

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL  
BY THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of )

B S )

) OAH No. 16-1505-MDX  
) Agency No.

**DECISION**

**I. Introduction**

B S reapplied for TEFRA Medicaid. T and O S, B’s parents, were notified that B’s application was denied because she exceeded the maximum qualifying score on the Inventory for Client and Agency Planning (ICAP) by three points. The Ss requested that the denial be overturned and B’s ICAP assessment be redone.

The record shows that although there were concerns with the initial ICAP, the totality of the evidence supports the Division of Senior and Disabilities Services (Division) TEFRA denial. Accordingly, the Division’s denial of B’s application is affirmed.

**II. Facts**

B is four years old. Dr. S C and Dr. K U diagnosed B with autism. B exhibits a host of challenging behaviors. B experiences sensitivity to textures and sound, refusing to eat many foods and covering her ears. She hits her mother and twin sister, but does not strike children in school. B once held her sister under water, and another time tried to choke her. She often pretends she is a bird flapping her “wings” and tweeting for extended periods of time. B repeats the same phrases over and over. B is socially withdrawn, and does not join group play. She also lacks self-soothing skills and has inappropriate emotional responses. B has regular screaming fits and tantrums.

Her self-care skills are also poor and she has difficulty with transitions throughout the day or change in routine. B does not communicate her basic needs, like hunger or the need to use the restroom. For example, in July 2016, the Ss brought B to the emergency room because of lower right abdomen pain, suspecting appendicitis.<sup>1</sup> At the hospital, Mr. S brought B to the bathroom, where she voided a substantial amount of urine, which alleviated her pain. B had a new teacher that day, and her parents theorized that B, uncomfortable with any change in routine, did not ask for a bathroom break.

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<sup>1</sup> Ex. 1; Providence Alaska Medical Center records, July 14, 2016.

Mr. and Mrs. S sought assistance for B. B qualifies for special education services, and attends behavioral and occupational therapy.<sup>2</sup> The Ss applied for TEFRA to access additional services for B. B first qualified for TEFRA on January 28, 2015, and the Division reapproved her level of care on September 25, 2015.<sup>3</sup> The Division approved B based on her autism diagnosis and functional limitations, using the level of care determination checklist for individuals under 36 months old.<sup>4</sup> Children under 36 months old are approved for TEFRA based on a qualifying diagnosis and a 50% delay in one of five areas- mobility, self-direction, self-care, communication, and learning.<sup>5</sup> With the combination of services, and family support B has made progress with developmental language skills, motor and visual skills, and social and emotional play skills.<sup>6</sup> Despite these advances, B still faces many challenges, particularly with social skills.<sup>7</sup>

The Division reviews TEFRA level of care determinations annually.<sup>8</sup> The Division reassessed B for TEFRA benefits in November 2016. Because B was over 36 months old, the Division conducted an ICAP to determine level of care. Alison Seymour, employed by the Division as a Qualified Intellectual Disability Professional (QIDP), conducted the ICAP assessment on November 21, 2016.<sup>9</sup>

As part of the ICAP assessment, Ms. Seymour interviewed Mrs. S, X Y, an applied behavior analysis therapist with a PhD in Behavioral Psychology, and occupational therapist E Q. The Ss identified Dr. Y and Ms. Q as professionals who have worked with B. During the ICAP, the assessor asks each interviewee to rate the applicant's skills from zero to three, with zero being the lowest. The ICAP measures four "domains" or adaptive behavior areas - motor skills, social and communication, personal living, community living, and broad independence.<sup>10</sup> B received the following domain scores: motor skills score of 424, social and communication score of 431; personal living score of 430; and community living score of 428. B received a broad independence score of 428.<sup>11</sup>

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<sup>2</sup> Ex. E 28; E40.

<sup>3</sup> Ex. G; Ex. H.

<sup>4</sup> Ex. H1 - H3.

<sup>5</sup> Ex. B40.

<sup>6</sup> Ex. E20- E38, No Name City School District Evaluation Summary and Eligibility Report, December 10, 2015; T S testimony; O S testimony.

<sup>7</sup> Ex. E

<sup>8</sup> Ex. B26.

<sup>9</sup> Ex. E3. *See* Ex. B37

<sup>10</sup> Ex. E4. An overview of the ICAP is available here <http://icaptool.com/icap-accuracy/icap-content/>

<sup>11</sup> Ex. D; Ex. E4; Seymour testimony.

The ICAP also lists and measures maladaptive or problem behaviors, including: hurts self, hurts others, destructive, disruptive, unusual habits, socially offensive, withdrawn/inattentive, and uncooperative.<sup>12</sup> The November 21, 2016, ICAP scored B as being disruptive 1 -10 times a day, which it lists as “a mild problem.”<sup>13</sup> All of the other problem behaviors were listed as never occurring, not a problem.<sup>14</sup>

On December 2, 2016, the Division notified the Ss that B no longer met the TEFRA Medicaid level of care criteria.<sup>15</sup> For individual’s over 36 months old, the Division uses the ICAP’s broad independence score for TEFRA qualification. The broad independence cutoff score for an applicant 3 years, 11 months old (B’s age when the ICAP was administered) is 425.<sup>16</sup> B’s broad independence was 428, three points over the maximum qualifying score. The notice stated that B’s TEFRA Medicaid benefits would end October 31, 2017.<sup>17</sup>

On December 22, 2016, the Ss requested a hearing to challenge the Division’s determination that B no longer met the level of care criteria for TEFRA.<sup>18</sup> The first day of hearing was February 28, 2017. At the first hearing, Mr. and Mrs. S testified on B’s behalf. T A, B’s care coordinator, also participated. Terri Gagne, a Medical Assistance Administrator, presented the Division’s position. Ms. Seymour also testified. The record remained open for the Ss to submit medical records and a Vineland assessment. A second day of hearing occurred on April 13, 2017. Mr. and Mrs. S and Ms. Seymour testified. Angela Ybarra presented the Division’s position.

After the February 28, 2017 hearing, the Division submitted an updated ICAP scoring sheet, which contained changes based on the Ss testimony during the first hearing. All of B’s domain score remained the same. The ICAP now listed the following behaviors as occurring 1 - 10 times per day, a mild problem: hurts others, disruptive, unusual habits, and uncooperative.<sup>19</sup> These changes resulted in B’s general maladaptive behavior score moving from zero, within normal range, to -12, marginal problems.<sup>20</sup> It also changed B’s service score level from a 5,

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<sup>12</sup> Ex. E4.

<sup>13</sup> Ex. E4.

<sup>14</sup> Ex. E4.

<sup>15</sup> Ex. D.

<sup>16</sup> Ex. F.

<sup>17</sup> Ex. D.

<sup>18</sup> Ex. C.

<sup>19</sup> Ex. F2.

<sup>20</sup> Ex. F3; compare Ex. E5.

“regular personal care and/or close supervision” to a 4, “extensive personal care and/or constant supervision.”<sup>21</sup>

The record also contains a January, 10, 2017, Vineland Summary conducted by Dr. X Y. Dr. Y administered the Vineland after the Division denied B’s level of care, and relied solely on reports from Mrs. S. The Adaptive Behavior Composite standard score summarizes a person’s overall level of adaptive functioning.<sup>22</sup> B scored 75, or moderately low. She scored in the 5<sup>th</sup> percentile, meaning higher than only 5% of similarly aged children.<sup>23</sup> The Vineland scored B’s communication and motor skills as 86, or the 18<sup>th</sup> percentile rank. These were B’s highest scores.

The Vineland placed B in the 4<sup>th</sup> percentile rank for socialization, with a moderately low score of 73. B scored lowest in daily living skills. The Vineland identified B’s daily living skills score as 62, low, which equates to a 1<sup>st</sup> percentile rank.<sup>24</sup> B score is higher than only 1% of her peers. The Vineland also scored B’s maladaptive behaviors as clinically significant.<sup>25</sup> The Division reviewed B’s medical records and Vineland assessment. The Division concluded that the Vineland and medical records identified B’s many challenges, but did not demonstrate a level of care needed for TEFRA qualification.

#### **IV. Discussion**

Because the Division is terminating B’s TEFRA benefits, it has the burden of proof in this case.<sup>26</sup>

The Medicaid program has a number of coverage categories. The TEFRA Medicaid category provides Medicaid eligibility for certain disabled children, regardless of their parents’ income and resources. TEFRA benefits are eligible to children with developmental delays requiring an institutional level of care. States are allowed to provide benefits to children 18 years of age or less who qualify and who live at home rather than in an institution. In B’s case, the relevant institution would be an intermediate care facility for individuals with an intellectual disability or related condition services (ICF/IDD).<sup>27</sup>

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<sup>21</sup> Ex. F..

<sup>22</sup> Ex. 2.1 – 2.4.

<sup>23</sup> Ex. 2.1 – 2.4.

<sup>24</sup> Ex. 2.1 – 2.4.

<sup>25</sup> Ex. 2.2 – 2.4.

<sup>26</sup> 7 AAC 49.135.

<sup>27</sup> 7 AAC 100.424(a)(5).

In order to satisfy the eligibility requirements for this category, B must have both a qualifying diagnosis and have “a broad independence domain score equal to or less than the cutoff score in the department’s Table of ICAP Scores by Age.”<sup>28</sup>

In order to terminate waiver services, the Division’s assessment must show that the recipient’s condition has materially improved and that the person no longer needs the level of care provided by an intermediate care facility for persons with intellectual and developmental disabilities.<sup>29</sup> For ICF/IDD waiver recipients, materially improvement may be shown by a change in diagnosis or the recipient is able to demonstrate the ability to function in a home setting without the need for waiver services.<sup>30</sup> “Material improvement” is focused on whether the person currently qualifies for the waiver program rather than on any specific change in functional limitation or cognitive impairment since the prior assessment.<sup>31</sup> The assessment must also be reviewed by an independent QIDP.<sup>32</sup>

Here the Division established that B does not currently meet the TEFRA qualification criteria. B has the necessary qualifying diagnosis, autism.<sup>33</sup> However, she does not have the required broad independence ICAP score. Her score is 428. The cutoff score is 425. The ICAP score is a new requirement for B. She previously qualified under the criteria for children three years old and younger, which did not rely on the ICAP.

Furthermore, nothing in the record suggests that B would be institutionalized without TEFRA waiver services. The Ss provide an incredible array of support for B, both through parental care and therapies. Mr. S testified that most of B’s support is not accessed through TEFRA, but privately.

At hearing, the Ss challenged the ICAP results and requested a reassessment with a different assessor. Mr. and Mrs. S felt the ICAP flawed for several reasons. First, Mrs. S testified that she overstated B’s ability during the ICAP interview. Mrs. S also challenged the accuracy of the other interviewees’ reports, stating that she is with B all the time compared to her

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<sup>28</sup> 7 AAC 140.600(c) and (d)(3)(B). The Division uses different criteria for applicants without a qualifying diagnosis. These applicants must show a delay of at least two standard deviations below the mean in three of five developmental areas: self-care, communication, learning, mobility, and self-direction. Because B is over 36 months old and has a qualifying diagnosis, she is assessed using the ICAP’s board independence score. B would not appear to qualify even if she were assessed under the alternative criteria. According to her most recent Vineland evaluation, B is delayed at least two standard deviations below the mean in one area (daily living skills), and on the border for a second area (socialization).

<sup>29</sup> AS 47.07.045(b).

<sup>30</sup> AS 47.07.045(b)(3)(b).

<sup>31</sup> *In re E H*, OAH No. 13-1000-MDS, at 3 (Comm’r of Health & Soc. Serv. 2013).

<sup>32</sup> AS 47.07.045.

<sup>33</sup> 7 AAC 140.600(c)(5); Ex. E12.

occupational and behavioral therapists, and she functions at a lower level than that captured by the ICAP. The Ss also asserted that the ICAP is unreliable because it failed to accurately portray B's problem behaviors. Lastly, Mr. S argued that Ms. Seymour did not have the qualifications needed to be a QIDP or interpret other diagnostic tools and evaluations.

*A. ICAP interviews*

Mr. S did not attend the majority of the ICAP scoring interview. Mrs. S provided the answers to Ms. Seymour's interview questions. During Mrs. S's interview in the family home, B displayed distracting behaviors and repeatedly interrupted. Mrs. S testified that she over-reported B's abilities during the interview with Ms. Seymour. For example, Mrs. S reported that B could write her name, but in reality B only attempts to write her name with illegible results. Mrs. S also testified that she may not have shared the extent of B's problem behaviors, because these incidents are uncomfortable and not generally discussed. Mr. S believed that his wife wanted to present B in the best light possible.

While it is understandable that parents want to portray their children favorably, they cannot later attack an evaluator's accuracy for relying on their statements. Additionally, the ICAP considered not only Mrs. S's answers, but also those of Dr. Y and Ms. Q.

Mrs. S asserted that Dr. Y and Ms. Q's interview answers should be discounted because they do not spend as much time with B as she does. As an example, Mrs. S stated that B may have walked up stairs, putting only one foot on a stair at a time during occupational therapy, but that at home, she puts both feet on each step. Mrs. S's arguments are not persuasive.

Like parent interviews, it is reasonable for the Division to rely on the other interviewees identified as familiar with an applicant. Ms. Y and Ms. Q are child development professionals familiar with B. They are trained to observe and accurately describe a client's abilities.

*B. Problem Behavior Scoring*

The Ss also challenged the ICAP's failure to list problem behaviors. However, Ms. Seymour testified that the ICAP's failure to note B's problem behaviors would not change the level of care determination because that decision is based on the broad independence score. The scoring on the amended ICAP demonstrated this assertion.

According to Ms. Seymour, she was unaware of the extent of B's problem behaviors during the ICAP interviews. Mrs. S, in keeping with her attempt to portray B positively, downplayed her negative behaviors. Ms. Seymour was also not aware of B's emergency room visit or violence toward her sibling during the initial ICAP assessment.

While the emergency room visit is clearly concerning, it did not change the ICAP score. The Ss relied on B's emergency room visit as evidence of harmful behavioral issues stemming from her communication challenges. Ms. Seymour did not view the incident in that light. Instead, she viewed the urinary retention issue as captured under the ICAP's personal living domain score. B received a zero in toileting.<sup>34</sup>

In sum, the initial ICAP recorded incomplete information regarding B's maladaptive behaviors. The amended ICAP was revised to include reports from the Ss during the first hearing. Mr. and Mrs. S argued that the ICAP's "mild problem" label for events occurring 1- 10 times per day is at odds with the Vineland's finding that B's behaviors are clinically significant. On this point, Ms. Seymour testified that typically a clinically significant or substantial limitation equates to a functional level at or below the second percentile. Although the Vineland shows that B meets that threshold for daily living, she does not meet it overall. Instead, B scores in the fifth percentile, a designation that included consideration of her maladaptive behaviors.<sup>35</sup> After fully considering both the amended ICAP and Vineland summary, B's overall functioning is higher than required for TEFRA qualification, despite serious and persistent maladaptive behaviors.

*C. Ms. Seymour's qualifications*

During the second hearing, Mr. S asserted that Ms. Seymour lacks the requisite qualifications to adequately perform her job. Mr. S's also asserted that Ms. Seymour would not be qualified in any other state to do her job. Mr. S's challenges to Ms. Seymour's qualifications were carefully considered, but found ultimately unpersuasive.

Alaska adopted the federal standard for QIDPs in 2010.<sup>36</sup> QIDPs need at least one year of experience working directly with persons with intellectual disability or other developmental disabilities, and require a bachelor's degree in a related field, unless the person is a nurse or doctor.<sup>37</sup>

Ms. Seymour does not have a bachelor's or master's degree in developmental disabilities.<sup>38</sup> Instead, Ms. Seymour obtained an associate's degree in developmental disabilities

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<sup>34</sup> Mrs. S testified that she looked on the ICAP scoring sheet during the assessment and believed she saw a higher score for toileting. Ms. Seymour testified that B scored a zero (the lowest score) overall in toileting. The Division only provided the ICAP's summary and scoring sheets, not the underlying questions, answers and domain breakdown. However, Ms. Seymour testified credibly on this issue.

<sup>35</sup> Seymour testimony; Ex. 2, Vineland summary.

<sup>36</sup> 7 AAC 140.640.

<sup>37</sup> 42 CFR §483.430(a).

<sup>38</sup> 42 CFR §483.430(a).

with an emphasis on behavioral issues and management after receiving a bachelor's degree in environmental science and physical geography. She has worked extensively with individuals with development disabilities since 1982. Ms. Seymour trained and worked as the first ICAP assessor in the state. She began performing ICAP assessments in the mid to late 1990s.

Ms. Seymour testified that the State of Alaska recognizes her as a QIDP based on the combination of an associate's degree in developmental disabilities plus her direct work experience. State and federal practices, as well as the regulation adoption date support the Division's qualification of Ms. Seymour as a QIDP, despite lacking a bachelor's degree in a related field. First, 7 AAC 140.640 was adopted in 2010, at least five years after Ms. Seymour began performing her job as an ICAP assessor. It is reasonable for the state to grandfather her in because she was performing the job already. Next, direct work experience is often substituted for educational requirements. The ratios vary, but one year of direct work experience is commonly equated to one year of education.<sup>39</sup> Ms. Seymour's over thirty years of direct professional working experience focused solely on individuals with developmental disabilities would more than qualify her based on any experience for education substitution scale.

Furthermore, Ms. Seymour was not the only person to weigh in on B's level of care determination. Another QIDP reviews each waiver termination. Ms. Seymour testified that this occurred in B's case. Another assessor reviewed B's scoring and Ms. Seymour's notes and agreed with its conclusion – that B no longer meets the institutional level of care requirement.<sup>40</sup>

## **V. Conclusion**

The regulations requiring an ICAP assessment and setting the scoring requirements do not provide for a reassessment when a party disagrees with the ICAP scoring or the ICAP cutoff score is only slightly exceeded.<sup>41</sup> The Ss raised several challenges to the ICAP, but did not establish that B's broad independence score was flawed or that B continues to meet an institutional level of care. B continues to have severe challenges, but she no longer meets the strict level of care criteria. Therefore, the Division's denial of TEFRA Medicaid benefits is affirmed.

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<sup>39</sup> See <https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-policies/#desc>. It appears that Missouri, Georgia, and Kentucky may allow relevant experience to substitute for a degree, but Colorado does not. See <https://dmh.mo.gov/docs/dd/directives/2040.pdf>; <http://dbhddjobs.com/jobDesc.aspx?id=1510&loc=Augusta&d=08/12/2015&sp=yes>; <http://dbhddjobs.com/jobDesc.aspx?id=1510&loc=Augusta&d=08/12/2015&sp=yes>; [http://agency.governmentjobs.com/colorado/job\\_bulletin.cfm?jobID=1241772&sharedWindow=0](http://agency.governmentjobs.com/colorado/job_bulletin.cfm?jobID=1241772&sharedWindow=0).

<sup>40</sup> The record does not contain information about the reviewing QIPD's education and experience.

<sup>41</sup> 7 AAC 140.600(c) and (d)(3)(B).



If B's functional abilities decline, she may reapply for TEFRA services.

DATED this 15<sup>th</sup> of June, 2017.

*Signed* \_\_\_\_\_  
Bride Seifert  
Administrative Law Judge

**Adoption**

The undersigned, by delegation from the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 30<sup>th</sup> day of June, 2017.

By: *Signed* \_\_\_\_\_  
Name: Bride A. Seifert  
Title: Administrative Law Judge

[This document has been modified to conform to the technical standards for publication.]