

# Publications

## *Dunkelberger v. DHS: Rare Binding Precedent for ID/A Providers in Pennsylvania*

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On May 4, 2026, the Pennsylvania Commonwealth Court granted parallel petitions<sup>[1]</sup> to publish the previously unpublished memorandum decision in *Dunkelberger v. Department of Human Services* (1236 CD 2024). As a result of the Commonwealth Court's order, the *Dunkelberger* decision will be recategorized as an "opinion" and will be formally reported in legal reporters. The effect of the publication is that the *Dunkelberger* decision becomes binding precedent on lower courts and administrative agencies.

The publication of the *Dunkelberger* decision has immediate and far-reaching implications for individuals with intellectual disabilities and autism (ID/A), as well as the provider agencies that serve the ID/A population under Pennsylvania's Medicaid waiver programs.

### Background

Initially released as an unpublished memorandum opinion on February 17, 2026, the *Dunkelberger* decision struck down a longstanding policy from Pennsylvania's Office of Developmental Programs (ODP), the program office within the Department of Human Services (DHS) that oversees Pennsylvania's Medicaid waiver programs for home and community-based services (HCBS).

Bret Dunkelberger, a 32-year-old autistic individual, receives care through Pennsylvania's HCBS waiver program. His mother Kathleen Dunkelberger, a registered nurse, started the corporation "Bret's Adventure" to provide care to Bret. Kathleen is the sole employee of Bret's Adventure and is Bret's primary caregiver.

Bret's individual support plan authorized approximately 98 hours of HCBS per week (14 hours per day). In 2019, an employee of the Northumberland County Behavioral Health/Intellectual & Developmental Services informed Ms. Dunkelberger of two DHS rules:

- The "40/60 Rule" – limits **paid hours** for a relative or legal guardian to 40 per week, and combined hours for multiple relatives to 60 per

week. Accordingly, Dunkelberger's mother could not **be compensated** for providing care in excess of 40 hours per week. Notably, this rule did not limit the amount of care Dunkelberger could receive but merely imposed a cap on the amount of time mother could be compensated.

- The "Travel Rule" – imposes a cap on services provided outside Pennsylvania at 30 days per year.

Upon being informed that these rules were not subject to interpretation and must be followed "to the letter", Ms. Dunkelberger sought an exception to these rules. In seeking an exception to these rules, Ms. Dunkelberger highlighted the issues of rural provider shortages and his unique care needs which required 24-hour care. By letter dated October 30, 2019, ODP denied the request, stating exceptions were only allowed for emergencies or unplanned staff departures. The letter specifically stated that the Travel Rule had been in effect since 2009 and is "not subject to a variance or exception process."

Dunkelberger appealed to DHS's Bureau of Hearings and Appeals (BHA), arguing that the rules were not lawfully promulgated as regulations and thus unenforceable. An Administrative Law Judge (ALJ) was appointed to conduct a hearing and ultimately upheld DHS's position. The ALJ concluded that he lacked authority to "change, alter or determine the validity of the 40/60 [r]ule or the travel policy, which is a party of departmental regulations." *Dunkelberger* at p.9.

Dunkelberger appealed to the Commonwealth Court arguing, in part, that BHA erred by treating the 40/60 Rule and the Travel Rule as regulations with the force and effect of law (*i.e.*, "binding norms"). Dunkelberger argued that an agency's adoption of a "binding norm" without adhering to the procedures in the Commonwealth Documents Law, the Regulatory Review Act, and the Commonwealth Attorneys Act, renders the binding norm void and unenforceable.

The Commonwealth Court considered the 40/60 Rule and Travel Rule by considering: (1) the plain language of the rule; (2) the manner in which the agency implements the rule; and (3) whether the rules restrict the agency's discretion.

Applying these factors, the Commonwealth Court determined that both the 40/60 Rule and the Travel Rule were "binding norms" and thus indicative of regulations. The Court noted that DHS considered both rules to be "very concrete" such that they were "not subject to any interpretation and must be followed to the letter." ODP's letter to Dunkelberger further stated that the Travel Rule "is not subject to a variance or exception process" and that the 40/60 Rule was subject only to limited exceptions such as an emergency or unplanned departure of a regularly scheduled worker. ODP included both the 40/60 Rule and the Travel Rule in Pennsylvania Bulletin No. 00-22-05, which set forth ODP's "*requirements and standardized processes* for preparing, completing, documenting, implementing, and monitoring Individual Support Plans."

The Commonwealth Court found this language mandatory and restrictive, indicative of a regulation. This meant that both the 40/60 Rule and the Travel Rule should have been adopted through the formalities required for promulgating regulations. Because DHS had never formally adopted the rules through the required procedures, the Court determined they constituted "unpublished regulations" under Pennsylvania law and where thereby null and void.

## Considerations for Pennsylvania ID/A Providers

Beyond its immediate ruling, the *Dunkelberger* decision has potentially widespread implications for ID/A Providers and for Pennsylvania's HCBS waiver programs. For starters, families and legal guardians who have previously sought (and been denied) payment for service due to the 40/60 Rule and/or Travel Rule may now have legal recourse against DHS. For Providers, the *Dunkelberger* decision may create an opportunity to utilize family caregivers without concern about hourly caps.

In a broader sense, the *Dunkelberger* decision may lead to a period of regulatory uncertainty. In recent years, ODP has implemented numerous changes to the HCBS waiver programs via bulletins, the same process by which ODP adopted the 40/60 Rule and Travel Rule. The Commonwealth Court's decision clearly signals that "binding norms" having the force and effect of regulations must be adopted through formal regulatory processes, calling into question the enforceability of these bulletins.

Finally, two issues arose in the *Dunkelberger* case which, while not central to the Court's decision, are worth noting for Providers. The first issue is that during the hearing, the ALJ took the position that s/he had no authority to strike down or modify the department's rules and regulations. On appeal, DHS conceded this was inaccurate. The Commonwealth Court noted that the ALJ's position was inconsistent with the Supreme Court of Pennsylvania's previous decision in *RCPA v. DHS*, 283 A.3d 260 (Pa. 2022), but did not otherwise address the issue.

The second issue of note is that Ms. Dunkelberger filed her appeal in 2019 but did not receive a hearing from BHA for over 3 years. In total, it took roughly seven years for the *Dunkelberger* case to produce a reported decision from Commonwealth Court, highlighting the experience of many ID/A Providers frustrated with the slow progress of administrative appeals pending with BHA.

## Conclusion

Decisions from the Commonwealth Court involving Pennsylvania's HCBS waiver programs are rare. This fact alone makes a case like *Dunkelberger* impactful for Pennsylvania ID/A Providers and the families they support. The secondary consequences of the *Dunkelberger* decision, particularly the questions it raises regarding recent ODP initiatives adopted via bulletin, could be pivotal for the industry.

As always, Vorys is proud to represent many Pennsylvania ID/A Providers in regulatory matters involving ODP and DHS, including formal appeals through the BHA. Vorys clients interested in the impact of the *Dunkelberger* decision on their operations should contact their Vorys lawyer.

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<sup>[1]</sup> One of the petitions was filed by the Dunkelberger family, as petitioners in the case. The other was filed by Vorys on behalf of PAR, TCPA, RCPA, MAX, The Alliance, and The Arc of Pennsylvania, as non-parties.