



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

**Sherri A. Young, DO, MBA, FAAFP
Interim Cabinet Secretary**

**Christopher G. Nelson
Interim Inspector General**

October 27, 2023



RE: [REDACTED] v. WVDHHR
ACTION NO.: 23-BOR-2494

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

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

[REDACTED]

Appellant,

v.

Action Number: 23-BOR-2494

**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 [REDACTED]. 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 September 20, 2023.

The matter before the Hearing Officer arises from the Respondent's June 15, 2023 decision to deny the Appellant eligibility for the Children with Disabilities Community Service Program (CDCSP).

At the hearing, the Respondent was represented by Linda Workman, Psychological Consultation and Assessment. The Appellant's mother, [REDACTED], represented the Appellant. All witnesses were sworn in and the following documents were admitted into evidence.

Department's Exhibits:

- D-1 Bureau for Medical Services (BMS) Manual Chapter 526
- D-2 CDCSP Initial Application Eligibility Determination Notice, dated June 15, 2023
- D-3 CDCSP Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IID) Level of Care Evaluation, physician signed on April 10, 2023
- D-4 CDCSP Information Sheet, completed on May 24, 2023
- D-5 [REDACTED] Neurodevelopmental Center ABA Therapy Daily Note, encounter date May 24, 2023
- D-6 [REDACTED] Neurodevelopmental Center Initial Evaluation and Treatment Plan for Applied Behavior Analysis, dated January 27, 2023
- D-7 CDCSP Comprehensive Psychological Evaluation, dated January 13 and June 14, 2023 (addendum)

- D-8 [REDACTED] Neurodevelopmental Center Initial Patient Visit, dated January 13, 2023
- D-9 WV Birth to Three Evaluation/Assessment Summary Report, dated September 14, 2022
- D-10 WV Birth to Three Evaluation/Assessment Summary Report
- D-11 WV Birth to Three Evaluation/Assessment Summary Report, dated June 8, 2022
- D-12 Social Security Administration Notice of Disapproved Claim, dated March 17, 2023
- D-13 CDCSP Cost Estimate Worksheet

Appellant's Exhibits:

A-1 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) The Appellant has an eligible diagnosis (Exhibit D-7 through D-9).
- 2) The Appellant had a substantial deficit in *communication* (Exhibits D-6 and D-7).
- 3) The Appellant's ABAS-3 results reflected a scaled score of 8 in *functional pre-academics*, 7 in *self-direction*, 3 in *leisure*, 6 in *community use*, 4 in *home living*, 3 in *health and safety*, 5 in *self-care*, and 8 in *motor*.

APPLICABLE POLICY

Bureau for Medical Services (BMS) Manual § 526.5 *Medical Eligibility for ICF/IID Level of Care* provides in relevant sections:

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 5.2.6.5.2 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: medical necessity for ICF/IID level of care is determined by the evaluation of the child's diagnosis, functionality, and need for active treatment.

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

The child must have the 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

1. Self-care refers to 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 person from one place to another with or without mechanical aids.
5. Self-direction refers to the age of 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) 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 ...

Code of Federal Regulations 42 CFR § 435.1010(a)(2)-(6) provide in relevant sections:

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

- Attributable to any other conditions, 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 like that of mentally retarded persons, and requires treatment or services like those required for these persons,
- Manifested before the person reaches age 22,
- Is likely to continue indefinitely,
- Results in substantial functional limitations in three or more of the following areas of major life activity:
 - Self-care
 - Understanding and use of language
 - Learning
 - Mobility
 - Self-direction
 - Capacity for independent living

DISCUSSION

The Appellant submitted an initial application for Medicaid CDCSP benefit eligibility. The Respondent issued a notice advising the Appellant that CDCSP benefit eligibility was denied because the submitted documentation failed to demonstrate the presence of substantial adaptive deficits in three or more of the six major life areas. The Appellant's representative argued that the Appellant's diagnosis of Autism, Level 3, and the submitted documentation demonstrate the presence of substantial functioning deficits.

The Board of Review cannot make changes or provide exceptions to the eligibility criteria established by the policy and can only determine whether the Respondent decided the Appellant's eligibility according to the policy criteria. The Respondent had to prove by a preponderance of the evidence that the submitted documentation failed to establish the presence of substantial adaptive deficits in at least three functioning areas at the time of the Respondent's denial. The presence of substantial deficits must be supported by relevant test scores and narrative descriptions contained in the submitted documentation. The provided records and testimony revealed that the Appellant had a deficit in *communication* at the time of the Respondent's denial, as corroborated by relevant test scores and narrative descriptions. The Respondent's representative testified that substantial adaptive deficits are consistent with scaled scores of 1 or 2 on the ABAS-3 testing measure.

During the hearing, the Appellant's representative testified the Appellant has substantial functioning deficits and requires total care and supervision as evidenced by the physician's narrative. The physician's descriptions of the Appellant's functioning reveal functioning delays, however, substantial delays must also be established by relevant test scores.

During the hearing, the Respondent's representative testified that the information provided in the January 2023 assessment may be outdated as the Appellant's development may have changed his functioning since January 2023. The Respondent's representative testified that the January 2023

ABAS-3 results reflected general domain scores, but not the scores for each area of functionality. Without these scores, the Respondent's representative testified that areas of substantial delay could not be determined. Because the submitted reports were outdated, the Respondent requested an updated evaluation. Subsequently, the June 2023 Comprehensive Psychological Evaluation addendum was submitted. Because the Appellant's June 2023 ABAS-3 results reflected a scaled score of 8 in *functional pre-academics*, 7 in *self-direction*, 3 in *leisure*, 6 in *community use*, 4 in *home living*, 3 in *health and safety*, 5 in *self-care*, and 8 in *motor*, deficits could not be affirmed in these areas.

The Appellant received a score of 2 in *social* — a subdomain of *capacity for independent living*. To establish a substantial deficit in *capacity for independent living*, the scaled scores and narrative had to corroborate the presence of substantial deficits in at least three subdomains. As the evidence only revealed the presence of substantial deficits in one subdomain, a substantial deficit in *capacity for independent living* could not be affirmed.

During the hearing, the Appellant testified that the DP-4 scores reflect extremely low functioning in each area. The Respondent's representative testified that the DP-4 is frequently used by psychologists but does not measure all six major life areas. The Respondent's representative testified that substantial adaptive deficits are consistent with standard scores of 55 on the DP-4. While the exhibit reflects an adaptive behavior score of 54, the areas of substantial adaptive delays are not identified. As the evidence did not reveal DP-4 scores for each of the six major life areas, substantial deficits in other functioning areas could not be affirmed.

CONCLUSIONS OF LAW

- 1) To be eligible for CDCSP eligibility, the submitted documentation must establish the presence of substantial adaptive deficits in at least three functioning areas, as evidenced by relevant test scores and narrative, at the time of the Respondent's denial.
- 2) The preponderance of the evidence revealed that the Appellant had substantial deficits in one functioning area.
- 3) The Respondent correctly denied the Appellant's CDCSP eligibility because the submitted documentation failed to establish the presence of substantial adaptive deficits in at least three functioning areas.

DECISION

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

Entered this 27th day of October 2023.

Tara B. Thompson, MLS
State Hearing Officer