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In the Matter of the Appeal of  
██████████

from a determination by the Suffolk County  
Department of Social Services

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**DECISION  
AFTER  
FAIR  
HEARING**

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**JURISDICTION**

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of Title 18 NYCRR, (hereinafter Regulations), a fair hearing was held on March 3, 2016, in Suffolk County, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

████████████████████████████████████████

For New York State Office for People with Developmental Disabilities

Michelle Giuliano, Self-Directional Liaison New York State; Sheryl Livingston, Fiscal Intermediary Independent Support Services; Debbie Lipsky, Supervisor Individual Services OPWDD; Lauren Nelson, Self-Direction Liaison OPWDD; Rosemary Barlone, Family ██████r for Autism; summer Boyd, Director Service Coordinator at Life's Work, Representatives

**ISSUE**

Was the Agency's determination to discontinue the Appellant's services that she was receiving through Home and Community Based Waiver Services at ██████████ correct?

**FINDINGS OF FACT**

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. The Appellant, a minor, was enrolled in Home and Community Based Services Waiver ("HCBS") since 2009.

2. The Appellant received services through [REDACTED] until January 8, 2016.

3. Prior to January 8, 2016, the Appellant's mother was advised the Appellant's services through [REDACTED] would not be reimbursed and as such be discontinued based on a finding by the Fiscal Intermediary for OPWDD that [REDACTED] did not meet the criteria for Self-Direction Guidance for Providers as the [REDACTED] was not open to the public.

4. On January 15, 2016, the Appellant requested this fair hearing.

### APPLICABLE LAW

Department Regulations at 18 NYCRR 360-7.5(a) set forth how the Medical Assistance Program will pay for medical care. Generally the Program will pay for covered services which are necessary in amount, duration and scope to providers who are enrolled in the Medical Assistance program, at the Medical Assistance rate or fee which is in effect at the time the services were provided.

In instances where an erroneous eligibility determination is reversed by a social services district discovering an error, a fair hearing decision or a court order or where the district did not determine eligibility within required time periods, and where the erroneous determination or delay caused the recipient or his/her representative to pay for medically necessary services which would otherwise have been paid for by the Medical Assistance Program, payment may be made directly to the recipient or the recipient's representative. Such payments are not limited to the Medical Assistance rate or fee but may be made to reimburse the recipient or his/her representative for reasonable out-of-pocket expenditures. The provider need not have been enrolled in the Medical Assistance program as long as such provider is legally qualified to provide the services and has not been excluded or otherwise sanctioned from the Medical Assistance Program. An out-of-pocket expenditure will be considered reasonable if it does not exceed 110 percent of the Medical Assistance payment rate for the service. If an out-of-pocket expenditure exceeds 110 percent, the social services district will determine whether the expenditure is reasonable. In making this determination, the district may consider the prevailing private pay rate in the community at the time services were rendered, and any special circumstances demonstrated by the recipient. 18 NYCRR 360-7.5(a).

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### **Community Classes**

Self-directed supports through IDGS offer great opportunities for people with developmental disabilities to purchase community based classes that result in active engagement and participation in **integrated** community settings.

A community setting is considered "integrated" if all of these four criteria are met:

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1. The setting and class is open to the broader community
2. The setting is not certified by OPWDD
3. The setting results in interactions with other participants who do not have an intellectual or developmental disability
4. The class is not being run by OPWDD or members of a provider agency staff who are acting in their official capacities.

Participation in specialized classes that take special needs, such as physical limitations or beginner level learning, into consideration are appropriate as long as those specialized classes are open to the broader public.

In determining if a community class meets the standard of being “available to the general public,” the following **five questions** should be asked:

1. Is it taught by staff or run by an agency that provides OPWDD services to people with I/DD?
2. Is it located on the grounds where OPWDD services for people with I/DD are normally provided?
3. Is it open to the public?
4. Does it have published fees?
5. Are people who are not OPWDD eligible going to the class (in this case parents and staff do not count)?

## **DISCUSSION**

The undisputed evidence is that the Appellant has been in receipt of HCBS since 2009 and was receiving care at [REDACTED] until the Appellant’s Representative was advised that the Appellant would not be reimbursed for services from the [REDACTED] after January 8, 2016. The Appellant’s Representative stopped taking the Appellant to the [REDACTED] and did not submit any requests for reimbursement and the Agency did not issue a notice of discontinuance but the Appellant’s Representative requested a fair hearing regarding this action.

The Agency’s position is that the [REDACTED] did not meet the criteria for Self-Direction Guidance as it was not open to the public. On inquiry the basis of this finding was a statement from someone who was previously working at the [REDACTED] who said they were not open to the public.

The Appellant’s Representative provided direct testimony of the providers at the [REDACTED] in which they stated the [REDACTED] is open to the public and the [REDACTED] does in fact, meet the enumerated criteria for Self-Direction.

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On inquiry, the Agency could not provide any documentation of an evaluation of the [REDACTED] to determine if they met the enumerated criteria of Self-Direction other than the statement of the aforementioned former employee. The Agency contended that the Appellant is always free to go to another provider site and use respite funds.

The Appellant's representative noted that the respite funds are capped at \$3,000.00 and argued that the Appellant was receiving services at the [REDACTED] through the waiver program and contended that he should be allowed to continue to receive services at the Center.

The record in this case reflected that the Agency failed to establish that the [REDACTED] no longer met the enumerated criteria or that a satisfactory evaluation was performed to eliminate the [REDACTED] as a Self-Direction provider. The Agency's sole evidence that an ex-employee told the fiscal intermediary that the [REDACTED] was not open to the public was uncorroborated by the facts in this case and was insufficient on its face to establish the [REDACTED] does not meet the above criteria under the regulations. The Appellant's Representative's direct testimony from the [REDACTED] is credible and compelling. As such the Agency's determination, conveyed orally to the Appellant's Representative, to discontinue HCBS services at the [REDACTED] was not established with credible evidence. Accordingly, the Agency's action is not correct and is reversed.

**DECISION AND ORDER:**

The Agency's determination to discontinue the Appellant's services through Home and Community Based Waiver Services at [REDACTED] was not correct and is reversed.

1. The Agency is directed to continue to provide the Appellant's services through Home and Community Based Waiver Services at [REDACTED].
2. The Agency is directed to advise the Appellant in writing of its determination.

Should the Agency need additional information from the Appellant in order to comply with the above directives, it is directed to notify the Appellant's representative promptly in writing as to what documentation is needed. If such information is required, the Appellant's representative must provide it to the Agency promptly to facilitate such compliance.

As required by 18 NYCRR 358-6.4, the Agency must comply immediately with the directives set forth above.

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DATED: Albany, New York  
03/16/2016

NEW YORK STATE  
DEPARTMENT OF HEALTH

By

A handwritten signature in black ink, reading "Richard A. Zurbrugg". The signature is written in a cursive style with a large, prominent initial 'R'.

Commissioner's Designee