



STATE OF WEST VIRGINIA  
OFFICE OF INSPECTOR GENERAL  
BOARD OF REVIEW

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

Ann Vincent-Urling  
Interim Inspector General

March 12, 2024



RE: ██████████ A JUVENILE v. WV DEPARTMENT OF HUMAN SERVICES BUREAU  
FOR MEDICAL SERVICES  
ACTION NO.: 24-BOR-1365

Dear ██████████:

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 Human Services. 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,

Kristi Logan  
Certified State Hearing Officer  
Member, State Board of Review

Encl: Recourse to Hearing Decision  
Form IG-BR-29

cc: Bureau for Medical Services, PC&A

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**WEST VIRGINIA OFFICE OF INSPECTOR GENERAL  
BOARD OF REVIEW**

█ A JUVENILE,

**Appellant,**

v.

**Action Number: 24-BOR-1365**

**WEST VIRGINIA DEPARTMENT OF HUMAN SERVICES  
BUREAU FOR MEDICAL SERVICES,**

**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 Office of Inspector General Common Chapters Manual. This fair hearing was convened on March 6, 2024, on an appeal filed on February 7, 2024.

The matter before the Hearing Officer arises from the January 23, 2024, decision by the Respondent to deny placement for the Appellant in an ICF/IID facility.

At the hearing, the Respondent appeared by Charley Bowen, consulting psychologist for the Bureau for Medical Services. The Appellant appeared by █ Child Protective Services Supervisor and guardian. Appearing as witnesses for the Appellant were █ Child Protective Services; █ Adult Protective Services; █ Child Protective Services and █ Child Protective Services. 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
- D-2 Notice of Denial dated January 23, 2024
- D-3 ICF/IID Level of Care Evaluation (DD2A) dated November 2, 2023
- D-4 Comprehensive Psychological Evaluation dated October 26, 2023
- D-5 Social History dated November 29, 2023
- D-6 Individual Service Plan dated December 14, 2023
- D-7 Inventory for Client and Agency Planning dated December 16, 2023
- D-8 Psychological Evaluation and Testing Report dated September 27, 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 Hearing Officer sets forth the following Findings of Fact.

**FINDINGS OF FACT**

- 1) An application was made for placement on behalf of the Appellant in an ICF/IID setting.
- 2) The Appellant has an eligible diagnosis of a mild Intellectual Disability (Exhibit D-3).
- 3) The Appellant was found to have a substantial adaptive deficit in the major life area of *capacity for independent living* (Exhibit D-2).
- 4) The Respondent issued a notice of denial on January 24, 2024, advising that ICF/IID placement had been denied as the documentation submitted did not support the presence of substantial adaptive deficits in three or more of the six major life areas (Exhibit D-2).

**APPLICABLE POLICY**

Code of Federal Regulations Title 42 §435.1010 states, in pertinent parts:

*Institution for Individuals with Intellectual Disabilities or persons with related conditions* means an institution (or distinct part of an institution) that—

- (a) Is primarily for the diagnosis, treatment, or rehabilitation of Individuals with Intellectual Disabilities or persons with related conditions; and
- (b) Provides, in a protected residential setting, ongoing evaluation, planning, 24-hour supervision, coordination, and integration of health or rehabilitative services to help each individual function at his greatest ability.

Code of Federal Regulations Title 60 §741.2 states, in pertinent parts:

(m) *Major life activities* —

- (1) ***In general.*** Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting,

reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

(2) **Major bodily functions.** For purposes of [paragraph \(m\)\(1\)](#) of this section, a major life activity also includes the operation of a major bodily function, including, but not limited to, functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

(3) In determining other examples of major life activities, the term “major” shall not be interpreted strictly to create a demanding standard for disability. Whether an activity is a “major life activity” is not determined by reference to whether it is of “central importance to daily life.”

(bb) **Substantially limits** —

(1) **In general.** The term “substantially limits” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by law. *Substantially limits* is not meant to be a demanding standard and should not demand extensive analysis.

(i) An impairment is substantially limiting within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered “substantially limiting.” Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(ii) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. However, nothing in this section is intended to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

(iii) In determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity. This may include consideration of facts such as the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function.

Bureau for Medical Services Provider Manual Chapter 511 explains eligibility for ICF/IID services:

### **511.2.2 Medical Eligibility Determination of Members**

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 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 guardian, 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 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). The provider will assume the financial risk of providing services during the period that eligibility is being considered. In the event an individual is determined not to meet ICF/IID eligibility there is no mechanism to reimburse the provider.

### **511.2.3 Medical Eligibility Criteria**

The Bureau for Medical Services (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 deficits are defined as standardized scores of three standard deviations below the mean or less than one percentile when derived from a normative sample that represents the general population of the United States. 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 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,
  - Documented as being required by the licensed psychologist (DD-3) and;
  - 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. Active treatment does not include services to maintain generally independent individuals who are able to function with little supervision or in the absence of a continuous active treatment program.

## **DISCUSSION**

Pursuant to policy, an individual must meet the medical eligibility criteria of a diagnosis of Intellectual Disability or related condition which constitutes a severe and chronic disability that manifested prior to age 22, the functionality criteria of at least three (3) substantial adaptive deficits out of the six (6) major life areas that manifested prior to age 22, the need for ICF/IID level of care, and a determination that the individual would require and benefit from active treatment.

The Respondent conceded that the Appellant met the diagnostic criteria with an eligible diagnosis of mild Intellectual Disability. The Respondent also conceded that the Appellant was demonstrating a substantial adaptive deficit in the major life area of *capacity for independent living*. However, the Respondent contended that the Appellant did not meet the functionality criteria of demonstrating at least three substantial adaptive deficits in the six major life areas.

A substantial adaptive deficit is defined by policy as standardized scores of at least three standard deviations below the mean, or average, or a score of less than one percentile, when compared to a normative population. Substantial deficits must be documented through both the narrative documents and the standardized measures of adaptive behavior submitted for review.

Charley Bowen, psychological consultant for the Respondent, testified that although the Appellant received eligible scores of less than one percentile (scaled scores of 1 or 2) on the Adaptive Behavior Assessment Scale (ABAS) administered during the October 2023 psychological evaluation in the areas of *communication (receptive/expressive language)*, *functional academics (learning)*, *self-direction and self-care*, conflicting documentation submitted for review did not support deficits in these areas (Exhibit D-4).

### **Receptive/Expressive Language (Communication)**

The Appellant received a score of less than one percentile on the ABAS in the major life area of *receptive/expressive language*. However, Mr. Bowen referred to the documentation that contradicted a substantial deficit in this area. Mr. Bowen noted that the Appellant speaks in complete sentences, is able to ask and answer simple questions, initiates conversations with others

and his communication is coherent and relevant. The November 2023 DD-2A did not indicate that the Appellant had difficulties with speech. Based on this information, the Appellant is not demonstrating a substantial deficit in *receptive/expressive language*.

#### Learning (Functional Academics)

The Wide Range Achievement Test (WRAT) administered to the Appellant in October 2023 resulted in test scores of 73 in Math Computation, 74 in Spelling, 75 in Sentence Comprehension and 79 in Word Reading. The mean, or average of this test is a 100, and three standard deviations below the mean of this test would result in eligible test scores of 55 or below. The WRAT measures an individual's ability to learn, and the Appellant's scores were in the borderline range. Mr. Bowen testified that the Appellant completed the WRAT, indicating that his potential to learn is inconsistent with a score of less than one percentile in functional academics from the October 2023 ABAS (Exhibit D-4). Based upon the scores from the WRAT, the Appellant is not demonstrating a substantial adaptive deficit in the area of *learning*.

#### Self-Direction

According to the psychological evaluation, the Appellant enjoys going out to eat, going outdoors, watching basketball and playing video games. The Appellant exhibits disruptive behaviors, including a refusal to complete tasks. Mr. Bowen disagreed with a rating of less than one percentile on the ABAS in the area of self-direction due to the Appellant's ability to make choices (Exhibits D-4 and D-5). Based on the documentation provided, the Appellant is not demonstrating a substantial adaptive deficit in self-direction.

#### Self-Care

The Appellant is able to bathe, dress and groom himself with prompting and supervision. The Appellant is independent with eating and can complete some household chores. The Appellant is continent, although some accidents were noted. Mr. Bowen testified that based on the Appellant's abilities to complete areas of self-care with prompting and supervision, he is not functioning at less than one percentile. Mr. Bowen stated individuals with a substantial adaptive deficit in self-care require hand-on-hand training to complete these tasks and require more intensive training than prompting or supervision (Exhibits D-4 and D-5). Based on the documentation provided, the Appellant is not demonstrating a substantial adaptive deficit in self-care.

#### Mobility

The Appellant's representatives did not dispute that the Appellant did not receive a substantial adaptive deficit in this area.

The Appellant's representatives contended that a Child Protective Services worker, who was unfamiliar with the Appellant, provided the answers to the ABAS that was administered to the Appellant in October 2023 and believed his abilities were not reported accurately. The Appellant's representatives argued that the Appellant cannot carry on an appropriate conversation, requires step-by-step instructions to complete any task, is unable to interact with his peers and cannot manage money.

Policy requires that an individual demonstrate substantial adaptive deficits in at least three of the six major life areas to be eligible for placement in an ICF/IID facility. Substantial adaptive deficits



are identified by standardized test scores which must be consistent with narrative reports of functionality. The documentation submitted did not support that the Appellant was functioning at less than one percentile than his peers and the scores obtained on the ABAS were an underestimation of his actual abilities. Whereas the documentation submitted failed to establish that the Appellant was substantially limited in at least two additional major life areas, medical eligibility for ICF/IID placement cannot be approved.

### **CONCLUSIONS OF LAW**

- 1) Pursuant to policy, an individual must meet the medical eligibility criteria of a diagnosis of Intellectual Disability or related condition which constitutes a severe and chronic disability that manifested prior to age 22, the functionality criteria of at least three (3) substantial adaptive deficits out of the six (6) major life areas that manifested prior to age 22, the need for ICF/IID level of care, and a determination that the individual would require and benefit from active treatment.
- 2) The Appellant met the diagnostic criteria of an eligible diagnosis of mild Intellectual Disability.
- 3) The Appellant was found to have a substantial adaptive deficit in the major life area of *capacity for independent living*.
- 4) The documentation submitted failed to support that the Appellant was demonstrating additional substantial adaptive deficits in the major life areas.
- 5) The Appellant did not meet the functionality criteria for ICF/IID placement.

### **DECISION**

It is the decision of the State Hearing Officer to **uphold** the decision of the Respondent to deny approval for placement in an ICF/IID facility.

**ENTERED this 12<sup>th</sup> day of March 2024.**

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**Kristi Logan**  
**Certified State Hearing Officer**