

## FAIR HEARING DECISION

January 30, 2006

Kathy Keck, Esq.  
Alaska Legal Services Corp.  
1016 W 6<sup>th</sup> Ave., Suite 200  
Anchorage, Alaska 99501

RE: H N  
Medicaid – Respite Care  
OHA Case # 05-FH-605  
Medicaid ID #

Dear Ms. Keck:

A fair hearing was held on October 25, 2005 to consider the following issue:

Was the agency correct to deny H N's (claimant) request for Hourly and Daily respite care services contained in his Medicaid Home and Community Based (HCB) Waiver plan of care for the time period between July 1, 2005 and June 30, 2006?

You appeared in person and represented the claimant. The claimant did not attend the hearing. N N, the claimant's mother and guardian, attended in person and testified on claimant's behalf. N M, the claimant's care coordinator with No Name Services, attended in person and testified on the claimant's behalf. K O, also with No Name Services, attended in person; she did not testify.

Blair Christensen, Asst. Atty General, attended in person, and represented the State of Alaska Division of Senior and Disabilities Services (DSDS or the agency). Rebecca Hanson, a regional program specialist with DSDS attended in person and testified on the agency's behalf.

The claimant's hearing was originally scheduled for September 20, 2005. It was rescheduled at claimant's request. Post hearing briefing was completed on December 12, 2005.

### **SUMMARY OF EVIDENCE**

The claimant is a 24 year old man who experiences the following conditions: severe mental retardation, cytomegalovirus, scoliosis, and periodic seizures. (Exh. E, p. 15) He lives with his parents. *Id.* The claimant's mother is his primary caregiver and paid personal care assistant (PCA). The claimant's plan of care for July 1, 2005 through June 30, 2006 contained a provision wherein the claimant would receive respite care services in addition to PCA services. (Exh. E, pp. 8, 18, 20) The agency denied the claimant's request for respite care services. (Exh. D, p. 1)

Ms. N testified on her son's behalf. In addition to being the claimant's mother, she is his guardian. The claimant resides with her in the family home. He has never resided in a foster care or other residential setting. Ms. N described the claimant's medical condition, the extent of his activities, and his complete physical dependency. His mental age is between 9 months to 18 months, because he can crawl, which is his mode of ambulation. The claimant's father and 76 year old grandmother also reside in the family home. They do not provide care for the claimant. The claimant's father had a severe stroke a year before the hearing; he also requires care, which is provided by Ms. N.

Ms. N is employed by No Name as the claimant's PCA for 40 hours per week. She provides for the claimant's care as his primary care provider the rest of the time, for which she is not paid. Respite services were previously provided to Ms. N. The last time she received respite services was in May 2005. The respite services consisted of both hourly and 24 hour respite services. The hourly respite services allowed Ms. N to run errands, have some social life, do yard work, and to do things in other parts of the home, other than where the claimant was located. The 24 hour respite was used rarely, for emergency purposes, because Ms. N and her husband did not like to leave the claimant overnight.

Ms. N preferred to be the claimant's primary PCA. She felt taking care of the claimant was her responsibility. She stated having different people in the home caused the claimant to experience increased seizure activity. Ms. N occasionally has some other PCAs come in to the home, these being her daughter and one other person.

Ms. M testified on behalf of the claimant. She is his care coordinator at No Name Services. She said hourly respite services were previously provided in the amount of 480 hours, which were used by February 2005. This was for a period when Ms. N was a paid PCA for the claimant. In addition to the 40 hours per week that Ms. N provides in PCA services, the claimant's plan of care provides for 14 hours per week in supported living services, and 15.7 hours in additional PCA services.<sup>1</sup> Ms. M testified, given the claimant's condition and capabilities, adult day care was not a viable option for him.

Rebecca Hanson testified on behalf of the agency. She is a regional program specialist with the agency. She works with the MRDD (mental retardation and developmentally disabled) waiver program. She had approved the claimant's previous waiver plan. She was unable to approve a

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<sup>1</sup> The claimant's plan of care provides for 55.7 hours of PCA services per week. Ms. N can only provide 40 hours of PCA service per week because she is not authorized to work overtime.

portion of the current waiver plan, because respite services could not be provided to a paid care provider.<sup>2</sup> Ms. Hanson said there is no primary unpaid care giver in this case.

The agency did not dispute the fact Ms. N essentially provides 24 hour a day care 7 days per week for her son, for which she is only compensated 40 hours per week.

### **DISCUSSION**

There are no disputed facts in this case. The claimant is a totally dependent adult male who resides in his parents' home, along with his grandmother. He receives Medicaid coverage from the State under the HCB waiver program's MRDD category. *See* 7 AAC 43.1010(d)(1)(C) and (d)(2). His mother, Ms. N, is his guardian and primary caregiver. His father and grandmother do not provide care for the claimant. Indeed, the claimant's father, due to his health, also requires care from Ms. N. While the claimant has access to other support services, including some additional PCA services, Ms. N provides the claimant with almost all of his care, 24 hours a day, 7 days per week. She is compensated as a PCA only for a portion of that time, 40 hours per week.

Respite care services, both daily and hourly, were requested for the claimant as part of his plan of care for the time period from July 1, 2005 through June 30, 2006. Respite care services had been provided for the claimant in his previous plan year. The agency denied his request for respite services in the 2005 – 2006 plan year. The agency's reason for the denial was based upon its interpretation of 7 AAC 43.1049. That regulation states the agency will pay for preauthorized respite care services approved in the recipient's plan of care. 7 AAC 43.1049(a)(1). The regulation further provides:

- (b) The department will consider services to be respite care services if they provide alternate caregivers . . . to relieve
  - (1) primary unpaid caregivers, including family members and court-appointed guardians;

7 AAC 1049(b)(1). The agency interpreted that portion of the regulation to mean respite care services could not be provided to relieve Ms. N, a family member and guardian, inasmuch as she is the claimant's primary caregiver, who is paid to be his PCA for 40 hours per week. 7 AAC 43.1049 was adopted in its entirety effective May 15, 2004. (Register 170) Prior to the adoption of 7 AAC 43.1049, the regulations for the HCB waiver program did not provide a definition for respite care; "respite care" was only defined in the regulations governing Personal Care Services: "respite care' means care provided to an individual for the purpose of relief of family members or other regular care providers in the home, except for personal care assistants." 7 AAC 43.795(6).

Because there are no disputed factual issues, the issue presented is a purely legal one: whether the applicable regulations allow the agency to provide respite care services where the primary caregiver is a paid family member and guardian. The claimant advanced several arguments in support of its contention the agency erroneously concluded it could not provide respite care services. These arguments are: (1) the agency interpreted its regulation improperly, and (2) the

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<sup>2</sup> The agency argued the pertinent regulation, 7 AAC 43.1049, did not allow the agency to provide respite care to paid care providers.

regulations impermissibly violate the claimant's constitutional due process and equal protection rights. These arguments are addressed below.

A. Interpretation of the Regulation

“[A]n agency's interpretation of its own regulation [is reviewed] under the reasonable basis standard, deferring to the interpretation unless it is ‘plainly erroneous and inconsistent with the regulation.’” *Lauth v. State of Alaska*, DHSS 12 P.3d 181, 184 (Alaska 2000) (quoting *Board of Trade, Inc. v. State, Dep't of Labor, Wage & Hour Admin.*, 968 P.2d 86, 89 (Alaska 1998))

The agency interpreted the regulation to allow respite care for “primary unpaid caregivers, including family members and court-appointed guardians” and to preclude paid caregivers, who were family members and/or court-appointed guardians from receiving respite care. It therefore denied the claimant's request for respite care. The regulation defines respite care as alternative caregivers provided to relieve the following categories of persons: “(1) primary unpaid caregivers, including family members and court-appointed guardians; (2) providers of family habilitation home services under 7 AAC 43.1046(b)(1) . . . or (3) foster parents licensed under AS 47.35.” 7 AAC 43.1049(b). A different section of the regulation specifically states the agency will not reimburse for respite care services provided to “other paid providers of Medicaid services, except providers of family habilitation home services under 7 AAC 43.1046(b)(1).” 7 AAC 43.1049(d)(4)(B). When the regulation is reviewed as a whole, the agency's interpretation is reasonable. Ms. N is a paid Medicaid provider for the claimant: she is his PCA. She is a family member, and legal guardian for the claimant. She is not a provider of family home habilitation services for the claimant. Nor is she the claimant's foster parent. Under the terms of the regulation, the agency cannot provide the claimant respite services to relieve Ms. N.

The claimant also argued Ms. N was both a paid and an unpaid care provider, and she could receive respite care because of her “unpaid care provider” status. Ms. N is paid for 40 hours per week as the claimant's PCA. Ms. N is not paid for the remaining time in the week where she provides the claimant's care, a period substantially in excess of the 40 hours per week for which she is paid. The agency interpreted the issue of whether a person is a paid care provider as a yes or no question. Under its interpretation, if a person is a paid care provider, even if the person also renders care on a gratuitous basis, that person remains a paid care provider for the purpose of the regulation. The regulation states respite care services cannot be provided for “other paid providers of Medicaid services.” 7 AAC 43.1049(d)(4)(B). It simply says “paid” without any attached qualifiers; it does not carve out an exception for someone who provides gratuitous care in excess of paid care. The claimant's argument fails. It seeks to read something into the regulation which is not present. The agency's interpretation of its own regulation is a reasonable one. Because Ms. N is a paid ME provider for the claimant, she cannot also be considered to be an unpaid care provider, regardless of the amount of uncompensated care she provides for the claimant.

B. Claimant's Constitutional Rights

The claimant argued denial of respite care services for the claimant amount to a violation of his constitutional rights of equal protection and due process. As I found above, the agency's interpretation of its regulation was reasonable. This argument is therefore a challenge to the constitutionality of the agency regulation. “Challenges to the constitutionality of an agency regulation are beyond the power or jurisdiction of that agency. As a result, a hearing officer who

derives his or her powers to act from a delegation of the agency cannot determine that an agency regulation is unconstitutional and invalid.” Hearing Officer’s Manual, State of Alaska, Chapter 3(C)(3) (5<sup>th</sup> Ed., 2002) (Citing *Gilbert v. NTSB*, 80 F.3d 364, 366 – 67 (9<sup>th</sup> cir. 1996); *Howard v. FAA*, 17 F.3d, 1213, 1218 (9<sup>th</sup> Cir. 1994)). Accordingly, I decline to rule on this issue.

### **DECISION**

Based upon a preponderance of the evidence, for the reasons stated above, I find the agency was reasonable when it interpreted its own regulation to preclude claimant from receiving respite care; it was correct to deny the claimant’s request for respite care services as contained in his proposed 2005 – 2006 plan of care.

This decision is supported by the above mentioned citations as well as 7 AAC 49 et seq.

### **APPEAL RIGHTS**

If for any reason you are not satisfied with this decision, you have the right to appeal by requesting a review by the Director. To appeal this decision, send a written request directly to the Director of the Division of Senior and Disabilities Services, Department of Health and Social Services, P.O. Box 110680, Juneau, AK 99811-0680. If you appeal, you must send your request within 15 days from the date you receive this letter. Filing an appeal with the Director could result in the reversal of the Hearing Authority’s decision.

Larry Pederson  
Hearing Authority

cc: NN  
Blair Christensen, Asst. A.G.  
Rod Moline, Director  
Ellie Fitzjarrald, DPA Policy & Program Development  
Gerry Johnson, DHCS  
Case File  
Hearing File