

exceeding the reasonable and customary rate of \$25/hour. The two issues addressed by the Administrative Law Judge (ALJ) were (1) Who has the power to determine what hourly wage is reasonable; and (2) Do Petitioner's guardians have the authority to obligate the DDD to pay an hourly wage above the rate determined to be reasonable and customary. For the reasons set forth below, I agree with the ALJ that the authority to determine reasonable and customary rates rests with DHS. I further agree that program beneficiaries cannot compel DHS to grant a wage increase exceeding the reasonable and customary maximum.

The Developmentally Disabled Rights Act (the Act) declared "that persons with developmental disabilities are entitled to certain fundamental rights; that services provided to people with developmental disabilities should be provided in a manner which respects the dignity, individuality and rights of persons with developmental disabilities; and that the purpose of the Act was to denote such rights and to establish standards for the provision of such services." N.J.S.A. 30:6D-1, 2. The DHS, Division of Disabilities (DDD), is the agency charged with carrying out the goals of the Act. N.J.A.C. 30:6D-2. In furtherance of this, DDD funds services and supports for eligible individuals with developmental disabilities. N.J.A.C. 10:40-1.1. The courts have held that "where the Legislature creates a class of beneficiaries which is greater than that which can be served by the amount of resources available for the purpose... the administrative agency may establish reasonable classifications and priorities to allocate [its] limited resources to serve the maximum class of individuals with developmental disabilities." Morton v. Ruiz, 415 US 199,230, 231, 94 S. Ct. 1055, 1072, 39 L.Ed. 2d 270 (1974); S.I. v. N.J. Div. of Developmental Disabilities, 265 N.J. Super. 251, 264 (App. Div. 1993). Accordingly, DDD is responsible for making appropriate decisions about State funding for the services it provides." N.J.S.A. 30:6D-32.1, 6.

Petitioner participates in the DDD Community Care Program (CCP), which provides a budget for Individual Supports, including the employment of Self-Directed Employees (SDE). SDEs are people who are offered employment directly by the individual receiving the services. The beneficiary of the services is responsible for creating the position description,

setting the hours of employment, managing the SDE, and determining the continuation or termination of employment. Petitioner's guardian employs two SDEs to care for Petitioner twenty-four hours a day, seven days a week within his parents' home. I agree with the ALJ that while the individual participant has some flexibility and control in the SDE process, the individual participant's budget is ultimately under the control of DHS, DDD. N.J.S.A. 30:6D-32.1. To that end, it is within DHS' purview to determine the reasonable and customary wage rates for services performed within the parameters of the Individual supports budget.

DDD's policies with regard to SDE compensation are set forth in the CCP Manual. Section 8.3.2.2, entitled *Wages and Benefits*, states "wages are determined by the individual, subject to minimum wage laws, at a rate that is considered reasonable and customary for the service being provided." Section 7.8, entitled *Service Approvals by the Division*, states that "SDE rates above/below what is considered reasonable and customary must be approved by the Division prior to being included in an individual service plan (ISP)." There is no statute, regulation, or policy compelling the Commissioner to grant a wage increase in excess of the reasonable and customary rate.

That said the issue transmitted to the OAL was an appeal of DDD's denial of Petitioner's request for a wage increase because the proposed rate was not reasonable and customary. DDD has argued that a reasonable and customary rate for SDEs employed as DSPs is \$25/hour. DDD asserts that it arrived at this rate after researching private-agency DSPs, the majority of which pay staff between \$12 and \$15 per hour. While I agree provider agency rates are not comparable to individual DSP rates, largely due to the costs and overhead associated with running the business, I feel that the record is lacking documentary evidence of DDD's research into the reasonable and customary rates for individual DSPs. Similarly, Petitioner has failed to present evidence that the rates he proposes are more appropriate for the services provided by his DSP. For this reason, I am REMANDING this matter to the OAL for additional documentary evidence supporting DDD's conclusion that \$25/hour is the reasonable and customary rate for individual DSPs, and alternatively,

documentary evidence that the rate requested by Petitioner is the appropriate rate.

THEREFORE, it is on this 10th day of AUGUST 2021

ORDERED:

That the Initial Decision is hereby ADOPTED with regard to the two issues addressed in the Initial Decision, and

That the matter is REMANDED for additional documentary evidence in accordance with this decision.



Jennifer Langer Jacobs, Assistant Commissioner
Division of Medical Assistance
and Health Services