligible for Medicaid if they were in a medical institution, and who are receiving, while living at home, medical care that would be provided in a medical institution.
- (b) If the agency elects the option provided by *paragraph (a)* of this section, it must determine, in each case, that the following conditions are met:
 - 1.) The child requires the level of care provided in a hospital, SNF, or ICF.
 - 2.) It is appropriate to provide that level of care outside such an institution.
 - 3.) The estimated Medicaid cost of care outside an institution is no higher than the estimated Medicaid cost of appropriate institutional care.
- (c) The agency must specify in its State plan the method by which it determines the cost-effectiveness of caring for disabled children at home.

Code of Federal Regulations 42 CFR § 435.1010 *Definitions relating to institutional status* provides in relevant parts:

Active Treatment in intermediate care facilities for individuals with intellectual disabilities means treatment that meets the requirements specified in the standard concerning active treatment for intermediate care facilities for persons with Intellectual Disability under § 483.440(a) of this subchapter.

Persons with related conditions means individuals who have a severe, chronic disability that meets all of the following conditions: ...

- (a) It is attributable to –
 - (1) Cerebral palsy or epilepsy; or
 - (2) Any other 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 mentally retarded persons, and requires treatment or services similar to those required for these persons.
- (b) It is manifested before the person reaches age 22.
- (c) It is likely to continue indefinitely.
- (d) It results in substantial functional limitations in three or more of the following areas of major life activity:
 - (1) Self-care.
 - (2) Understanding and use of language.
 - (3) Learning
 - (4) Mobility
 - (5) Self-Direction
 - (6) Capacity for independent living.

Code of Federal Regulations 42 CFR § 483.440 *Condition of participation: Active treatment services* provides in pertinent parts:

- (a) Standard: Active Treatment.
 - (1) Each client must receive a continuous active treatment program, which includes aggressive, consistent implementation of a program of specialized and generic training, treatment, health services, and related services described in this subpart, that is directed toward –
 - (i) The acquisition of the behaviors necessary for the client to function with as much self-determination and independence as possible; and
 - (ii) The prevention or deceleration of regression or loss of current optimal functional status.

- (2) Active treatment does not include services to maintain generally independent clients who are able to function with little supervision or in the absence of a continuous active treatment program.

Bureau for Medical Services (BMS) Manual Chapter 200 *Definitions* provides in relevant parts:

Active Care – Any medically necessary care or treatment meant to ameliorate or cure illness or injury.

Diagnosis (DX) – The identification of a condition or disease.

Medically Necessary Services – Services and supplies that are appropriate and necessary for the symptoms, diagnosis, or treatment of an illness. They are provided for the diagnosis or direct care of an illness within the standards of good practice and not for the convenience of the plan, member, caregiver, or provider. The appropriate level of care can be safely provided and the most efficient and cost-effective services/supplies to meet the member's needs.

Intellectual Disability ... - A condition which is usually permanent and originates prior to the age of 18. This condition results in significantly below-average intellectual functioning as measured on standardized tests of intelligence (IQ of 70 or below) along with concurrent impairments in age-appropriate adaptive functioning. Causes of intellectual disability may vary and the degree of intellectual impairment can range from mild to profound.

Utilization Management Contractor (UMC) – The contracted vendor responsible for prior authorization for services provided to West Virginia Medicaid members.

BMS Manual Chapter 511 *Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IID)* provides in relevant parts:

ICF/IID are part of the long-term care continuum that provides care for individuals with intellectual disabilities and/or related conditions.

BMS Manual § 526.1 *Member Eligibility and Enrollment Process* provides in relevant parts:

The targeted population of the CDCSP program includes:

- A child, through the age of 18, who lives with his/her adoptive or biological family, and;
- Who has a disability that qualifies her to receive Supplemental Security Income (SSI), but who is denied SSI because her parents' income or assets exceeds the Social Security Administration guidelines;

- Whose care is provided in her home and community setting at the same level of quality and does not exceed the cost of care in a medical facility (Nursing Facility, ICF/IID, or Acute Care Hospital), and;
- Whose care requires the level of services provided in one of the following medical facilities: Acute Care Hospital; ... Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IID); ... Nursing Facility (NF)

BMS Manual § 526.2.1 *Medical Eligibility* provides in relevant parts:

Medical Eligibility 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 ... during the same period.

BMS Manual § 526.5.1 *Medical Eligibility for ICF/IID Level of Care* provides in relevant parts:

To be medically eligible, the child must require the level of care and services provided to an ICF/IID as evidenced by required evaluations and other information requested and [emphasis added] 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 the 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* provides in relevant parts:

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* provides in relevant parts:

Have a diagnosis of intellectual disability with concurrent substantial deficits manifested prior to age 19 or a related condition that 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; ...

BMS Manual § 526.5.2.2 *Functionality for ICF/IID Level of Care* provides in relevant parts:

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.

1. Self-care refers to such basic activities such as age-appropriate grooming, dressing toileting, feeding, bathing, and simple meal preparation.
2. 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.
3. Learning (age-appropriate functional academics).
4. Mobility refers to the age-appropriate ability to move one's person from one place to another with or without mechanical aids.
5. 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.
6. 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) percentile when derived from a normative sample that represents the general population of the United States or the average range of 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* provides in relevant parts:

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 an 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

The Respondent denied the Appellant's medical eligibility for CDCSP because the documentation submitted failed to establish the presence of an eligible diagnosis. Autism Spectrum Disorder is an eligible diagnosis if severe and chronic in nature. The Appellant's representative contested the Respondent's denial of the Appellant's CDCSP medical eligibility and argued that the evidence verified the presence of substantial functioning limitations related to the Appellant's Autism diagnosis and should qualify the Appellant for CDCSP eligibility. To prove that the Appellant was correctly denied CDCSP eligibility, the Respondent had to demonstrate by a preponderance of the evidence that the Appellant lacked an eligible diagnosis.

The Board of Review does not have the authority to change or permit exceptions to the policy. The Board of Review may only determine whether the Respondent correctly followed the policy when denying the Appellant's CDCSP medical eligibility.

Diagnosis

To be eligible for the CDCSP program, the Appellant had to have a severe and chronic disability attributable to an eligible diagnosis found to be closely related to Intellectual Disability because the diagnosis results in the impairment of the Appellant's general intellectual functioning or adaptive behavior, similar to that of individuals with an I/DD Diagnosis, and requires treatment or services similar to those required for individuals diagnosed with I/DD. The diagnosis must be

likely to continue indefinitely and result in substantial functional limitations in three or more of the major life activity areas.

During the hearing, the Respondent's representative testified that a diagnosis of Autism Spectrum Disorder, Level 3, constituted an eligible severe and chronic related diagnosis. The Appellant's diagnostic history — established in the submitted documentation — must be considered. The submitted documentation failed to establish the presence of an Autism Spectrum Disorder, Level 3 diagnosis. The Appellant's representative did not refute that the documentation failed to identify a diagnosis of Autism Spectrum Disorder, Level 3, (Exhibits D-4).

Functioning

The policy stipulates that the Appellant's severe and chronic disability, as attributed to a qualifying condition, must result in the Appellant's substantial functioning limitations in three major life areas. The Appellant's representative testified that even though the Appellant's Autism Spectrum Disorder diagnosis was below Level 3, the Appellant's diagnosis resulted in substantial functioning limitations. The policy does not provide a CDCSP medical eligibility exception for individuals that have significant functioning limitations without a qualifying diagnosis. An eligible diagnosis must be established by a qualifying physician to establish the Appellant has a diagnosis that meets the severity requirement stipulated in the policy. Without the evidence to prove the presence of an eligible diagnosis, functioning deficits due to an eligible diagnosis cannot be established.

Active Treatment

Because the submitted documentation failed to prove the presence of an eligible diagnosis that resulted in substantial functioning limitations in three major life areas, the Appellant's requirement of an ICF/IID level of care because of a severe and chronic disability attributable to an Autism diagnosis cannot be established.

CONCLUSIONS OF LAW

- 1) To be eligible for CDCSP medical eligibility, the Appellant had to have an eligible diagnosis that constituted a severe and chronic disability.
- 2) A diagnosis of Autism Spectrum Disorder, Level 3, is an eligible diagnosis.
- 3) The preponderance of evidence revealed that the Appellant's Autism Spectrum Disorder diagnosis did not meet the CDCPS medical eligibility severity criteria.
- 4) As an eligible diagnosis was not supported by the submitted documentation, the Respondent correctly denied the Appellant's eligibility for the CDCSP.

DECISION

It is the decision of the State Hearing Officer to **UPHOLD** the Respondent's decision to deny the Appellant medical eligibility for CDCSP.

Entered this 31st day of May 2023.

Tara B. Thompson, MLS
State Hearing Officer