



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
9083 Middletown Mall
White Hall, WV 26554

Earl Ray Tomblin
Governor

Rocco S. Fucillo
Cabinet Secretary

December 14, 2012

RE: ---- v. WV DHHR
ACTION NO.: 12-BOR-2312

Dear Mr. ----:

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 Health and Human Resources. These same laws and regulations are used in all cases to assure that all persons are treated alike.

If you believe the decision was reached in error, you may appeal. See the attached explanation of Claimant's Recourse.

Sincerely,

State Hearing Officer
Member, State Board of Review

Pc: Chairman, Board of Review
----, APS Healthcare, Inc.

**WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES
BOARD OF REVIEW**

Claimant,

vs.

Action Number: 12-BOR-2312

**WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,**

Respondent.

DECISION OF THE STATE HEARING OFFICER

I. INTRODUCTION

This is a report of the State Hearing Officer resulting from a fair hearing for ----. This hearing was held in accordance with the provisions found in the Common Chapters Manual, Chapter 700, of the West Virginia Department of Health and Human Resources. This fair hearing convened via videoconference on December 13, 2012, on a timely appeal filed August 27, 2012.

All persons giving testimony were placed under oath.

II. PROGRAM PURPOSE:

The Intellectual and Developmental Disabilities (I/DD) Waiver Program is West Virginia's home and community-based services program for individuals with intellectual and/or developmental disabilities. It is administered by the Bureau for Medical Services pursuant to a Medicaid waiver option approved by the Centers for Medicare and Medicaid (CMS). The I/DD Waiver Program reimburses for services to instruct, train, support, supervise, and assist individuals who have intellectual and/or developmental disabilities in achieving the highest level of independence and self-sufficiency as possible. The I/DD Waiver Program provides services in natural settings, homes and communities where the individual resides, works and shops.

III. PARTICIPANTS

----, Claimant's sister/MPOA

----, Claimant's sister/witness

---- ----, Claimant's brother/witness
----, RN, ---- - Claimant's witness
----, Service Coordinator, ---- – Claimant's witness
----, Program Manager, ---- – Claimant's witness
Patricia Nesbit, BMS, Program Manager – Respondent's representative
----, APS Healthcare, Respondent's witness

Presiding at the hearing was Thomas E. Arnett, State Hearing Officer and a member of the State Board of Review.

IV. QUESTION TO BE DECIDED

The question to be decided is whether or not the Department was correct in its decision to deny the Claimant's request for Skilled Nursing (LPN 1:1) service units in excess of the service limits allowed through the Medicaid I/DD Waiver Services Program.

V. APPLICABLE POLICY

West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations, And Exclusions, For I/DD Waiver Services.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Department's Exhibits:

- D -1 West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services §513.9.1.12.1
- D-2 Notice of Denial dated 8/14/12
- D-3 APS Healthcare Purchase Request – start date of 7/1/12

VII. FINDINGS OF FACT:

- 1) On or about August 14, 2012, the Claimant, an active recipient of services through the Medicaid Intellectual and Developmental Disabilities (I/DD) Waiver Services Program, was notified that his request for an increase in the amount of Skilled Nursing, Licensed Practical Nurse (LPN 1:1) was denied because the request exceeds the service limitations of 11,680 units. The notice indicates the Claimant has already been approved for 11,680 units and that the request for an increase to 14,600 units was denied.
- 2) Respondent, represented by Patricia Nisbet, a Program Manager at the Bureau for Medical Services (BMS), cited applicable policy and noted that Skilled Nursing (LPN 1:1) services cannot exceed 11,680 units/2920 hours (an average of 8 hours per day) per member's annual IPP year. Respondent cited Exhibit D-3 and noted that the Claimant has been approved for 24,032 units of Person Centered Support (PCS) – Agency 1:1 (average 16 hours per day) and 11,690 units of Skilled Nursing (LPN 1:1) for a total of just over 24 hours of 1:1 care to

allow for overlap of services. The Claimant, however, is requesting ten (10) hours (14,600 units) of Skilled Nursing (LPN 1:1), or 26 hours of 1:1 care per day, and Medicaid cannot pay for 26 hours of 1:1 care in a 24-hour period. Respondent acknowledged that there could be some overlap of services, but noted that if the member receives two (2) or more hours of skilled nursing services per day, the LPN is responsible for providing direct care supports and training. Respondent emphasized that approval is based on daily averages and noted that the medical documentation indicates there are going to be days when less than 8 hours of skilled nursing is required by the Claimant.

- 3) The Claimant's representatives proffered testimony to indicate the Claimant has a doctor's order for the use of a ventilator five (5) to eight (8) hours nightly, and according to State law, it is required that an LPN provide this service. The Claimant also requires LPN services for trachea care twice a day (once every 12 hours). Claimant's representatives acknowledged that the Claimant did not require the requested units of LPN 1:1 services the previous year, but indicated that was only because he was sick and spent a lot of time in the hospital. The Claimant lives in his own home, and he can only do this because of the services provided. Claimant's representatives noted that they cannot anticipate how many hours of LPN services are required through the night when the Claimant is on the ventilator, and that he has a doctor's order for ten (10) hours of LPN care per day.
- 4) Respondent noted that the I/DD Waiver Program is not designed to provide care for medically fragile individuals who might otherwise require institutional care where skilled nursing services are available on a 24-hour basis. Respondent again noted that the Skilled Nursing (LPN 1:1) cap of eight (8) hours per night is an annual cap, not a daily cap, and while a doctor can order any number of units, the cap remains at eight (8) hours a day. Respondent acknowledged that while there will be occasions when the LPN is needed for eight (8) hours throughout the night, there should be occasions when the LPN is needed for only five (5) hours. This provides some flexibility with how the Skilled Nursing (LPN 1:1) units are used.
- 5) Medicaid Provider Manual, §513.9.1.12.1 (Skilled Nursing: Licensed Practical Nurse (LPN): Traditional Option) provides that if the member receives two or more hours of skilled nursing services per day, then the LPN is responsible for providing direct care supports and training. The maximum annual units of LPN services cannot exceed 11,680 units/2920 hours (average 8 hours/day) per member's annual IPP year. When the member accesses other direct care services, these units are counted toward the cap listed in the Person Centered Support sections in the Traditional Options, excluding respite. This service may not be billed concurrently with any other direct care services.

VIII. CONCLUSIONS OF LAW:

- 1) Regulations that govern the I/DD Waiver Program provides that the maximum annual units of Skilled Nursing (LPN 1:1) services per member's IPP year cannot exceed 11,680 units/2920 hours (average of 8 hours a day). This service may not be billed concurrently with any other direct care services. If the member receives two (2) or more hours of skilled nursing services a day, the LPN is responsible for providing direct care supports and training.
- 2) Evidence submitted at the hearing reveals that the Claimant has been approved for the

maximum allowable units of Skilled Nursing LPN 1:1 (an average of eight (8) hours per day). When added to the approved Person Centered Support (PCS) – Agency 1:1 (average 16 hours per day), the Claimant is approved to receive just over 24 hours of 1:1 care. Pursuant to policy, Skilled Nursing (LPN 1:1) cannot be billed concurrently (at the same time) with any other direct care service, and the LPN can provide direct care support, thereby eliminating the hours of overlapping services.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the action of the Department in denying the Claimant's request for Skilled Nursing (LPN 1:1) services in excess of the service limits.

X. RIGHT OF APPEAL:

See Attachment.

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision.

Form IG-BR-29.

ENTERED this ___ Day of December 2012

**Thomas E. Arnett
State Hearing Officer**