



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

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

**Christopher G. Nelson
Interim Inspector General**

October 13, 2023

[REDACTED]

RE: [REDACTED] v. WV DHHR
ACTION NO.: 23-BOR-2510

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, J.D.
Certified State Hearing Officer
Member, State Board of Review

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

cc: BMS, PC&A, Kepro

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

██████████,

Appellant,

v.

Action Number: 23-BOR-2510

**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' Common Chapters Manual. This fair hearing was convened on October 4, 2023, on an appeal filed August 14, 2023.

The matter before the Hearing Officer arises from the July 28, 2023, decision by the Respondent to deny prior approval for Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IID) services.

At the hearing, the Respondent appeared by Charley Bowen, PC&A. The Appellant was represented by her guardian, ██████████ WV DHHR Bureau of Social Services. Appearing as a witness for the Appellant was ██████████ Program Manager. The witnesses were placed under oath and the following documents were admitted into evidence.

Department's Exhibits:

- D-1 Bureau for Medical Services Provider Manual §511.2 (excerpt)
- D-2 Denial Notice, dated July 28, 2023
- D-3 West Virginia Department of Health and Human Resources ICF/IID Level of Care Evaluation (DD-2A), dated June 22, 2023
- D-4 Psychological Evaluation (DD-3), dated May 19, 2023
- D-5 West Virginia Department of Health and Human Resources Social Assessment/Personal Profile (DD-4), dated July 11, 2023
- D-6 Denial Notice, dated September 8, 2017
- D-7 Psychological Evaluation (DD-3), dated February 8, 2017/Updated July 20, 2017
- D-8 Social History, dated September 1, 2017
- D-9 Individualized Education Program, ██████████ Schools, dated February 5, 2013
- D-10 Amendment of the IEP Without Convening an IEP Team Meeting dated March 29, 2013

Appellant's Exhibits:

None (The Appellant's representative submitted 112 pages of documents the day before the hearing, but decided not to introduce them at the hearing)

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 28-year-old whose guardian, [REDACTED] applied for prior approval for ICF/IID services for the Appellant.
- 2) After reviewing the present measures of functioning and historical documentation, the Respondent determined that the documentation submitted for review did not substantiate that the Appellant had a diagnosis of intellectual disability or a related condition which is severe. (Exhibits D-2)
- 3) The Respondent sent notification of the denial on July 28, 2023. (Exhibit D-2)
- 4) The Appellant has been diagnosed with mild mental retardation/borderline intellectual functioning/Intellectual Disability, mild, prior to age 22. (Exhibits D-3 to D-5, D-7)
- 5) The documents presented did not support reliable test scores or narratives consistent with a diagnosis of intellectual disability with concurrent substantial deficits manifested prior to age 22 or a related condition which constitutes a severe and chronic disability with concurrent substantial deficits manifested prior to age 22.
- 6) The documentation showed that the Appellant has a long history of mental/behavioral diagnoses: Unspecified Bipolar and Related Disorder, moderate; Unspecified Disruptive, Impulse-Control and Conduct Disorder, severe by history; Intermittent Explosive Disorder; ADHD; Major Depressive Disorder; and Other Person History of psychological trauma (history of Post-Traumatic Stress Disorder). (Exhibits D-4 and D-5)
- 7) The Appellant has had several facility placements and hospitalizations since 2011 due to her aggressive behavior, homicidal ideations, and suicidal ideations. (Exhibits D-4, D-5, D-7, D-8)
- 8) The Appellant attended high school with an IEP indicating she was on track for a standard high school diploma. (Exhibit D-9)

- 9) In 2016, the Appellant lived in her own apartment with twice weekly support services. Exhibit D-4)
- 10) The narratives contained in the submitted documentation reveal that the Appellant ambulates, communicates, is independent with grooming and self-care, is continent, is able to make simple foods in the microwave, is able to feed herself, is able to make decisions, has been employed, and had an IEP for receiving a standard high school diploma, and was able to be her own reporter on several evaluations. (Exhibits D-3 to D-5, D-7 to D-9)
- 11) In September 2017, the Appellant's previous application for the ICF/IID program was denied because: "The documentation submitted reflects no eligible diagnosis for an ICF/IID level of care. [The Appellant] has neither a diagnosis of intellectual disability, nor a diagnosis of a related condition closely associated with an intellectual disability. Additionally, eligibility is specifically excluded for individuals with a primary diagnosis of mental illness. Additionally, neither the licensed psychologist nor the licensed social worker has indicated she requires an ICF/IID level of care, which is required by policy for eligibility." (Exhibit D-6)

APPLICABLE POLICY

Bureau for Medical Services Provider Manual §511.2.2 states individuals must meet both medical and financial eligibility to receive ICF/IID services. Individuals seeking ICF/IID services may have their eligibility determined prior to or after their admission to an ICF/IID facility.

To establish eligibility prior to admission, a complete packet of required information must be submitted no more than 30 days prior to placement in the ICF/IID facility and placement must occur within 90 days of the date of the DD-3. To establish initial eligibility for post admission, a complete packet of required information must be submitted no more than thirty 30 days after placement in the ICF/IID facility. The DD-3 must be current (within 90 days of placement).

All submitted information must be current. The prior eligibility packet of information includes the DD-2A, DD-3, and DD-4 and must be submitted to the BMS or the ICF/IID contracted agent in order to determine eligibility for each applicant for whom payment is requested. Current is defined as:

- DD-2A (Medical Evaluation) must have been completed within 180 days of the placement date. Additionally, any Medical Evaluation dated prior to 180 days of receipt by BMS or the ICF/IID contracted agent shall be considered out of date.
- DD-3 (Psychological Report) must have been completed within 90 days of the placement date. Additionally, any psychological report dated prior to 90 days of receipt by BMS or the ICF/IID contracted agent shall be considered out of date.
- DD-4 (Social History) must have been completed within 180 days of the placement date. Additionally, any social history dated prior to 180 days of receipt by BMS or the ICF/IID contracted agent shall be considered out of date.

Upon receipt of a complete packet, an eligibility determination will be made within 30 days and the decision communicated to the applicant and/or the provider that submitted the packet. Post-admission eligibility determination requires the provider to submit a DD-1, and a complete DD-5 (IPP) within thirty 30 days after the intake to BMS or the ICF/IID contracted agent. Payment authorization for start and stop dates shall be delayed until the receipt of the DD-1, the DD- 5 (IPP) and the Inventory for Client and Agency Planning (ICAP).

BMS, through the ICF/IID contracted agent, determines the medical eligibility for an applicant in the ICF/IID Program. In order to be eligible for ICF/IID placement, the applicant must meet the following criteria:

1. The applicant must have a diagnosis of intellectual disability with concurrent substantial deficits manifested prior to age 22 or a related condition which constitutes a severe and chronic disability with concurrent substantial deficits manifested prior to age 22.

a. Examples of related conditions which may, if severe and chronic in nature, make an individual eligible for ICF/IID placement 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 persons with an intellectual disability, and requires services similar to those required for persons with an intellectual disability.

b. Additionally, the applicant who has a diagnosis of intellectual disability or a severe related condition with associated concurrent adaptive deficits must meet the following requirements:

- Likely to continue indefinitely, and
- Must have the presence of at least three substantial deficits out of the six identified major life areas listed below.

2. The applicant must have substantial adaptive deficits in three or more of the following six major life areas:

- self-care,
- receptive and/or expressive language, (communication)
- learning, (functional academics)
- mobility,
- self-direction,
- capacity for independent living which includes the following six subdomains,
 - home living,
 - social skills,
 - employment,
 - health and safety,
 - community use
 - leisure activities.

For the capacity for independent living major life area to be met, the applicant must be substantially delayed in at least three of the six sub-domains (home living, social skills, employment, health and safety, community use and leisure activities).

Substantial adaptive deficit is defined as scores on standardized measures of adaptive behavior that are three standard deviations below the mean or less than one percentile when derived from non-ID normative populations, or in the average range or below the 75th percentile when derived from ID normative populations. The presence of substantial deficits must be supported by the additional documentation submitted for review (e.g. Individual Education Program (IEP), Occupational therapy (OT) evaluations, narrative descriptions, etc.).

Substantial deficits must be documented through both the narrative documents and the standardized measures of adaptive behavior.

3. The applicant must have a need for an ICF/IID level of care that:

- is certified by a physician (DD-2A) and,
- is documented as being required by the licensed psychologist (DD-3) and;
- is recommended by a licensed social worker (DD-4).

4. The applicant must require and would benefit from active treatment.

- Evaluations of the applicant must demonstrate a need for intensive instruction, services, assistance, and supervision in order to learn new skills and increase independence in activities of daily living.

DISCUSSION

The Appellant is a 28-year-old whose guardian applied for prior approval for ICF/IID services. After reviewing the Appellant's present measures of functioning and historical documentation, the Respondent determined that the documentation submitted for review did not substantiate a diagnosis of intellectual disability or a severe related condition for program eligibility. On July 28, 2023, the Respondent notified the Appellant that prior approval for ICF/IID services had been denied. The Appellant appeals the Respondent's decision.

The Respondent must show by a preponderance of the evidence that the documentation submitted for the ICF/IID program application did not establish that the Appellant had a diagnosis of intellectual disability with concurrent substantial deficits manifested prior to age 22 or a related condition which constitutes a severe and chronic disability with concurrent substantial deficits manifested prior to age 22.

Psychological Consultation and Assessment (PC&A) is the Respondent's contracted agent for applicant eligibility determination for the ICF/IID Program. PC&A is required to determine the Appellant's eligibility through review of the submitted documents necessary for program application: DD-2A (Medical Evaluation); DD-3 (Psychological Report); and DD-4 (Social History). Additionally, PC&A must review test scores 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 the additional documentation submitted for review (e.g. Individual Education Program (IEP), Occupational therapy (OT) evaluations, narrative descriptions, etc.).

Charley Bowen, a licensed psychologist with PC&A, reviewed the submitted documentation to determine the Appellant's eligibility for the ICF/IID services. Mr. Bowen explained that the submitted documentation showed that the Appellant had been diagnosed with mild intellectual disability prior to age 22, however, indicated that the potentially eligible score in regard to intellectual disability is not compatible with the other information submitted. Mr. Bowen testified that the documentation in totality showed that the Appellant suffered from mental health and behavioral issues that accounted for some of the low test scores. Additionally, Mr. Bowen noted that in reviewing the Appellant's long history of the various placement in shelters, group homes, and hospitals, those placements are not available for those individuals who have intellectual disabilities. The Appellant's IEP also noted that the Appellant was on track for a standard high school diploma, which is not available to those individuals with intellectual disabilities.

In 2012, the Appellant underwent Intellectual/Cognitive and Adaptive Behavior testing through ██████████ Schools. These scores were felt to be an underestimate of the Appellant's abilities. It was also noted that the Appellant achieved higher scores in testing done in 2011. In 2017, just outside of the Appellant's developmental period, she underwent an IPE evaluation as part of her ICF/IID services application at that time. The evaluating psychologist did diagnosis borderline intellectual functioning, however, no ICF/IID placement was recommend. The 2017 IPE test scores did show low scores in adaptive behavior; however, these scores were inconsistent with the narrative. The 2017 application for ICF/IID services was denied because the Appellant did not have a diagnosis of intellectual disability or a related condition closely associated with an intellectual disability, noting that eligibility is specifically excluded for those individuals with mental illness as a primary diagnosis. At that time, there was no recommendation for ICF/IID level of care.

In reviewing the current DD-2, DD-3 and DD-4, the narratives indicated that the Appellant is able to feed herself, shower and groom herself independently with occasional prompting, toilets independently, chooses weather-appropriate clothing and is able to dress herself independently. The Appellant is noted to take an interest in her appearance, use the microwave oven, and does laundry. Specifically, on the Appellant's current DD-4, the assessing social worker noted that from the age of eighteen to present, the Appellant reported she had worked at various jobs independently and that she lived on own with "drop in staffing". Mr. Bowen testified that this level of independence is not typical for those who qualify for the ICF/IID services. Mr. Bowen concluded that the diagnosis of mild intellectual disability cannot be accepted as a valid diagnosis as it is unsupported by the Appellant's test scores and other submitted documentation.

Historically, the Appellant has lived on her own in an apartment with support services twice a week and has lived in group homes and shelters. The Appellant has been hospitalized several times for her behavioral/mental issues in the past, and recently has been incarcerated. The testimony provided by the Appellant's guardian who has been working with the Appellant for two years (notably outside of the developmental period), testified that although the Appellant has lived independently in the past, she had difficulty with maintaining proper hygiene for herself and her

living space, and requires prompting. The Appellant's witness testified that the Appellant seems to be totally independent, but she cannot do things independently unless prompted.

The preponderance of evidence showed that the Appellant has a long history of behavioral/mental illness, and the documentation does not support the presence of an eligible diagnosis of Intellectual Disability with concurrent substantial deficits manifested prior to age 22 or a related condition which constitutes a severe and chronic disability with concurrent substantial deficits that manifested prior to age 22. Therefore, the Respondent's denial for prior approval for ICF/IID services is affirmed.

CONCLUSIONS OF LAW

- 1) To establish medical eligibility for ICF/IID facility placement, an applicant must have a diagnosis of Intellectual Disability with concurrent substantial deficits manifested prior to age 22 or a related condition which constitutes a severe and chronic disability with concurrent substantial deficits that manifested prior to age 22.
- 2) Policy states that mental illness is specifically excluded as an eligible diagnosis for ICF/IID placement.
- 3) Prior to age 22, the Appellant had received a diagnosis of mild/borderline intellectual disability.
- 4) The historical documentation submitted for review demonstrates that the Appellant has a long history of mental/behavioral illness.
- 5) The low adaptive behavior test scores the Appellant received during her developmental period or just beyond the developmental period, are unsupported by the narratives and historical documentation.
- 6) Documentation does not support the presence of an Intellectual Disability with concurrent substantial deficits manifested prior to age 22 or a related condition which constitutes a severe and chronic disability with concurrent substantial deficits that manifested prior to age 22.
- 7) As the Appellant does not meet diagnostic criteria, the Respondent acted correctly in denying her application for ICF/IID facility placement.

DECISION

It is the decision of the State Hearing Officer to **UPHOLD** the decision of the Respondent to deny prior approval for ICF/IID services.

ENTERED this 13th day of October 2023.

Lori Woodward, Certified State Hearing Officer