



June 12, 2017

[REDACTED]

[REDACTED]

RE: [REDACTED] [REDACTED] v. WVDHHR  
ACTION NO.: 17-BOR-1499

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 (DHHR). 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 to Hearing Decision  
Form IG-BR-29

cc: Janice Brown  
Taniua Hardy  
Teresa McDonough  
Pat Nisbet

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

[REDACTED] A PROTECTED INDIVIDUAL,

**Appellant,**

v.

**ACTION NO.: 17-BOR-1499**

**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 [REDACTED]. 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 May 31, 2017, on an appeal filed March 22, 2017.

The matter before the Hearing Officer arises from the March 14, 2017 decision by the Department to deny Appellant's request for Title XIX Medicaid Intellectual and Developmental Disabilities (I/DD) Waiver Program services which exceed the individualized participant budget.

At the hearing, the Respondent appeared by [REDACTED], KEPRO. Appearing as a witness for the Department was Tania Hardy, Bureau for Medical Services (BMS). The Appellant was represented by his co-guardian, [REDACTED]. Appearing as witness for the Appellant were [REDACTED], Behavior Support Professional with [REDACTED]; [REDACTED], Behavior Support Professional with [REDACTED]; [REDACTED], Service Coordinator with [REDACTED] and [REDACTED], Area Supervisor with [REDACTED]. All witnesses were sworn and the following documents were admitted into evidence.

**EXHIBITS**

**Department's Exhibits:**

- D-1 Bureau for Medical Services (BMS) Notice of Denial, dated March 14, 2017
- D-2 I/DD Waiver Policy Manual, §513.17.4.1
- D-3 I/DD Waiver Policy Manual §513.8.1
- D-4 I/DD Waiver Policy Manual §513.25.2
- D-5 I/DD Waiver 2<sup>nd</sup> Level Negotiation Request, dated February 16, 2017
- D-6 KEPRO Care Connection Purchase Request Details, Interdisciplinary Team (IDT) meeting date December 5, 2016
- D-7 I/DD Waiver Direct Support Services Living Arrangement Assessment date submitted December 9, 2016
- D-8 I/DD Waiver Request for Prior Authorization for Direct Support Services Change in Living Arrangement, date submitted June 8, 2016

**Appellant's Exhibits:**

- A-1 Comprehensive Psychological Evaluation, dated March 30, 2011
- A-2 [REDACTED] Care System prescription sheet, dated May 22, 2017
- A-3 I/DD Waiver Behavior Report Monthly Summaries beginning March 13, 2017
- A-4 [REDACTED] Functional Behavior Assessment, dated May 26, 2017
- A-5 I/DD Waiver Individual Program Plan (IPP) meeting minutes, dated January 13, 2017
- A-6 I/DD Waiver IPP meeting minutes, dated March 28, 2017
- A-7 I/DD Waiver IPP Critical Juncture documents, dated January 13, 2017
- A-8 I/DD Waiver IPP Critical Juncture documents, dated September 27, 2016
- A-9 I/DD Waiver IPP 3-Month documents, dated March 28, 2017

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 recipient of benefits and services through Title XIX Medicaid Intellectual and Developmental Disabilities Waiver Program (I/DD Program).
- 2) In IPP service year January 1, 2015 - December 31, 2016, the Appellant resided with his mother in her home, in his own apartment with a roommate, and in his own apartment without a roommate. (A-8)
- 3) KEPRO is the Utilization Management Contractor (UMC) that conducts the annual functional assessment on behalf on BMS.
- 4) On October 28, 2015, an Inventory for Client and Agency Planning (ICAP) was completed and indicated the Appellant displayed slightly serious problems including destructive one to three times per month, disruptive one to three times per month, unusual habits one or more times per hour; and moderately serious behavior including being uncooperative one to ten times per day. (A-8)
- 5) On October 28, 2015, the ICAP indicated the Appellant had Maladaptive Behaviors for Internalized within the normal range and Asocial, Externalized, and General within the marginally serious range. (A-8)
- 6) ICAP results from October 28, 2015, reflect that Appellant had a service score of 24, a service level of 2, required total personal care, and required intense supervision (A-8)
- 7) On June 8, 2016, an I/DD Waiver Request for Prior Authorization for Direct Support Services Change in Living Arrangements worksheet was completed. (D-8)

- 8) On June 30, 2016, BMS approved the request for the Appellant to move from his mother's residence into a 1:2 setting. (D-8)
- 9) The Appellant resided with a roommate from June 2016 until September 2016. During the time the Appellant resided with a roommate, he exhibited aggressive and destructive behaviors resulting in the roommate moving out. (D-7)
- 10) On September 27, 2016, a Critical Juncture was held due to an increase in the Appellant's aggressive behavioral incidents, his roommate moving out, temporary 1:1 placement, and budget modification. Potential new roommate being considered was no longer an option due to the Appellant's aggressive and intrusive behaviors. (A-8)
- 11) On October 4, 2016, an ICAP was completed and indicated the Appellant demonstrated an increase in problem behaviors: moderately serious problems including hurting himself less than one time per month, disruptive one to ten times per day; and very serious problems including hurting others one to six times per week, destructive one to six times per week, unusual habits one to six times per week, socially offensive one to ten times per day, and uncooperative one or more times per hour. (A-7)
- 12) On October 4, 2016, the ICAP indicated the Appellant had Maladaptive Behaviors for Internalized in the moderately serious range and Asocial, Externalized, and General in the very serious range. (A-7)
- 13) ICAP results from October 4, 2016 reflected that the Appellant has a Service Score of 1 and a Service Level of 1: Total Personal Care and Intense Supervision. The narrative reads that the Appellant lives by himself with staff supervising and training, and attends a daytime activity center. The narrative reads that there are no recommended residential or day program changes. (A-7)
- 14) The Appellant had fourteen incident reports between November 10, 2015 and January 25, 2017 that were aggressive or destructive in nature. (A-7)
- 15) On December 9, 2016, a Direct Support Services Living Arrangement Assessment was submitted, requesting services to continue in a 1:1 ISS due to maladaptive behaviors that have been documented as placing the Appellant or others in imminent danger. Unlicensed Residential PCS 1:1- [REDACTED] at 28,180 units and [REDACTED] at 160 were requested, exceeding the Appellant's budget by \$35,563.46. (D-7)
- 16) On December 14, 2016, KEPRO recommended that the request be approved and indicated that clinical/medical/circumstantial necessity had been demonstrated. (D-7)
- 17) On December 21, 2017, BMS did not approve the request and provided no description for denial. (D-7)
- 18) On January 9, 2017, a Critical Juncture was held to discuss issues including the Appellant's increase in aggressive and destructive behaviors at the day habilitation

program and at home, potential roommate, unmet needs, and budget. Multiple incidents were discussed in which the Appellant caused injury to others at the day program and at least one incident in which the Appellant caused destruction to property in his home. (A-7)

- 19) The Appellant met a potential roommate on January 6, 2017; however, the potential roommate's service coordinator declined the match. (A-7)
- 20) On February 16, 2017, a 2<sup>nd</sup> Level Negotiation Request was completed regarding Unlicensed Residential PCS 1:1 and 1:2. Unlicensed Residential PCS 1:1 services requested in the amount of 28,180 units; 1:2 services requested in the amount of zero units. (D-5)
- 21) On March 14, 2017, BMS issued a Notice of Denial advising the Appellant that the Service Authorization 2<sup>nd</sup> Level Negotiation Request of 28,180 Unlicensed Residential 1:1 units and zero Unlicensed Residential 1:2 units were denied because the Appellant's assessed annual budget would have been exceeded and the Appellant had not shown that funds in excess of the budget were necessary to ensure the Appellant's health and safety in the community (D-1).
- 22) No information was included on the Notice of Denial that would indicate how BMS concluded the information provided in the 2<sup>nd</sup> Level Negotiation Request did not demonstrate that Unlicensed Residential 1:1 units requested were necessary to ensure the Appellant's health and safety in the community. (D-1)
- 23) On March 28, 2017, a 3-month IPP meeting was held. The Appellant's aggressive and destructive incidents at the day habilitation program had increased; it was determined that the Appellant could no longer attend day habilitation after April 4, 2017. (A-9)
- 24) During the 3-month IPP meeting, it was determined that the Appellant would not receive therapies approved within his budget to allow for the team to use the combined 464 units toward provision of necessary Unlicensed Residential 1:1 services. (A-9)
- 25) A plan for utilization of Natural Supports to provide care for the Appellant was implemented to allow the Appellant to visit with relatives as outlined in the 3-month IPP. (A-9)
- 26) Between March 13, 2017 and May 16, 2017, the Appellant had four incident reports involving aggression toward others and three incident reports involving destructive behaviors occurring at his residence. In that same time frame, the Appellant has had four incident reports involving aggression toward others occurring in the community. (A-3)
- 27) Testimony by the Appellant's representative and Ms. [REDACTED] reflect that there have been meetings with 3 potential roommates since September 2016, and no placements have been approved due to the Appellant's behaviors, rendering no possibility of Unlicensed

Residential 1:2 units being utilized in the home. Therefore, the Appellant requires an increase in 1:1 services to ensure 24-hour care, 7 days a week.

- 28) Due to the Appellant's vulnerability as a member of the I/DD Waiver program and the nature of his current needs, if the services requested are not provided, there is a risk of Appellant institutionalization to ensure his health and safety, and the safety of others.

### **APPLICABLE POLICY**

#### **Intellectual and Developmental Disabilities Waiver (I/DD) §513.1 provides:**

BMS contracts with a Utilization Management Contractor (UMC) to act as an agent of BMS and administer the operation of the I/DD Waiver program. The UMC conducts the annual functional assessment to establish re-determination of medical eligibility and to calculate individualized budgets. The UMC provides authorization for services that are based on the person's assessed needs and provides authorization information to the claims payer.

#### **I/DD Waiver §513.25.4.2 provides:**

The IDT must initially make every effort to purchase services for the person receiving services within the budget allocated by the UMC. A "first level negotiation" request may be submitted if the person or legal representative:

- Determines, after making every effort to purchase services within the allocated budget, that the budget is not sufficient to purchase services necessary to ensure the person's health and safety within the community; or
- Believes there has been a change in circumstances since the assessment that is documented pursuant to a Critical Juncture Meeting.

The UMC does not have authority to increase the person's budget during a first level negotiation, except if a finding is made that there was an error in the person's assessment. An increase in the individualized budget can only be done by BMS through a second level negotiation.

If the first level negotiation is unsuccessful and the IDT determines that funds beyond the individualized budget are still necessary for purchasing services to ensure the person's health and safety in the community, then a second level negotiation may be requested. A second level negotiation request for services exceeding the person's individualized budget is clinically researched and reviewed by BMS. BMS will review the second level negotiation request to determine if funds in excess of the budget are

needed to purchase clinically appropriate services necessary to ensure the person's health and safety in the community.

**I/DD Waiver §513.17.4.1 provides:**

Unlicensed Residential Person-Centered Support (PCS) must be assessment based and outlined on the IPP. Activities must allow the person who receives the services to reside and participate in the most integrated setting appropriate to their needs and within their individualized budgets. The activities are designed to increase the acquisition of skills and appropriate behavior that are necessary for the person who receives services to have greater independence and personal choice, and to allow for maximum inclusion into their community. The areas of functionality to be addressed include self-care, self-direction, and capacity for independent living.

All services must be prior authorize, based on the assessed need as identified on the annual functioning assessment, and within the individualized budget of the person receiving services.

The maximum annual units of Unlicensed Residential PCS services cannot exceed 35,040. 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.

**I/DD Waiver §513.25.1 provides:**

A person and/or their legal representative have the right to choose between home and community-based services as an alternative to institutional care. The Person and/or their legal representative have the right to have all assessments, evaluations, medical treatments, budgets and IPPs explained to them in a format that they can understand.

**I/DD Waiver §513.25.2 provides:**

The person and/or their legal representative have the responsibility to purchase services within their annual individualized budget or utilize natural or unpaid supports for services unable to be purchased.

**DISCUSSION**

For the I/DD Waiver program budget year January 1, 2017 through December 31, 2017, the Appellant was approved for 13,871 units of Unlicensed Residential PCS 1:1 and 14,309 units of Unlicensed Residential PCS 1:2. Due to an increase in the Appellant's maladaptive behavior, the Appellant's roommate moved out and no suitable roommate arrangement could be aligned, rendering the 1:2 services unusable and increasing the necessity for 1:1 services. The IDT

requested 28,280 units of Unlicensed Residential PCS 1:1 and 0 units of Unlicensed Residential PCS 1:2 which would exceed the Appellant's annual budget by \$35,563.46. The Respondent denied the Appellant's request on the basis that the annual budget would have been exceeded and that the Appellant had not shown that funds in excess of the budget were necessary to ensure the Appellant's health and safety in the community.

Per policy the Appellant must make every effort to purchase services within the budget. However, if the IDT has made efforts to purchase services within the budget allocated by the UMC and determines that the budget is not sufficient to purchase services to ensure the Appellant's health and safety in the community or if a change in circumstances has occurred, upon request, BMS solely has the authority to review the Appellant's circumstances and approve services over the allocated budget to ensure the Appellant's health and safety in the community.

At the time the ICAP was administered on October 4, 2016, the appellant was living in a 1:1 setting due to his behaviors causing him to be inappropriate for a roommate. As reflected in policy, BMS contracts with KEPRO to conduct the assessment and to calculate individualized budgets. The assessment showed a significant increase from the previous year in problem behaviors. Following the completion of the assessment in October 2016, from November 2016 forward, the Appellant continued to have aggressive and destructive episodes at home and at the day habilitation program as evidenced in the incident reports presented. Pursuant to policy, the IDT held Critical Juncture meetings in September 2016 and January 2017. The IDT determined that the Appellant's aggression toward others and destruction of others' belongings rendered him inappropriate for a roommate. In December 2016, the service coordinator completed a Direct Support Services Living Arrangement Assessment to continue services at a 1:1 ISS. KEPRO reviewed the ICAP, 2016-2017 budget, Behavior Guidelines, Behavior Support Guidelines, Rights Restrictions, Behavior Tracking Sheet, Critical Juncture meeting minutes, and other documents to support KEPRO's recommendations to approve the request in excess of the budget. However, despite the KEPRO recommendation, BMS denied the request. No evidence or testimony was given to reflect what clinical research had been conducted or what reasoning was used to determine the denial. No information whatsoever was provided to explain why BMS had denied the request in conflict with KEPRO's determination that the clinical/medical/ circumstantial necessity had been demonstrated.

Per policy, the service provider has a responsibility to provide for the Appellant's living arrangement and services, including aligning a roommate. The service providers have made multiple attempts to meet this responsibility by attempting to match the Appellant with potential roommates. The respondent argued that the Appellant's current 1:1 ISS living arrangement was a choice; the Appellant's representative argued that the arrangement is not a choice and is a necessity to ensure the Appellant's health and safety in the community.

At the time of the functioning assessment and the denial of the 2<sup>nd</sup> level negotiation the Appellant was still attending day habilitation and had approved therapy units within his budget. Since the IDT request for hearing, the Appellant no longer attends day habilitation and the IDT has determined that units reserved for therapies should be reallocated to Unlicensed Residential PCS 1:1 services. The Respondent testified that no changes to the Appellant's units could be made in CareConnection while the Appellant is in hearing status. The Respondent further testified that making changes to the Appellant's units regarding reallocation of day habilitation units would not



be a problem once the Appellant is not in hearing status. No evidence or explanation outside of exceeding budget allocation was given to justify BMS 2<sup>nd</sup> level negotiation denial.

Per policy, the Appellant has the right to have all assessments and budgets explained to him or his representative in a form they can understand. The Respondent failed to provide explanation of how the Appellant's needs were considered in determining the budget. Further, no explanation was provided by the Respondent, despite the increase in behaviors that place the Appellant at risk of institutionalization, of how the current budget allocation meets the Appellant's current needs for 1:1 services to maintain his health and safety in the community. I/DD Waiver policy provides that maximum annual units of Unlicensed Residential PCS services cannot exceed 35,040; the 28,180 units requested fall below this threshold.

Evidence and testimony provided demonstrate Unlicensed Residential PCS 1:1 services currently are medically necessary to ensure the Appellant's health and safety in the community. Due to the Appellant's current individual needs, roommate placement has become a barrier and would not be therapeutically appropriate at this juncture as the Appellant's behaviors place himself and others at risk of harm. Providing the Appellant with the requested Unlicensed Residential PCS 1:1 services would provide the Appellant with the 24/7 support necessary for the Appellant to continue living in the most integrated setting appropriate to his needs and complies with the Appellant's I/DD Waiver program right to choose between services as an alternative to institutional care.

### **CONCLUSIONS OF LAW**

- 1) Policy permits a participant's budget to be adjusted in situations wherein a demonstrated increase in need is present, such as the circumstances demonstrated by the Appellant.
- 2) There are adjustments that could be made within the Appellant's budget to decrease the amount needed in excess of the budget to provide Unlicensed Residential PCS 1:1 services.

### **DECISION**

It is the decision of the State Hearing Officer to **REVERSE** the Department's decision to deny the Appellant I/DD Waiver services in excess of the allotted budget. This matter is **REMANDED** to the Department to reassess allocation of the budget and determine the amount needed in excess of the budget in order to provide services to meet the Appellant's needs.

ENTERED this 12th day of June 2017.

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Tara B. Thompson  
State Hearing Officer