

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 employments of SDEs to help individuals “achieve and/or maintain the outcomes of increased independence, productivity, enhanced family functioning and inclusion in the community, as outlined in an Individual Service Plan (ISP).” R-1. SDEs are employed 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. However, wages are determined at a rate that is considered reasonable and customary for the service being delivered. SDE rates above or below what is considered reasonable and customary must be approved by the Division prior to being included in the ISP. Consequently, 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 DDD's purview to determine the reasonable and customary wage rates for services performed within the parameters of the Individual supports budget.

Here, DDD argues that a \$25 per hour is a reasonable and customary maximum SDE rate that accounts for the substantial medical and behavioral needs of its clients. DDD asserts that it arrived at this rate after researching private-agency DSPs, the majority of which pay staff between \$12 and \$15 per hour. However, wages can rise above the reasonable and customary cap where an individual's service needs are extraordinary. Some of the factors DDD considers in determining whether extraordinary circumstances exist include: "if the individual frequently elopes;" "if the individual has severe intensive behaviors – that are constant;" and "if there is a frequency of 911 calls and hospitalizations." While I agree that DDD has the authority to determine its own rates of pay, I feel that the record is lacking documentary evidence of DDD's research into the reasonable and customary rates for SDEs. Additionally, I find the record is lacking an explanation of which behavioral issues, if not Petitioner's, would warrant SDE compensation in excess of DDD's \$25 reasonable and customary cap.

Similarly, Petitioner has failed to present evidence that the rates he proposes are more appropriate for the services provided by his SDE. Petitioner argues that the extraordinary circumstances of his situation, specifically his size and injurious behavior, warrant an hourly wage of at least \$30.¹ In support of this, Petitioner provides job postings for Applied Behavioral Analysis therapists (ABA) and Registered Behavior Technicians (RBT), both of which require licenses or certifications that Petitioner's SDE does not hold, and neither of which is an authorized SDE service. However, DDD supervisor Nany Price's testimony that no significant behavior occurred in the prior twelve months contradicts Petitioner's contention

¹ Petitioner initially requested his SDE be paid \$38 per hour. The SDE agreed to \$30 per hour with the additional \$5 above DDD's reasonable and customary rate paid out of Petitioner's pocket.

that his circumstances are unique. As the ALJ found both witnesses credible, it is difficult to get a true sense of Petitioner's situation. While Petitioner's SDE may need to exhibit skills that warrant additional compensation, there is no evidence in the record that the appropriate rate of compensation is \$30 per hour.² The Initial Decision arbitrarily substitutes Petitioner's opinion for that of DDD.

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 SDEs, and additional testimony and documentary evidence that the rate requested by Petitioner is the appropriate rate for the services provided.

THEREFORE, it is on this 15th day of MARCH 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

² The Initial Decision notes that Petitioner's SDE was previously paid \$35 from a previous employer. The only support for this is a single check issued by a consulting firm with the notation "9 hrs." There are no pay stubs in the record, and no first hand testimony with regard to this documentation.