



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
203 East Third Avenue
Williamson, WV 25661

Bill J. Crouch
Cabinet Secretary

Jolynn Marra
Interim Inspector General

October 5, 2018

[REDACTED]

RE: [REDACTED] v. WV DHHR
ACTION NO.: 18-BOR-2210

Dear Ms. [REDACTED]

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.

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

Sincerely,

Stephen M. Baisden
State Hearing Officer
Member, State Board of Review

Encl: Appellant's Recourse to Hearing Decision
Form IG-BR-29

cc: Barbara Recknagel, KEPRO
Teresa McDonough, WV Bureau for Medical Services
[REDACTED], RN, [REDACTED]
[REDACTED], Coordinating Council for Independent Living

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

████████████████████,

Appellant,

v.

ACTION NO.: 18-BOR-2210

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

Respondent.

DECISION OF STATE HEARING OFFICER

INTRODUCTION

This is the decision of the State Hearing Officer resulting from a fair hearing for ██████, a protected individual. This hearing was held in accordance with the provisions found in Chapter 700 of the West Virginia Department of Health and Human Resources' Common Chapters Manual. This fair hearing was convened on October 2, 2018, on an appeal filed August 16, 2018.

The matter before the Hearing Officer arises from the July 26, 2018, decision by the Respondent to discontinue the Appellant's participation in the Traumatic Brain Injury Waiver (TBIW) Program for non-compliance with TBIW Program policy.

At the hearing, the Respondent appeared by Barbara Recknagle of KEPRO. Appearing as witnesses for the Respondent were Teresa McDonough, Program Manager of the WV Bureau for Medical Services (WV BMS), ██████, RN, of ██████, and ██████, of the Coordinating Council for Independent Living (CCIL). The Appellant appeared *pro se* by his mother ██████. All participants were sworn and the following documents were admitted into evidence.

Department's Exhibits:

- D-1 TBIW Policy Manual, §512.33
- D-2 TBIW Policy Manual, §512.15
- D-3 Letter from WV BMS to Appellant, dated July 26, 2018
- D-4 TBIW Request for Discontinuation of Service from ██████ to WV BMS, dated July 18, 2018
- D-5 ██████ Progress Notes, dated June 25 through August 3, 2018
- D-6 E-mail from Public Partnerships LLC to WV BMS, dated April 12, 2018

Appellant's Exhibits:

None

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

FINDINGS OF FACT

- 1) The Appellant participated in and received services through the Traumatic Brain Injury Waiver (TBIW) program.
- 2) On July 18, 2018, [REDACTED] (hereinafter referred to as “[REDACTED]”), the Appellant’s home health agency, submitted to the WV Bureau for Medical Services (WV BMS) a Request for Discontinuation of Services form (Exhibit D-4) regarding the Appellant. The form indicated that the reason for the request was non-compliance with the TBIW program.
- 3) The WV BMS discontinued the Appellant from the TBIW Program for “Persistent non-compliance with [the] service plan.” The WV BMS informed the Appellant of its decision by letter dated July 26, 2018 (Exhibit D-3).
- 4) The Appellant’s representative, his mother, requested a fair hearing to protest the discontinuation of the Appellant’s services through the TBIW Program.

APPLICABLE POLICY

The WV Bureau of Medical Services (BMS) Traumatic Brain Injury Waiver (TBIW) Policy Manual §512.15 reads as follows:

The following services are available to people on the TBIW [Program] if they are deemed necessary and appropriate during the development of and listed on their Service Plan:

- A. Case Management Services
- B. Personal Attendant Services
- C. Non-Medical Transportation Services

TBIW services, eligible for reimbursement by Medicaid, are to be provided exclusively for the person utilizing the program only for necessary activities as listed in their [*sic*] Service Plan. They are not to be provided for the convenience of others living in the household or others [with] whom the person utilizing the program has contact.

The WV BMS TBIW Policy Manual §512.33 reads as follows:

The following require a Request for Discontinuation of Services Form be submitted and approved by the [Utilization Management Contractor or] UMC:

- A. No Personal Attendant services have been provided for 180 continuous days – example, an extended placement in long-term care or rehabilitation facility.
- B. Unsafe Environment – an unsafe environment is one in which the personal attendant and/or other agency staff are threatened or abused and the staff’s welfare is in jeopardy. This may include, but is not limited to, the following circumstances:
 - 1) The person [receiving TBIW services] or other household members demonstrate sexually inappropriate behavior; display verbally and/or physically abusive behavior; and/or threaten a personal attendant and/or other agency staff with guns, knives, or other potentially dangerous weapons, including menacing animals or verbal threats to harm the personal attendant and/or other agency staff.
 - 2) The person or other household members display an abusive use of alcohol and/or drugs and/or illegal activities in the home.
- C. The person is persistently non-compliant with the Service Plan.
- D. The person no longer desires services.
- E. The person no longer requires services.

The Request for Discontinuation of Services Form must be submitted to the UMC. The UMC will review all requests for a discontinuation of services. If it is an appropriate request, and the UMC approves the discontinuation, the UMC will send notification of discontinuation of services to the person (or legal representative) with a copy to the Case Management Agency or [Fiscal/Employer Agent or] F/EA. Fair hearing rights will also be provided except if the person (or legal representative) no longer desires services.

DISCUSSION

On July 18, 2018, [REDACTED] sent to the WV Bureau for Medical Services (WV BMS) a Request for Discontinuation of Services form (Exhibit D-4) regarding the Appellant. On the area of the form labeled “Reason for Request,” the [REDACTED] employee who completed it chose “Participant is persistently noncompliance [*sic*] with service plan/no longer requires services.” Attached to the form is an e-mail which describes a conversation between the [REDACTED] employee and the Appellant’s mother. According to the e-mail, the [REDACTED] employee asked the Appellant’s mother which homemaker services she requested and which days and times were desired. She wrote that the Appellant’s mother informed her she and the Appellant were not at their residence “a lot” and were planning to go to North Carolina where the Appellant’s father lives on the following day. The e-mail reported that she needed help one day per week for “a few hours” so she could mow her lawn or go grocery shopping.”

The employee reported she asked the Appellant’s mother what tasks she would like the attendant to perform and the Appellant’s mother responded, “Just cleaning and maybe watching movies with [the Appellant], I do all the taking care of him, I don’t let anyone feed him but me.” The [REDACTED] employee asked her to provide “a set day of the week she wanted someone” and the Appellant’s mother responded that it would differ from week to week.

Department's witness [REDACTED], RN, a home health nurse who works for [REDACTED] testified that she could not persuade the Appellant's mother to agree to a service plan which involved an established schedule of care-giving activities for [REDACTED] staff to perform on behalf of the Appellant. She testified that she entered progress notes (Exhibit D-5) describing her efforts to create a service plan with the Appellant's mother. An entry in the progress notes dated July 9, 2018, reads as follows:

Visit completed, spoke [with] mother regarding [personal care] services, [mother] states wants on as needed basis [because they are] frequently [out of town] and she performs all [activities of daily living] and environmentals for [Appellant].

The WV BMS approved the request for discontinuation. On July 26, 2018, the WV BMS sent to the Appellant and his mother a letter informing them of the Bureau's action. The letter reads as follows in part:

This letter is notification that KEPRO [WV BMS' utilization management contractor] received a Request for Discontinuation of your TBI Waiver Services for the following reason: Participant is persistently non-compliance [sic] with service plan. You have informed the Personal Attendant Provider that [Appellant's mother] performs all Activities of Daily Living (ADLs). In addition, the Personal Attendant Services being requested are non-covered services under the TBIW program. Non-covered services requested by [Appellant's mother] included:

- 1) Requesting a Personal Attendant Staff one (1) day a week for a few hours so [Appellant's mother] can run out and mow the grass or go to the store
- 2) Requesting that the Personal Attendant staff to clean and watch movies with [Appellant].

The Appellant's representative, his mother, testified that the Department's statements indicating she only wanted a personal attendant so that she could go grocery shopping or mow her lawn was taken out of context. She testified that she had a great deal of difficulty in obtaining help in her area, and she told [REDACTED] employees that if the only assistance she could obtain was someone to stay with her son while she performed household tasks such as mowing her lawn or going grocery shopping, then that would be acceptable to her.

The Appellant's representative testified that her case management agency, Coordinating Council for Independent Living (CCIL), had suggested an individual to provide TBIW services, but she knew this person and did not think she was an appropriate care provider. She stated she suggested an individual to CCIL, but CCIL did not approve this person. She added that she lived in a remote area and there were few individuals who could be potential care givers living near her.

The Department's witness, the Appellant's case manager from CCIL, testified that there were few people living near the Appellant's home, and finding potential care givers was a challenge. She stated that CCIL had approached the individual suggested by the Appellant's mother as a

potential care-giver for the Appellant, but he had not followed through with the training and other activities required of CCIL-approved caregivers.

Documentation sent to the Appellant and his mother indicated the reason for the discontinuation of services was that the Appellant persistently was non-compliant with the service plan. In fact, the Appellant and his mother were non-compliant with the TBIW Program in completing a service plan that was practical. It is not reasonable to expect the program to provide a care-giver who only works on an on-call basis. Progress notes from [REDACTED] (Exhibit D-5) indicated the Appellant's mother informed [REDACTED] that she was frequently out of the area with the Appellant, and needed assistance on "an as-needed basis."

The Department presented a preponderance of evidence to support its position that the Appellant should have been removed from the TBIW Program for program non-compliance.

CONCLUSION OF LAW

The Department presented a preponderance of evidence to support its position that the Appellant and his mother were non-compliant with the TBIW Program, pursuant to policy found in the Traumatic Brain Injury Waiver Policy Manual, §§512.15 and 512.33. The Department acted correctly to discontinue his participation in the TBIW program.

DECISION

It is the decision of the State Hearing Officer to UPHOLD the Department's decision to discontinue the Appellant's participation in the Traumatic Brain Injury Waiver program for non-compliance with TBIW Program policy.

ENTERED this 5th Day of October 2018.

**Stephen M. Baisden
State Hearing Officer**