

TITLE 404 COMMUNITY-BASED SERVICES FOR INDIVIDUALS WITH
DEVELOPMENTAL DISABILITIES

CHAPTER 3 ELIGIBILITY AND AUTHORIZATION

3-001 ELIGIBILITY AND AUTHORIZATION FOR DD SERVICES: The Department authorizes funding for services to individuals determined to be eligible. An individual needing developmental disabilities services as described in 404 NAC must go through this process:

1. Determination of the individual's eligibility for funding;
2. Prioritization, which is the determination of the immediacy of the individual's need for specialized services; and
3. Authorization of the funding for each individual for services.

In addition to state general funds, the Department uses federal Medicaid funds available for Home and Community Based Waiver (waiver) services. An individual must meet additional eligibility criteria to be authorized for this funding.

3-001.01 The following policies apply to DD services, regardless of whether the services are funded by state general funds or Medicaid waiver funds.

3-001.01A Family Members: The Department will not pay family members to provide DD services. Family member means the parent, spouse, or child of the individual in services or a person of the same relation by marriage.

3-001.01B Educational Services: No service that is the responsibility of the school system will be authorized as a DD service. The Department will not authorize developmental disabilities services for the hours the child is attending school or in a vocational rehabilitation program. Regular school hours and days apply for a child who receives home schooling.

3-001.02 Eligibility Criteria for DD Services: To be eligible for funding under the Developmental Disabilities Services Act, the individual must:

1. Be a citizen of the United States of America or a qualified alien under the federal Immigration and Nationality Act and be lawfully present in the United States:
 - a. Attestation: The applicant must attest that s/he is a citizen of the United States of America or that s/he is a qualified alien under the federal Immigration and Nationality Act, 8 USC 1101 et seq., as such act existed on January 1, 2009; and is lawfully present in the United States. The

applicant must provide his/her immigration status and alien number, and agree to provide a copy of his/her United States Citizenship and Immigration Services (USCIS) documentation upon request.

- b. Verification: For any applicant who has attested that s/he is a qualified alien under 404 NAC 3-001.02, item 1.a., eligibility for benefits must be verified through the Systematic Alien Verification for Entitlements Program. Until verification of eligibility is made, the attestation may be presumed to be proof of lawful presence unless the verification is required before providing the public benefits under another provision of state or federal law.

2. Be a legal resident of the State of Nebraska; and
3. Have a developmental disability as defined in 404 NAC 2.

3-001.02A All individuals eligible for funding for specialized services under the Developmental Disabilities Services Act must apply for and accept any federal Medicaid benefits for which they may be eligible and benefits from other funding sources within the Department; the Department of Education, specifically including the Division of Rehabilitation Services; and other agencies to the maximum extent possible.

3-001.03 Referral for Eligibility Determination: Service Coordination accepts referrals for eligibility determinations of all individuals and must make a determination of eligibility without regard to whether the Department has sufficient funds to provide or obtain needed services for the individual. Service Coordination must inform the individual or legal representative of findings of eligibility determination and the individual's right to contest the determination.

3-001.04 Statewide Data Registry: All individuals who have been determined eligible for DD services are included in the statewide data registry. The Department will use the statewide data registry to:

1. Track the specialized service and support needs of persons with developmental disabilities;
2. Plan for future specialized support and/or service needs of persons with developmental disabilities; and
3. Budget for future specialized support and/or service needs of persons with developmental disabilities.

Information in the Registry is considered confidential and will not be released without the proper authorization as provided by law.

3-001.04A Information for each eligible individual listed in the data registry system may include:

1. Demographics;
2. Individual diagnosis;
3. Eligibility factor(s);

4. Financial information;
5. Family/legal representative information; and
6. The objectively assessed needs for specialized supports and/or services, specifying amount and type.

3-001.05 Determination of Eligibility: The Department determines eligibility for DD services and notifies the individual in writing within 14 calendar days of the final decision.

3-001.05A Reasons for Ineligibility: Service Coordination will find an individual to be ineligible if:

1. The individual does not meet the criteria listed in 404 NAC 3-001.02; or
2. The individual or persons acting on his/her behalf have not supplied needed information. Upon supplying this information, eligibility will be determined.

3-001.05B Service Coordination: Upon request, service coordination is provided to all eligible individuals when all statutory and regulatory requirements are fulfilled. Acceptance of service coordination is required to receive other DD services.

3-001.05C Application for Medicaid Waiver Services: See 404 NAC 3-003.01.

3-001.06 Authorization of Funds for DD Services: Funding for DD services other than service coordination is authorized for eligible individuals contingent upon legislative appropriations and availability of federal funds.

3-001.06A Beginning July 1, 1995, persons determined to be eligible for specialized services who on or after September 6, 1993, graduate from high school, reach the age of twenty-one years, or are currently receiving services must receive services in accordance with the Developmental Disabilities Services Act. The amount of funding for any person receiving services must be determined using an objective assessment process.

3-001.06B Specialized services for an individual must be authorized according to the individual's objective assessment.

3-001.06C Funding of services under pilot projects may require exceptions to the objective assessment process and will be utilized at the discretion of the Department.

3-001.06D The Department will authorize funding for services only when services and supports are not being provided through other available sources.

3-002 DD SERVICES FUNDED BY STATE GENERAL FUNDS

3-002.01 Denial of State General Funds: The Department may deny funding for specialized services for one or more of the following reasons:

1. The individual does not meet eligibility requirements;
2. The Legislature has not appropriated sufficient fiscal resources to fund all services for all persons determined eligible for specialized services;
3. The eligible individual's needs may be met through the use of natural supports or other resources;
4. Funding for requested specialized services is available from other sources;
5. The eligible individual has not met prioritization criteria;
6. The eligible individual has not met criteria for funding available through legislative mandates, or court decisions addressing specific population, groups, or order of services offered;
7. The eligible individual or legal representative has failed to apply for, and accept any federal Medicaid benefits for which s/he may be eligible and benefits from other funding sources within DHHS, the State Department of Education, and other agencies to the maximum extent possible.
8. The eligible individual or legal representative has failed to comply with requirements for continued eligibility of any federal Medicaid benefits for which s/he may be eligible and benefits from other funding sources within DHHS, the State Department of Education, and other agencies to the maximum extent possible;
9. The eligible individual or legal representative has not signed documentation required by the Department;
10. The eligible individual or legal representative has failed to cooperate with, or refused the services funded by the Department;
11. The child under the age of 22 could receive educational services during a normal, regular, or adjusted school day;
12. A plan of services and supports to protect the individual's health and welfare cannot be developed or maintained; and
13. The eligible individual/legal representative/representative payee has not supplied information requested by the Department including information for the individual's ability to pay under 202 NAC 1.

3-002.02 Funding Prioritization: As funding is available, the Department will authorize funding of specialized services for individuals who meet priority criteria. Priority is given to:

1. Individuals who need immediate intervention to prevent imminent physical harm caused by:
 - a. Abuse or neglect;
 - b. Lack of medical care;
 - c. Lack of food, housing or clothing; or
2. Individuals for whom immediate intervention by the Department is needed to prevent harm to themselves or others; or
3. All other eligible individuals waiting the longest.

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3-002.03 Ability to Pay: Prior to entry into services and annually, the Department will assess the ability of an individual to pay all or part of the cost of service coordination or services according to 202 NAC 1. This does not apply to Medicaid-eligible individuals.

3-003 DD SERVICES FUNDED BY MEDICAID WAIVERS: The Nebraska Medical Assistance Program, also known as Medicaid, funds community-based services to individuals who have been determined eligible for Intermediate Care Facility for Persons with Mental Retardation (ICF/MR) level of services.

The Department administers several Home and Community Based (HCB) Services Waivers for individuals with developmental disabilities.

3-003.01 Eligibility for Waiver Services

3-003.01A Application: An individual with developmental disabilities may apply for waiver services. To be eligible to receive waiver services:

1. A slot must be available; and
2. The individual must meet the criteria established for the adult or children's waiver, as appropriate.

3-003.01B Adult Waivers Eligibility Criteria: An individual is eligible for one of the adult home and community based services waivers if s/he:

1. Is eligible for and currently receives DD services;
2. Is 21 years old or older;
3. Does not receive services under another 1915(c) home and community-based service waiver;
4. Currently receives ICF/MR services, or meets the ICF/MR level of care criteria (see 404 NAC 3-003.01D);
5. Is eligible for Medicaid;
6. Has received an explanation of ICF/MR services and community-based waiver services;
7. Has elected to receive waiver services;
8. Has documentation of a physical exam within the past 12 months or, if the exam is waived, has written documentation from his/her physician;
9. Has been assessed to benefit from habilitation;
10. Has an Individual Program Plan (IPP) or Annual Supports Plan (ASP) developed by the individual and his/her team; and
11. Has a waiver eligibility assessment current within the last 12 months.

3-003.01C Children's Waiver Eligibility Criteria: An individual is eligible for the children's waiver if s/he:

1. Is eligible for and currently receives DD services;
2. Is less than 21 years old unless s/he is 21 years old and in special education, with an active IEP;
3. Does not receive services under another 1915(c) home and community-based service waiver;

4. Currently receives ICF/MR services, or meets the ICF/MR level of care criteria (see 404 NAC 3-003.01D);
5. Is eligible for Medicaid;
6. Has received an explanation of ICF/MR services and community-based waiver services;
7. Has elected to receive waiver services;
8. Has been assessed to benefit from habilitation;
9. Has an Individual and Family Support Plan (IFSP) developed by an interdisciplinary team; and
10. Has a waiver eligibility assessment current within the last 12 months.

3-003.01D ICF/MR Level of Care Criteria: The Department applies the following criteria to determine the need for ICF/MR services:

1. As documented by an evaluation which was made no more than three years before the initial determination of waiver eligibility, the individual has an intellectual disability or meets the definition of developmental disability; or
2. The individual has a severe, chronic disability other than an intellectual disability or mental illness which:
 - a. Is attributable to a mental or physical impairment other than a mental or physical impairment caused solely by mental illness;
 - b. Is manifested before the age of 22 years;
 - c. Is likely to continue indefinitely; and
 - d. Results in a substantial limitation in three or more of the following areas of major life activity, as appropriate for the person's age:
 - (1) Self-care'
 - (2) Receptive and expressive language development and use;
 - (3) Learning;
 - (4) Mobility
 - (5) Self-direction; and
 - (6) Capacity for independent living; and
3. Can benefit from habilitation directed toward:
 - a. The acquisition, retention, and improvement of self-help, socialization, and adaptive skills for the individual's maximum possible independence; or
 - b. For dependent individuals where no further positive growth is demonstrable, the prevention of regression or loss of current optimal functional status.
4. If an individual has a diagnosis of developmental disability and a diagnosis of mental illness, the diagnosis relating to developmental disability must be the primary disabling condition.

3-003.02 Determination of Eligibility for HCB Waiver Services: The individual is eligible if s/he meets eligibility requirements initially and on an ongoing basis. This determination is made annually by the Department. An individual who is eligible for waiver services will receive services if a slot and funds are available.

3-003.02A Annual and Ongoing Eligibility Review for Waiver Services: The Department must complete a review of eligibility on an annual basis or when changes in the individual's circumstances appear. If the individual is determined to be ineligible, the Department must notify the individual.

3-003.02B Authorization of Waiver Services Funding: All waiver services funding must be prior authorized.

3-003.02C Prohibited Uses of Department Funds: The Department must not use waiver services funds to pay for:

1. The care of individuals residing in a hospital, nursing facility, or ICF/MR;
2. Room and board, except when provided as part of respite in a facility, other than a private residence, approved by Medicaid;
3. Services currently covered under Nebraska Medicaid;
4. Services to an individual if it is reasonably expected that the aggregate cost of these services furnished to all individuals would exceed the cost of services provided in an ICF/MR, calculated by using the highest annual ICF/MR rate; and
5. Services to a child when educational services could be provided during a normal, regular, or adjusted school day.

3-003.04 Denial of Authorization: The Department may deny authorization for waiver services for any of the following reasons:

1. The individual fails to meet waiver eligibility criteria;
2. The individual fails to meet the Department's eligibility criteria;
3. A waiver slot is not available;
4. The individual or legal representative has not consented to waiver services;
5. The individual or legal representative has chosen to receive ICF/MR services;
6. The individual, his/her legal representative or other person on his / her behalf has not supplied needed information;
7. Intensity of services does not reflect the need for ICF/MR level of care;
8. The individual's needs are not being met through waiver services;
9. The IPP, IFSP, or ASP has not been implemented;
10. In the children's waiver, the IFSP does not include an appropriate family involvement plan, if applicable; or
11. A plan of services and supports to protect the individual's health and welfare cannot be developed or maintained.

3-003.05 Request for a Hearing regarding Waiver Eligibility or Waiver Services: An individual or his/her legal representative who disputes a Department decision regarding

eligibility for waiver services may request a hearing on the decision as provided in 465 NAC 2-001.02 and 465 NAC 6. The disputed decisions must concern:

1. Denial of eligibility for waiver services;
2. Not being given the choice of waiver services as an alternative to ICF/MR services; or
3. Being denied waiver services of the individual's choice.

3-004 INFORMAL DISPUTE RESOLUTIONS AND HEARINGS FOR ISSUES RELATED TO DD SERVICES FUNDED BY STATE GENERAL FUNDS

3-004.01 Right to Appeal a Decision Regarding DD Services: An individual or the individual's legal representative has the right to appeal decisions made by the Division of Developmental Disabilities with respect to:

1. The denial, change or termination of eligibility of the individual for specialized services;
2. The evaluation or placement of the individual;
3. The provision of specialized services to the individual;
4. The amount of the individual's authorized funding; or
5. The records relating to the individual.

3-004.01A Commencement of Appeal: An individual or the individual's legal representative may choose to begin the appeal process by either:

1. Requesting an Informal Dispute Resolution in writing or on a form provided by the Department; or
2. Filing a petition for a formal appeal with the Department in writing or on a form provided by the Department.

3-004.02 Availability of Copies

3-004.02A Service Coordination will provide a copy of the statutes, regulations, and forms for Informal Dispute Resolution and formal hearings to individuals receiving or requesting services or the individual's legal representative upon the initial determination of eligibility and annually after the commencement of services.

3-004.02B An individual or individual's legal representative may request a copy of the statutes, regulations, and forms for Informal Dispute Resolution and formal hearings from any Service Coordination office. Service Coordination will mail the requested information within five days of receipt of the request.

3-004.03 Timeliness of Appeal: In order to exercise the right to appeal, an individual or the individual's legal representative must either request Informal Dispute Resolution or file a petition for a formal appeal, in either case within 90 days of the decision that is being contested. If the individual or legal representative does not request an IDR or file a petition, the decision becomes final on the 90th day after the notification.

3-004.03A The 90-day period to exercise the right of appeal commences on the day immediately following the day on which the individual is notified of the decision by the Department. If the last day of the 90-day period is a Saturday, Sunday, or state holiday, the period will be deemed to continue until the close of business on the next day that the Department is open for business.

3-004.03B If an individual requests Informal Dispute Resolution, the 90-day period to file a formal appeal will be suspended, beginning on the day the Department receives the request for Informal Dispute Resolution until the day the Department notifies the individual or the individual's legal representative of the outcome of the IDR. At the conclusion of the IDR process, if the individual still wishes to dispute the Department's decision, the individual has the right to initiate a formal appeal, until the expiration of the 90-day period as calculated above.

3-004.03C If an individual files a petition for a formal hearing, the 90-day period to request Informal Dispute Resolution will not be suspended, except at the discretion of the Department. An individual will not have the right to request Informal Dispute Resolution at the conclusion of the formal hearing process.

3-004.04 Informal Dispute Resolution: Informal Dispute Resolution (IDR) is an opportunity for an interested party, including the individual or the individual's legal representative to request reconsideration of a decision of the Department without undergoing a formal hearing process before a hearing officer. Upon receiving a request for Informal Dispute Resolution, the Department will schedule a meeting between the individual or legal representative and the appropriate Department staff, which will be held at the soonest possible mutually convenient time for all necessary participants. An IDR may be held in person, by video, or by telephone.

3-004.05 Requesting a Hearing: In order to exercise the right to a hearing, the individual or the individual's legal representative must file a petition with the Department. The petition may be made on a form provided by the Department for such purpose, or in another writing that contains at least the following information:

1. The name of the petitioner (the individual's or legal representative's name, address, and phone number, and signature);
2. The specific decision contested;
3. The date of the decision contested; and
4. Any other information that the individual or legal representative wants to be included at the hearing.

If the petition fails to include any of the above information, it will be ineffective to initiate the hearing process and the Department may either reject the petition or request additional information from the individual or the individual's legal representative.

3-004.05A In order to be effective, the petition must be either mailed, sent via electronic mail or hand delivered to the Department.

3-004.05B If mailed, the petition will be deemed to be received by the Department on the date of the postmark. If hand delivered, the petition will be deemed to be received by the Department on the actual date of receipt.

3-004.06 Staying the Decision or Action: If an individual or the individual's legal representative makes a timely request for informal dispute resolution or makes a timely filing of a petition for a formal hearing, the related decision will be stayed until the final outcome of the appeal process. While the decision is stayed, the Department will not implement the decision and the individual must remain in his/her current placement unless:

1. The current placement is a temporary placement not to exceed 45 days made pursuant to a medical or other emergency and the emergency no longer exists;
2. A medical or other emergency arises necessitating a change in service or placement;
3. The health or safety of the individual would be endangered by the continued placement;
4. The health or safety of other persons would be endangered by the continued placement; or
5. The provider is no longer certified.

3-004.06A The hearing officer will rule on motions filed by parties disputing the application of and exclusion from the stay and the continuation of, or cessation of, current placement of the individual, pending the final decision on the petition.

3-004.07 Hearing Officer: Upon receipt of a petition for formal hearing, the Director of Developmental Disabilities will assign the matter to a hearing officer who will receive all subsequent pleadings and will conduct the hearing.

3-004.07A Any party may challenge a hearing officer on the grounds that the hearing officer has a conflict of interest. The challenge may be made to the hearing officer on, or before, the date set for hearing. The hearing officer may hear and decide the challenge or may refer the matter to the Director of Developmental Disabilities. If the hearing officer does not hear the challenge immediately, the hearing on the petition will be continued until the challenge is resolved. The hearing officer will notify all parties of the new hearing date by mail at least five days before the date of the hearing.

3-004.07B The Director of Developmental Disabilities may substitute a hearing officer for good cause. The substitution of a hearing officer is reason for a continuance.

3-004.08 Authority and Duties of the Hearing Officer

3-004.08A The hearing officer has the duty to:

1. Conduct full, fair, and impartial hearings;
2. Take appropriate action to avoid unnecessary delay in the disposition of proceedings; and
3. Maintain order during the hearing.

3-004.08B The hearing officer has all the powers necessary to carry out his/her duties, including to:

1. Administer oaths and affirmations;
2. Issue subpoenas as authorized by law to compel the appearance of witnesses and the production of relevant evidence;
3. Compel discovery and to impose appropriate sanctions for failure to make discovery;
4. Rule upon offers of proof and receive relevant, competent, and probative evidence;
5. Regulate the course of the proceedings in the conduct of the parties and their representatives;
6. Hold conferences for simplification of the issues, settlement of the proceedings, or any other proper purpose;
7. Consider and rule orally or in writing, upon all procedural and other motions appropriate in adjudicative proceedings, including the application of, or exclusion from, the stay of an action or decision on appeal;
8. Establish the time for filing briefs;
9. Grant a specific extension of time, at the request of either party for good cause shown;
10. Produce evidence on his/her own motion;
11. Exclude people from the hearing;
12. See that facts are fully developed including witness examination and cross examination, if needed; and
13. Take any other action consistent with the purpose of the law and consistent with these rules.

3-004.09 The Hearing: The hearing officer will set the date, time, and location of the hearing. The hearing officer will attempt to arrange a time and place for the hearing that is convenient to all parties.

3-004.09A Unless as otherwise specified in these regulations or applicable statutes, the hearing officer and all parties may serve all motions, notices, pleadings, orders, or other papers personally or by mail.

3-004.09B The hearing officer and all parties must serve all parties who have entered their appearances with all notices, motions, pleadings, orders, or other papers filed. Service on an attorney of record is service on the party represented by the attorney.

3-004.09C Presentation of Evidence: The Nebraska Evidence Rules, Neb. Rev. Stat. §§ 27-412 to 27-415, will not apply unless invoked in writing by either party at

least three business days before the hearing. However, the hearing officer will admit competent, relevant, and material evidence, but will exclude evidence that is incompetent, irrelevant, immaterial, or unduly repetitious.

3-004.09C1 Any party invoking the Nebraska Evidence Rules is liable for the payment of all costs related thereto, including the cost of court reporting services, which the party is responsible for procuring for the hearing.

3-004.09D Order of Presentation: At the hearing, the parties will present evidence on the issues raised in the petition and any subsequent pleadings:

1. The individual who filed the petition or the individual's legal representative (the "petitioner") will present evidence first;
2. The petitioner has the burden of persuasion throughout the hearing; and
3. The petitioner must prove his or her case by a preponderance of the evidence.

3-004.09E Rights: A party at a hearing has the right to:

1. Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to needs of persons with developmental disabilities;
2. Present evidence and confront, cross-examine, and compel the attendance of witnesses;
3. Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five calendar days before the hearing;
4. Obtain a written or electronic verbatim record of the hearing at his/her cost; and
5. Obtain written findings of fact and decisions from the Director of Developmental Disabilities.

3-004.09F Witnesses: The hearing officer may issue subpoenas to compel witnesses to attend or produce evidence. Witnesses are entitled to the fees and expenses as allowed in District Court.

1. The Director of Developmental Disabilities will certify failure to respond to a subpoena to the District Court of Lancaster County for enforcement or for punishment for contempt of the district court.
2. Each party is responsible for the payment of witness fees and mileage, including the fees and expenses of expert witnesses that it calls.
3. The Department will provide personnel as witnesses when served with a subpoena without payment of witness fees or mileage fees.

3-004.09G At the completion of the proceedings, the hearing officer will prepare a report based on the evidence presented containing recommendations for the

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Director of Developmental Disabilities to make findings of fact and conclusions of law.

3-004.09I The report and final decision and order will be delivered to each party or attorney of record by certified mail.

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3-004.10 Judicial Review: Any party aggrieved by the final decision and order of the Director of Developmental Disabilities is entitled to judicial review under Neb. Rev. Stat. §§ 83-1224. Any party to the hearing may seek enforcement of the final decision and order of the Director of Developmental Disabilities through the process of judicial review, if necessary.