



State of New Jersey

DEPARTMENT OF HUMAN SERVICES

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

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Assistant Commissioner

**STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES**

K.B.,

PETITIONER,

V.

DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES,

RESPONDENTS.

ADMINISTRATIVE ACTION

ORDER OF REMAND

OAL DKT. NO. HMA 05474-21

As Assistant Commissioner for the Division of Medical Assistance and Health Services (DMAHS), I have reviewed the record in this case, including the OAL case file, the Initial Decision and both Petitioner's and Respondent's exceptions. Procedurally, the time period for the Agency Head to file a Final Agency Decision in this matter is February 10, 2022 in accordance with an Order of Extension. The Initial Decision in this case was received on November 10, 2021.

This matter arises from the Department of Human Services (DHS), Division of Developmental Disabilities, May 18, 2021 denial of Petitioner's request for a \$5 hourly increase in wages paid to her Self-Directed Employee (SDE) because it would result in wages exceeding the reasonable and customary rate.

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 employs three SDEs. The SDE that is the subject of Petitioner's request, T.M., is employed ten hours per week from 7:00 a.m. to 9:00 a.m. Monday through Friday. 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 cap for SDEs is \$25/hr. DDD asserts that it arrived at this rate after researching private-agency employees, the majority of which pay staff between \$12 and \$15 per hour. While I agree provider agency rates are not comparable to individual direct service provider 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 SDEs similarly employed to T.M.

Likewise, Petitioner has failed to present evidence that the rate she proposes is more appropriate for the services provided by T.M. T.M.'s duties have been generally described as those performed by a licensed practical nurse (LPN) and as helping the Petitioner "get ready for program." (P-3). T.M. did not testify at the hearing, and it is not clear from the record what particular skilled services she provides Petitioner. Nor is there evidence that the Petitioner is in need of skilled nursing services and is eligible for the Support Services + Private Duty Nursing Program. Furthermore, there is no evidence in the record that T.M. holds a license that authorizes her to perform skilled nursing services. Instead, the reasons given for the increase in wages focuses more on T.M.'s willingness to work than her ability

to perform skilled services under extraordinary circumstances.¹ (P-3). Understanding T.M.'s duties and qualifications is necessary to determine the reasonable and customary rate of pay for someone in her position.

On June 17, 2021, this matter was transmitted to the Office of Administrative Law (OAL) for fair hearing. On September 29, 2021, a telephone status conference was scheduled. The OAL notice states that the conference is limited to "attorneys of record, approved non-lawyer representatives and pro-se petitioners."² According to both Parties' exceptions, the status conference was converted to a hearing upon their calling in to the conference. Perhaps this unexpected shift accounts for the incomplete record before me.

For these reasons, 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 additional testimony and documentary evidence that the rate requested by Petitioner is the appropriate rate for the services T.M. provides.

THEREFORE, it is on this 3rd day of FEBRUARY 2022,

ORDERED:

That the Initial Decision is hereby REVERSED; 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

¹ Petitioner cites T.M.'s commitment to return after the separation caused by Covid-19; her willingness to drive to the Petitioner's location, her ability to operate Petitioner's equipment and her enthusiasm to master new skills usually assigned to an LPN as a basis for an increase in wages.

² Despite this requirement, Petitioner's representative had two additional people on the call, the State Coordinator and the Ombudsman. This is in line with Petitioner's exceptions, which state that her notice allowed for additional participants. However, this notice is not part of the record.