

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
BY THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of)
)
 T G)
_____)

OAH No. 13-0286-MDS
Agency No.

DECISION

I. Introduction

T G receives home and community based Medicaid waiver services. He challenges the Division of Senior and Disabilities Services' (division's) decision to reduce the amount of time approved for day habilitation services from 40 hours per week to 25 hours per week. This matter turns on whether the division has met its burden of proof that a 15 hour reduction in day habilitation is appropriate, which it has not. Therefore, the division's decision is REVERSED.

II. Facts

T G is an 18-year-old high school senior who suffers from a complex combination of conditions including mild mental retardation, fetal alcohol syndrome (FASD), situational mental health problems, and other disorders.¹ He resides in a foster home with his twin brother, R. The brothers have been in state custody since 2008.

T receives Medicaid benefits through the Alaska Mentally Retarded/ Developmentally Disabled waiver program. The purpose of the waiver program is to offer eligible individuals the opportunity to live as independently as possible in the community rather than in institutional care.²

In T's case, this opportunity is accomplished through a variety of services. At issue here is the interplay between T's day habilitation services and residential habilitation services. Both types of habilitation services assist T with the acquisition, retention, or improvement in skills related to living in the community. Other than the provider of each service (residential habilitation is provided by the foster family and day habilitation through Hope Community Resources), the primary differences are that residential habilitation also includes personal care and protective oversight, which is not included as a day habilitation

¹ Exhibit F at 36.

² 7 AAC 130.200; Testimony of Corina Castillo-Shephard.

service, and that day habilitation takes place outside of the individual's residence. Additionally, day habilitation focuses on enabling the recipient to attain or maintain his or her maximum functional level. To achieve the maximum functional level, day habilitation services may serve to reinforce skills or lessons taught in other settings.³

In many ways T is a typical 18-year-old. He wants friends, likes girls, wants to drive, and wants to be independent. He is learning to cook with his day habilitation provider. He goes to school and the library, and participates in the Special Olympics and community outings with No Name Services. Through school he is volunteering at No Name. However, his lack of age-appropriate maturity and relationship skills inhibit his ability to make and keep friends. He is socially vulnerable and makes poor choices if not coached. His day habilitation provider is helping him learn the necessary skills to function, primarily through modeling socially appropriate responses and having him engage in community activities. He would like to get a learner's permit for driving, but needs someone to go with him to the Division of Motor Vehicles.

T's present foster situation is working, but it is not without its challenges. In addition to his brother, there are three other children in the home, and both of his foster parents work and are very busy.⁴ They do not have time to provide transportation to community activities and vocational rehabilitation services, or to teach him to cook.⁵

T has a strained relationship with his brother and it is best to keep their activities separate. T becomes violent when frustrated. This has resulted in his placement in a short-term residential treatment facility, as well as involvement with the juvenile justice system.

The types and amounts of services received are determined by T's plan of care (POC), developed for his particular needs. His initial POC was approved in January 2012 for the period from December 12, 2011 to December 11, 2012.⁶ It provided for 40 hours per week of day habilitation. On the front of the POC cover sheet there is a hand written note that reads:

³ Version 3.5 Instructions, Technical Guide and Review Criteria for §1915(c) Home and Community Based Waiver (CMS HCBS) at 152. Specific pages, 151 – 154, are found at Exhibit G. The complete document may be found at: <http://157.199.113.99/WMS/help/35/Version35InstructionsFinal20080201.pdf>.

⁴ Testimony of T G.

⁵ Testimony of T G.

⁶ Exhibit E at 1.

The level of Day Hab supports was approved for this initial POC but will be closely reviewed on renewal. As he becomes more adjusted to school & community outing the level of support is expected to be reduced.^[7]

The day habilitation goals were identified as learning: independent living skills, such as completing his homework; socially appropriate interactions; and researching jobs he may be interested in.⁸

A POC must be reviewed and renewed on an annual basis. The division has developed a Policy and Procedure Manual (P & P) to provide guidance to its employees and care coordinators who are responsible for developing and implementing POCs.⁹ T's care coordinator is Hope Community Resources. The POC is submitted on a division-provided form redeveloped for the purpose of developing and renewing a POC. The POC form combines instructions for creating the POC with space available to provide the information sought by the division.

When the POC at issue was renewed, all of T's day habilitation goals were carried forward and one, obtaining a driver learner's permit, was added. Learning to cook is designated in the POC as a residential habilitation service, but the unchallenged evidence is that the foster parents are not assisting T with this goal. Even with the addition of a day habilitation goal, the care coordinator did not seek to increase the number of day habilitation hours, but instead carried forward the prior day habilitation service level of 40 hours per week. The division denied the request to continue day habilitation at 40 hours per week and reduced the service by 15 hours to 25 hours per week.¹⁰

Corina Castillo-Shephard, one of the division's assessors, explained that she believed the reduction in hours appropriate because of the handwritten note on the prior year's POC and the POC's failure to identify other community supports available to T that could provide day habilitation type services.¹¹ The division also explained that once day habilitation was reduced, if it was determined that more time was needed, T could seek to amend his plan to replace the hours previously denied.

⁷ Exhibit E at 2.

⁸ Exhibit E at 14 – 16.

⁹ The division provided only those portions of the P & P it believed to be relevant. Exhibit B at 29 – 52. The record does not reveal whether the P & P has been adopted as law by regulatory reference or otherwise. Unless incorporated by regulation, the P & P itself is not law but may be used as guidance. If used as guidance, then a finding that the P & P has been followed may or may not be a valid or useful element on which to base other decisions made by the division, by other agencies, or by the courts.

¹⁰ Exhibit D at 1.

¹¹ Testimony of Corina Castillo-Shephard.

III. Discussion

The issue presented is whether the division has met its burden of proving that a 15 hour reduction in day habilitation remains sufficient for T's ability to "acquire, retain, or improve skills related to activities of daily living and self-help, social, and adaptive skills necessary to enable [T] to reside in a non-institutional setting."¹² The division has the burden of proof.¹³ The division gave three reasons in support of its 15 hour reduction: (1) the reduction was necessary to avoid a duplication of services; (2) 25 hours of day habilitation per week is a "sufficient amount, duration and scope to prevent institutionalization;" and (3) that 40 hours of day habilitation requested in the renewed POC was not supported by "appropriate and contemporaneous documentation that describes, supports, or justifies the recipient's request and need for [40 hours of day habilitation]."¹⁴

A. The Division Has Not Established That A 15 Hour Reduction Is Necessary To Avoid A Duplication Of Services.

The division believes that because T's foster parents should provide some of the day habilitation activities, there will be a duplication of services unless day habilitation is reduced.

To support its position, the division offered the testimony of Ms. Castillo-Shephard. She focused on the definitions of residential habilitation and day habilitation created by the Federal Centers for Medicare and Medicaid Services (CMS).¹⁵ Not surprisingly, the definition of residential habilitation and day habilitation services overlap.¹⁶ Day habilitation

¹² 7 AAC 130.260 (Day Habilitation Services); 7 AAC 130.319(3) (Habilitation Services).

¹³ 7 AAC 49.135.

¹⁴ Exhibit D at 1 quoting 7 AAC 130.230(c)(2) and (f)(1).

¹⁵ Version 3.5 Instructions, Technical Guide and Review Criteria for §1915(c) Home and Community Based Waiver at 151 – 154. Specific pages are found at Exhibit F. The complete document may be found at: <http://157.199.113.99/WMS/help/35/Version35InstructionsFinal20080201.pdf>.

¹⁶ The CMS HBCS at 151 – 153 (Exhibit G at 2 – 4) defines residential habilitation as:

Tailored supports that assist with the acquisition, retention, or improvement in skills related to living in the community. These supports include adaptive skill development, assistance with activities of daily living, community inclusion, transportation, adult educational supports, social and leisure skill development, that assist the participant to reside in the most integrated setting appropriate to his/her needs. Residential habilitation also includes personal care and protective oversight and supervision.

It defines day habilitation as:

Assistance with acquisition, retention, or improvement in self-help, socialization and adaptive skills that takes place in a non-residential setting, separate from the participant's private residence or other residential living arrangement. Activities and environments are designed to foster the acquisition of skills, appropriate behavior, greater independence, and personal choice. Services are furnished 4 or more hours per day on a regularly scheduled basis for 1 or

should not duplicate services furnished to T as other types of habilitation, but they “may serve to reinforce skills or lessons taught in other settings” provided the service assists or provides assistance with the “acquisition, retention, or improvement” of skills related to living in the community.¹⁷

While the division is correct that some of the day habilitation activities could be provided by the foster parents, the division fails to consider whether the day habilitation services were actually duplicating services or were instead reinforcing skills or lessons taught in other settings (residential habilitation, school, etc.). If the latter, then the day habilitation services do not duplicate residential services.

This decision focuses on whether T is receiving the services necessary to attain or maintain his maximum functional level and independence. The CMS agrees. Its definitions focus on whether the skill is provided to the recipient, and places less emphasis on whether it is day habilitation or residential habilitation, with the limited exception of day habilitation taking place outside of T’s residence. If the division believes the residential habilitation provider is not providing all the services it is contracted to provide, then that is an issue to be addressed directly with the residential habilitation provider, not by reducing services to T. The record in this case does not establish that day habilitation is duplicating any services. Rather, it is more likely than not that day habilitation is serving to reinforce skills or lessons taught in other settings.

B. The Division’s Position That 25 Hours Of Day Habilitation Per Week Is Of A Sufficient Amount, Duration And Scope To Prevent Institutionalization Is Not Supported By The Record.

The division reduced T’s day habilitation, from 40 hours to 25 hours. To prevail, the division must show that 25 hours a week of day habilitation is of a sufficient amount, duration, and scope to prevent institutionalization. When pressed to explain why 25 hours and not some other number was appropriate, the division responded that its decision was based on the combined years of experience of the team reviewing the POC. When asked what evidence in the record supported the denial, the division relied upon the handwritten note and the absence of

more days per week or as specified in the participant’s service plan. Meals provided as part of these services shall not constitute a "full nutritional regimen" (3 meals per day).

Day habilitation services focus on enabling the participant to attain or maintain his or her maximum functional level and shall be coordinated with any physical, occupational, or speech therapies in the service plan. In addition, day habilitation services may serve to reinforce skills or lessons taught in other settings.

¹⁷ CMS HCBD at 153 (Exhibit G at 4).

proper documentation establishing that 40 hours of day habilitation is required to prevent institutionalization.¹⁸

1. The Team's Years of Experience, Without More, is Insufficient To Support A Reduction.

The team has many years of experience. Its preference for a reduction was driven by the team's desire to see T explore other community services and supports before requesting a waiver service.¹⁹ This preference does not explain why or how the division determined 25 hours was a sufficient amount, duration and scope to prevent institutionalization. It is not enough to simply say that the team is experienced; the division must explain the facts and reasoning behind its decision that 25 hours is sufficient, and that 40 hours – or any amount above 25 – is excessive.²⁰

2. The Handwritten Note Does Not Require a Reduction In Day Habilitation.

The division also asserted that the reduction in day habilitation hours is appropriate because a reduction was anticipated in the initial POC. The handwritten note on the front provided that the level of support was expected to be reviewed and, as appropriate, reduced.²¹ All involved in this proceeding agree that when the time is right, the level of service should be reduced. However, what the record lacks is evidence sufficient to establish that the time for a reduction is now.

On its face, the note conveys to the reader that day habilitation will be closely reviewed on renewal, and as T becomes more adjusted on school and community outings, the level of day habilitation support is expected to be reduced. The note does not mandate a reduction of day habilitation, nor does it indicate how much of a reduction was envisioned. Rather, the note simply reminds future reviewers to look at day habilitation and reduce day habilitation if appropriate. This is no different from any other renewed POC, and does not relieve the division of its burden to establish that T has become more adjusted to community and school outings, and has transitioned such that 25 hours of day habilitation is now appropriate.

3. The Ability to Amend Later Does Not Relieve The Division Of Meeting Its Burden Of Proof In This Proceeding.

¹⁸ Testimony of Corina Castillo-Shephard.

¹⁹ Testimony of Corina Castillo-Shephard.

²⁰ See *In re Kohler* OAH 10-0635-MED at 11 (Medical Board 2010) (discussing the importance of “showing the work” in support of an opinion).

²¹ Exhibit E 2.

The division seeks to put any concerns at rest by emphasizing that T can submit an amended plan of care if community supports are lacking, or if he needs more day habilitation. This approach ignores the division's burden of proving that a reduction in waiver services is appropriate and instead places the burden on T to show that he needs the services previously approved and that were reduced over his objection.

C. Sufficiency of Supporting Documentation.

The division also argued that the care coordinator did not submit sufficient documentation with the POC. The division has guidelines that it expects the care coordinator to follow when submitting a POC.²² It is the care coordinator's responsibility to develop a POC incorporating services based on the most recent ICAP results or any changes noted in an interim assessment. Upon receipt, the division evaluates the POC to determine whether it is consistent with the assessment and meets the identified needs of the applicant. Services that the division believes meet the requirements of 7 AAC 130.230 are approved and those that do not are denied.

The division also contends that because Medicaid is the provider of last resort, before T may receive waiver services, his team must demonstrate a lack of available community resources.²³

Approval under 7 AAC 130.230 requires that each service listed on the POC is of sufficient amount, duration, and scope to prevent institutionalization; that it be supported by the documentation required by 7 AAC 130.230(c)(4); and that it be a service that cannot be provided except as a waiver service.²⁴ By regulation, the POC should be supported by "appropriate and contemporaneous documentation that . . . describes, supports, or justifies the recipient's request and need for home and community-based waiver services"²⁵ The division believed a reduction was appropriate because Hope Community Resources failed to submit documentation supporting their request for 40 hours of day habilitation.

To determine whether T submitted "appropriate and contemporaneous documentation" it is reasonable to turn to the division's POC form and the division's instructions for completing the POC form. The POC form consists of several sections. Only one section asks about "other services," such as community supports, natural/family supports, and other supports that are

²² Senior and Disabilities Services Policy & Procedure Manual, IDD Waivers §4-3 at 12.

²³ Exhibit D at 2; Testimony of Corina Castillo-Shephard.

²⁴ 7 AAC 130.230(c)(4)(B) and (f).

²⁵ 7 AAC 130.230(c)(4)(B).

currently utilized...Examples include but are not limited to: PCA, other regular Medicaid services, community/social programs, and family supports. The Plan of Care is an all-inclusive description of the Participant's life.^[26]

The division, in contrast, reduced T's day habilitation for failing to identify "other services" *not* currently utilized. Other than the level of care determination completed by a program specialist, the POC form does not request the submission of supporting documentation. Rather, the POC form is intended to be complete and comprehensive within the four corners of its 20 plus pages.²⁷ To deny a request to continue a previously approved service for failure to include information that was not asked for on the division's form is tenuous at best.

The 2012 POC was approved based on the completed application on accompanying level of care determination and testing results. The same level of documentation was submitted in support of the 2013 POC, but the services were reduced because of failure to submit appropriate and contemporaneous documentation. Without more, the division has not shown that the level of documentation is not appropriate.

IV. Conclusion

In 2012, the division agreed 40 hours per week of day habilitation was the amount, scope, and duration of day habilitation needed to meet T's needs and the purpose of the waiver program. For 2013, the division believed that 25 hours of day habilitation was the amount, scope, and duration of day habilitation needed to meet T's needs and the purpose of the waiver program.²⁸ However, when tasked with providing evidence in support of its decision, the division fell short of establishing by a preponderance of the evidence that a 15 hour reduction was appropriate. The decision of the division to reduce T's day habilitation service to 25 hours per week is reversed.

DATED this 6th day of January, 2014.

Signed

Rebecca L. Pauli
Administrative Law Judge

²⁶ Exhibit F at 17 (emphasis added).

²⁷ Exhibit F.

²⁸ 7 AAC 130.200; Testimony of Corina Castillo-Shephard.

Adoption

The undersigned, by delegation from of the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 22nd day of January, 2014.

By: Signed
Name: Rebecca L. Pauli
Title: Administrative Law Judge

[This document has been modified to conform to the technical standards for publication.]