

Developmental Disabilities' (DDD) January 29, 2021 denial of Petitioner's request for a \$2 hourly increase in wages paid to his Self-Directed Employee (SDE) because it would result in wages exceeding DDD's reasonable and customary hourly rate of \$25. This matter was transmitted to the OAL on February 25, 2021. On June 30, 2021, the Administrative Law Judge (ALJ) issued an Initial Decision that addressed the two issues agreed upon by the parties: (1) Who has the power to determine what hourly wage is reasonable; and (2) Do Petitioner's guardians have the authority to obligate the DDD to pay an hourly wage above the rate determined to be reasonable and customary? On August 10, 2021, the Final Agency Decision adopted the Initial Decision with regard to the ALJ's findings on these issues, but noted that the issue transmitted to the OAL concerned the denial of Petitioner's request for a wage increase because it exceeded the reasonable and customary rate. Accordingly, the matter was remanded for evidence that DDD's rate reflected the reasonable and customary rate for SDE services or conversely, that Petitioner's rate more appropriately reflected the rates paid for SDE services. On December 13, 2021, the ALJ issued another Initial Decision that upheld the original decision but did not address the evidence submitted by the parties. Rather, the ALJ interpreted the Final Agency Decision to instruct the court only to gather and submit the respective parties' research. While I acknowledge that the FAD may have been inartfully worded so as to cause this confusion, the transmitted issue is still outstanding and the need to apply the newly submitted evidence to the facts and circumstances of this matter still exists.

Despite the parties' agreement to frame the issues to be determined at fair hearing, this office transmitted the matter to address DDD's denial of Petitioner's requested rate because it was not considered reasonable or customary. See N.J.A.C. 1:1-8.2(a)5. Petitioner participates in the DDD Community Care Program (CCP), which provides a budget for Individual Supports, including the employment of Self-Directed Employees (SDE). DDD's policies with regard to SDE compensation are set forth in the CCP Manual. Section 8.3.2.2, entitled *Wages and Benefits*, states "wages are determined by the individual, subject to

minimum wage laws, at a rate that is considered reasonable and customary for the service being provided.” Section 7.8, entitled *Service Approvals by the Division*, states that “SDE rates above/below what is considered reasonable and customary must be approved by the Division prior to being included in an individual service plan (ISP).” As previously stated, I agree that the authority to determine reasonable and customary rates rests with DHS, DDD. I further agree that program beneficiaries cannot compel DDD to grant a wage increase exceeding the reasonable and customary maximum. However, the analysis cannot end here. Now we must determine whether DDD appropriately denied Petitioner’s request because the proposed rate was not reasonable and customary? Then, if it is decided that the proposed rate exceeds the reasonable and customary standard, we must ascertain whether Petitioner’s circumstance warrants a higher rate of pay?

DDD has argued that a reasonable and customary rate ceiling for SDEs is \$25 per hour. 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. Conversely, Petitioner has argued that \$27 per hour is a more appropriate rate. Both parties have submitted, or resubmitted, documentation that each believes supports its position. However, the documents themselves require further explanation. Some of Petitioner’s job postings are for services that SDEs are not authorized to perform, and it is not always clear if the posted rate is that of an individual or a provider agency. Additionally, while I agree with DDD that provider agency rates are not comparable to individual rates, largely due to the costs and overhead associated with running a business, I feel that the record is lacking documentary evidence supporting DDD’s determination of reasonable and customary rates for individual SDEs. In order to address and resolve this issue, it is necessary that that parties present evidence, both documentary and testimonial, to support their positions, and that the court undertake the necessary analysis of this evidence to determine the appropriate rate of pay for the services provided by the SDEs.

THEREFORE, it is on this 4th day of MARCH 2022,

ORDERED:

That the Initial Decision is hereby REVERSED, and

That the matter is REMANDED for additional testimony and documentary evidence in accordance with this decision.



Jennifer Langer Jacobs, Assistant Commissioner
Division of Medical Assistance
and Health Services



State of New Jersey

DEPARTMENT OF HUMAN SERVICES

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

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Governor

SHEILA Y. OLIVER
Lt. Governor

SARAH ADELMAN
Acting Commissioner

JENNIFER LANGER JACOBS
Assistant Commissioner

March 7, 2022

Kurt Schwartz, Clerk
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

Re: Michael Abend v. Division of Medical Assistance and Health Social Services
HMA 07401-21; HMA 01381-21 (ON REMAND)

Dear Mr. Schwartz:

The above Initial Decision has been rejected by the Assistant Commissioner and is being remanded for additional evidence and testimony with regard to the transmitted issue: whether the Division of Developmental Disabilities (DDD) correctly denied Petitioner's request for a rate increase because it exceeded the reasonable and customary rate. To that end, it is necessary for the court to determine if DDD's rate or Petitioner's rate accurately reflected the reasonable and customary rate for the services provided by Petitioner's Self-Directed Employee (SDE).

Very truly yours,

Lisa N. Lackay, Esq.
Office of Legal & Regulatory Liaison

c: Lori and Paul Abend
Jeanette M. Barnard, DAG

RP
Recipient

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FROM:
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TELEPHONE NUMBER

HMA

Michael Abend

COUNTY Warren

VS
DMAHS

JURISDICTION North

Name of Contested Case or Short Title

THE FOLLOWING ADDITIONAL INFORMATION IS REQUIRED:

07401-21
Agency Docket / Reference Number

1. Nature of the case. Please include references to statutes or rules and briefly summarize the facts and law involved. Attach pleadings to this form.

Remanded for additional proceedings.

2. Estimated time required for hearing.

_____ Day(s) or 1 Hours

3. Legal requirements (State or Federal) mandating a date for Agency Decision:

Yes ___ No If yes, please specify requirements and citation: _____

4. Is court stenographer requested?

___ Yes No

5. Special features to be anticipated in this matter, i.e. emergent relief, discovery motions, prehearing conference, conference hearing, remand, expedited hearings, location (county).

Remmand
Warren

6. Is a barrier-free location needed?

___ Yes No ___ Uncertain

7. Have the attached documents been exchanged between the parties?

Yes ___ No If no, the documents shall be served on or offered to parties on: _____

8. Names of other agencies claiming jurisdiction over transmitted dispute:

Transmitting officer or other agency personnel to receive notices of hearing etc., pursuant to N.J.A.C. 1:1-8.2 (a) 13. This person need not be served by the parties with motions, correspondence, etc.

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SERVICE LIST

Parties Named in this Proceeding and their Representatives.

For additional parties, attach names, addresses and telephone numbers of each party linked with that representative if any.

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