



STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
OFFICE OF INSPECTOR GENERAL

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Board of Review
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July 10, 2019



RE: [REDACTED], A PROTECTED INDIVIDUAL v. WVDHHR
ACTION NO.: 19-BOR-1581

Dear Mr. [REDACTED]

Enclosed is a copy of the decision resulting from the hearing held in the above-referenced matter.

In arriving at a decision, the Board of Review 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.

You will find attached an explanation of possible actions that may be taken if you disagree with the decision reached in this matter.

Sincerely,

Tara B. Thompson
State Hearing Officer
State Board of Review

Enclosure: Appellant's Recourse
Form IG-BR-29

cc: Stacy Broce, Bureau for Medical Services
Nora Dillard, Bureau for Medical Services
Janice Brown, KEPRO

D-6 IDD Waiver Exception Request Form, signed March 14, 2019

Appellant's Exhibits:

- A-1 Behavior Report Monthly Summaries and Behavior Incident Reports, dated March through May 2017
- A-2 [REDACTED] Letter, dated January 21, 2019; Addendum Individualized Program Plan (IPP), dated January 8, 2019
- A-3 IPP, dated December 13, 2018

After a review of the record, including testimony, exhibits, and stipulations admitted into evidence at the hearing, and after assessing the credibility of all witnesses and weighing the evidence in consideration of the same, the following Findings of Fact are set forth.

FINDINGS OF FACT

- 1) The Appellant is a Traditional Options participant in the Medicaid IDD Waiver Program and receives residential services through [REDACTED] (Exhibits A-2 and A-3).
- 2) The Appellant was assigned a 1:2 setting for the January 1 through December 31, 2019 service plan year, but resides in a 1:1 setting (Exhibits A-2 and A-3).
- 3) The Appellant or his representative have the authority to select which agency they wish to provide residential services.
- 4) [REDACTED] pervasively failed to implement the Appellant's behavioral support plan, document behavioral intervention, document the Appellant's behaviors, and complete incident reports (Exhibits A-2 and A-3).
- 5) The Appellant was unable to participate in community integration due to [REDACTED] staff lacking transportation.
- 6) In the 2018 service plan year, the Appellant was approved to purchase 34,905 units of 1:1. The Appellant's team was able to purchase units of 1:1 during the 2018 service plan year without exceeding the Appellant's individualized IDD Waiver Program budget.
- 7) For the service plan year January 1 through December 31, 2019, the Appellant requested an accommodation to receive 35,040 units of Unlicensed Residential 1:1 (1:1) services (Exhibit D-1).
- 8) The Respondent approved for the Appellant to receive 27,584 units of 1:1 and 7,360 units of Unlicensed Residential 1:2 (1:2) services (Exhibit D-1).
- 9) The approved 27,584 units of 1:1 equates 18.89 hours of 1:1 per day.
- 10) The approved 7,360 units of 1:2 equates 5.04 hours of 1:2 per day.

- 11) The Respondent issued a notice on April 9, 2018 advising that the request for accommodation of 35,040 units of 1:1 was denied due to the Appellant's failure to demonstrate that services that can be purchased within the Appellant's budget are insufficient to prevent a risk of institutionalization (Exhibit D-1).
- 12) On March 14, 2019, the Appellant's Service Coordinator, [REDACTED], and the Appellant's guardian, [REDACTED], signed an IDD Waiver Exceptions Request Form (Exceptions Request) (Exhibit D-6).
- 13) On the Exceptions Request, the team marked "No" to the question of whether the team believed an error was made in the Appellant's IDD Waiver budget calculation (Exhibit D-6).
- 14) On November 7, 2018, an ICAP assessment was completed to evaluate the severity of the Appellant's behaviors (Exhibit A-2).
- 15) The ICAP reflected that the Appellant hurts himself one or more times per hour – a moderately severe problem (Exhibit A-2).
- 16) The ICAP reflected that the Appellant hurts others or is destructive one to six times per week – a very serious problem (Exhibit A-2).
- 17) On November 7, 2018, an ABAS III was conducted and the Appellant scored "extremely low" in all skill areas (Exhibit A-2).
- 18) The Appellant exhibits physical aggression toward others, pounds his fist, slams doors, spits, stomps, swings items, pushes or grabs others, jumps, charges tables, shoves chairs, and moves "quickly toward or away from areas/others" (Exhibit A-2).
- 19) The Appellant exhibits intrusive, intimidating, and eloping behavior (Exhibit A-2).
- 20) On January 8, 2019, the Appellant's team completed an IPP addendum (Exhibit A-2).
- 21) The Appellant's use of out-of-service informal supports declined due to the Appellant's support's declining health, which resulted in the Appellant's increased use of services for 24/7 care. (Exhibit A-2).
- 22) Community Integration was identified as a support goal that is available and accessible (Exhibit A-2).
- 23) Other identified service goals reflected self-care, personal boundaries, hygiene, and sign language (Exhibit A-2).

- 24) Medication administration, grocery shopping, financial review, appointment alignment, transportation, team meeting schedule, service referrals, Appellant advocacy, and home and hygiene care were listed on the plan of action (Exhibit A-2).
- 25) No incident reports have been completed regarding the Appellant's behaviors since December 13, 2018 (Exhibit A-2).
- 26) The IPP addendum narrative reflected that the Appellant exhibited physical aggression toward others on four dates in June 2018, two dates in July 2018, and one date in August 2018. The narrative reflects that the Appellant exhibited physical aggression toward himself on one date in October 2018 (Exhibit A-2).
- 27) On one occasion within six-months of the hearing, the Appellant dragged a staff member by the arm through his home.
- 28) One "one or two" occasions by video, the Appellant's witness, Ms. [REDACTED] observed the Appellant to be pulling on staff's arm trying to get their attention.

APPLICABLE POLICY

Intellectual and Developmental Disabilities Waiver (IDDW) § 513.17.4.1 Unlicensed Residential Person-Centered Support (Traditional Option) provides in part:

Unlicensed Residential PCS services must be assessment based AND outlined on the IPP. Activities must allow the person who receives services to reside and participate in the most integrated setting appropriate to their needs and within their individualized budget.

All units of service must be prior authorized before being provided. Prior authorizations are based on assessed need as identified on the annual functional assessment and services must be within the individualized budget of the person who receives services.

All requests for more than average of 12 hours per day of 1:1 services require BMS approval. Approval of this level of service will be based on demonstration of assessed need not on a particular residential setting.

IDDW §513.8.1 provides in part:

The Interdisciplinary Team (IDT) must make every effort to purchase services within the individualized assessed budget.

IDDW § 513.25.4.2 provides in part:

The individualized budget is based on two components: 1. The base budget range that is determined based on the person's setting, and 2. "add-on" funding that is determined based on answers relating to the person's functionality provided to the UMC on the most current ICAP.

The individual seeking additional services through the exceptions process has the burden of showing that services in excess of the individualized budget are necessary to avoid a risk of institutionalization. To make this showing, the person or his legal representative must provide a clear explanation on the exception process request as to which additional services are requested and why they are necessary to prevent a risk of institutionalization, and may provide documentation to support his or her position.

DISCUSSION

Policy provides that the Appellant's individualized budget is calculated based on his residential setting and functionality as provided on the most current ICAP. As evidence demonstrated that the initial determination of the Appellant's IDD Waiver Program budget for service plan year January 1 through December 31, 2019 was not being contested, the matter to be decided is whether the Appellant's current functioning is such that additional requested units of 1:1 should be awarded in excess of the present service plan year budget in order to prevent the Appellant's institutionalization. The Respondent had to prove that the Appellant's Exceptions Request was correctly denied in consideration of the Appellant's most recent ICAP, Structured Interview, all IPPs from the current year, and information provided in the Exceptions Request. The Appellant had to prove by clear explanation that 1:1 services in excess of the Appellant's IDD Waiver Program budget were necessary to prevent institutionalization.

On the March 2019 Exceptions Request, the Appellant's team denied that they were able to decrease or substitute other services to purchase services sufficient to meet the Appellant's needs. The Exceptions Request contended that services could not be substituted because nursing was required for medication administration, health monitoring, coordination of physician appointments, communication between physicians and guardian, and ensuring continuity of medication availability and effectiveness. While the narrative provided reasons for an inability to substitute nursing, no discussion was provided as to how substitution of less expensive services such as 1:2 was unable to meet the Appellant's needs.

The Appellant contended that substitution of 1:1 was impossible because the Appellant's residential setting places him at a 1:1 ratio due to behaviors that place him or others at risk of harm. The Exceptions Request contended that additional 1:1 is required due to the Appellant's setting and behavior functioning. As policy provides that the base budget is determined pursuant to the setting, the Appellant must demonstrate that the Appellant's functioning is such that the Appellant cannot be maintained in the community without provision of 1:1 services in excess of add-on funding provided within his budget. Documentation must support that the Appellant's functioning

requires additional 1:1 services. Policy specifies that the Exception Request must clearly explain why additional services are necessary to prevent risk of institutionalization. In each of the areas on the Exceptions Request that questions why 1:2, 1:3, etc. cannot be substituted for 1:1, the narrative provides a copy/paste general answer regarding the Appellant thriving in a 1:1 living arrangement and his desire to retain his residential setting. The Exceptions Request narrative that the Appellant is thriving is in contrast to demonstration of the Appellant's functioning need for services in excess of his assigned budget.

The Appellant's evidence demonstrated incident reports and behavioral reports from 2016 and 2017. Because of the dates of the reports, information within was given little weight in the decision of this Hearing Officer as the Appellant's behaviors exhibited in 2016 and 2017 are irrelevant to determining his behavioral functioning during the current plan year. The Appellant received 34,905 approved 1:1 units during the 2018 service plan year; however, the Appellant's witness testified that the team was able to purchase the approved units from the Appellant's existing budget. The instant matter requires a decision to be made regarding whether the Appellant's current functioning warrants 1:1 units in excess of the current service year's budget. The Respondent testified that the Appellant was approved up to eighteen hours per day for the current year and that the Appellant had failed to demonstrate how being awarded a full 24 hours of 1:1 per day would prevent the Appellant from being institutionalized.

The Appellant's ICAP reflected that the Appellant exhibited behavior that caused him to be a danger to himself or others – including hurting himself one or more times per hour and hurting others or being destructive one to six times per week. Testimony provided by the Appellant's guardian reflected one incident within six months of the hearing in which he observed the Appellant dragging a staff member by the arm. The Appellant's witness testified to observing the Appellant pulling on staff's arm trying to get staff's attention. Even without [REDACTED] documentation of the incident reports, the narrative dates of which the Appellant exhibited physical aggression to himself or others in June, July, August, and October 2018 in combination with testimony provided during the hearing, do not match the severity level documented on the November 7, 2018 ICAP on which the Appellant's individualized 2019 IDD Waiver budget was based. The few reported incidents do not provide sufficient demonstration that the Appellant's aggressive behavior rises above the level assessed on the ICAP to warrant additional 1:1 services beyond those awarded in the budget.

The Respondent argued that the Appellant sleeps through the night and that the provision of the currently approved eighteen 1:1 hours per day is sufficient to meet the Appellant's health and safety needs. The evidence does not demonstrate any occurrence of physical aggression during times in which the Appellant was sleeping. All ICAP, behavioral, and incident information presented in the evidence was considered at the time of the January 1 through December 31, 2019 service plan year budget calculation. As the Appellant's budget was calculated pursuant to information provided and the calculation of the Appellant's budget was not contested, without provision of additional information demonstrating that the Appellant's functioning warrants 1:1 services in excess of the budget, this Hearing Officer cannot clearly discern that additional 1:1 services are required to protect the Appellant from risk of institutionalization.

The Appellant's IPP addendum reflected an increased utilization of services due to declined use of informal supports, which failed to establish that the Appellant's functioning has declined. The addendum reflected that the Appellant requires "intense supervision" but does not clarify what intense supervision entails nor provides a clear explanation for why intense supervision is required. Further, while 24/7 supervision was indicated as necessary "to ensure health and safety" of the Appellant and repeated references of "due to behaviors" were present throughout the IPP addendum, the goals focused on multiple non-behavior related plan-of-action interventions. Although the Appellant's witnesses testified that the Appellant was unable to utilize 1:2 for community integration due to lack of agency staff transportation, the IPP addendum indicated that on January 8, 2019, the team agreed that community integration was available and accessible.

The Appellant argued that 1:1 is necessary to teach the Appellant replacement behaviors and that [REDACTED] is not following through with the behavior plan or documenting health and safety issues. The Appellant and the Appellant's representative have the authority to choose the provider from which they receive services. The Appellant argued that other local providers would not accept the Appellant without a year of 1:1 approval. While the Appellant's representative may have difficulty aligning a provider of his preference, the Board of Review cannot award additional IDD Waiver Program service units in excess of the Appellant's budget contingent upon the Appellant's inability to gather sufficient supporting documentation from his chosen provider.

The Appellant's evidence failed to demonstrate that 1:1 service units should be awarded in excess of the approved budget.

CONCLUSIONS OF LAW

- 1) The Appellant's IDD Waiver Program January 1 through December 31, 2019 service year budget was determined based on the Appellant's personal setting and the Appellant's functionality as reflected on the November 7, 2018 ICAP.
- 2) The Appellant did not contest the budget methodology or subsequent budget calculation.
- 3) To award IDD Waiver Program service units for 1:1 services exceeding the Appellant's individualized budget for the January 1 through December 31, 2019 year, the Appellant was required by policy to demonstrate that services in excess of the individualized budget are necessary to avoid a risk of institutionalization.
- 4) Evidence failed to demonstrate that a change in the Appellant's functionality had occurred since the November 7, 2018 ICAP.
- 5) Evidence failed to demonstrate that the Appellant required additional 1:1 services in excess of his individualized IDD Waiver Program budget.
- 6) The Respondent correctly denied the Appellant's request for accommodation to receive services in excess of the Appellant's Medicaid IDD Waiver budget.

DECISION

It is the decision of this State Hearing Officer to **UPHOLD** the Respondent's decision to deny the Appellant's request for accommodation to receive services in excess of the Appellant's January 1 through December 31, 2019 Medicaid IDD Waiver budget.

ENTERED this 10^h day of July 2019.

Tara B. Thompson
State Hearing Officer