

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

In the Matter of)	Consolidated Cases
)	OAH No. 13-0832-MDS
A N)	OAH No. 13-0963-MDS
_____)	Division Nos.

DECISION

I. Introduction

A N is a disabled adult who receives Medicaid Home and Community-based Waiver (Waiver) services. He was receiving 20 hours per week of Supported Employment Services (SES) as part of his 2012 – 2013 Waiver Plan of Care (POC). He requested an amendment to his 2012 – 2013 POC that increased his SES. The Division of Senior and Disabilities Services (Division) denied the amendment. Mr. N also proposed a 2013 – 2014 POC that had 30 hours per week of SES. The Division approved 20 hours per week, rather than the requested 30 hours. Mr. N requested a hearing on both the 2012 – 2013 POC amendment denial (OAH No. 13-0832) and on the 2013 – 2014 proposed POC (OAH No. 13-0963). The cases were consolidated.

Mr. N’s hearing was held on August 15, 2013. M P, Mr. N’s guardian, represented him and testified on his behalf. Gerry Johnson, a Medical Assistance Administrator employed by the Department of Health and Social Services, represented the Division.

The evidence does not show that an increase in Mr. N’s SES, for either his 2012- 2013 POC or his 2013 – 2014 POC, is necessary to meet the underlying purposes of his plan of care and avoid institutionalization. Consequently, the Division’s decision denying him the requested increases is AFFIRMED.

II. Facts

Mr. N is an intellectually disabled adult who has been living in a two person group home since 2009.¹ He has a part-time job working at a dining hall on No Name, which is operated by No Name, Inc.² He enjoys that job and likes earning his own money.³ In order to perform the job, he requires cueing, redirection, and someone to help him understand his supervisor’s

¹ OAH No. 13-0963-MDS, Ex. E, pp. 4, 7.

² OAH No. 13-0832-MDS, Ex. E, p. 16.

³ Ms. D testimony.

instructions. He has a job coach, supplied by No Name (NN), who performs those functions.⁴ The Medicaid program pays for Mr. N's job coach as SES.

Mr. N initially requested that he receive 30 hours per week of SES as part of his 2012 – 2013 POC. The Division approved him for 20 hours per week.⁵ In April 2013, after the time period covered by his 2012 – 2013 POC had ended, he retroactively requested an amendment to his 2012 – 2013 POC to increase his SES by 189.5 hours for the plan year.⁶ The request was made because No Name, the dining hall operator, had Mr. N work additional hours.⁷ The Division denied that request.⁸ Immediately afterward, he proposed a 2013 – 2014 POC, asking for 30 hours per week of SES during that plan period.⁹ The Division again approved him for 20 hours per week.¹⁰ The rationale for limiting the hours to 20 was that this amount of SES would be enough to avoid institutionalization, keep him employed, and keep him engaged in the community.¹¹

D J D is currently Mr. N's care coordinator. She is very familiar with Mr. N, having worked with him in various capacities for approximately 15 years. T C is the supported employment department manager at NN. She is also very familiar with Mr. N, having worked with him since 2003. Ms. D's and Ms. C's testimony established the following:

- Mr. N's work hours increased, not at his request, but at the request of the employer No Name.
- The increase in Mr. N's work hours also required an increase in his SES.
- Mr. N likes working 30 hours per week.
- Keeping Mr. N's SES at 20 hours per week will not result in him losing his job, nor will it cause his condition to degrade, nor will it result in him being institutionalized.

⁴ Ms. D and Ms. C testimony.

⁵ OAH No. 13-0832-MDS, Ex. E, p. 2.

⁶ The 2012 – 2013 POC was for the time period from April 12, 2012 through March 28, 2013. OAH No. 13-0832-MDS, Ex. E, p. 5. The amendment request was date stamped as having been received by the Division on April 8, 2013. OAH No. 13-0832-MDS, Ex. F, p. 1.

⁷ OAH No. 13-0832-MDS, Ex. F.

⁸ OAH No. 13-0832-MDS, Ex. D; Ex. F, p. 2.

⁹ OAH No. 13-0963-MDS, Ex. E, pp. 18 – 19.

¹⁰ OAH No. 13-0963-MDS, Ex. D.

¹¹ Ms. Harwood testimony; OAH No. 13-0832-MDS Ex. D; OAH No. 13-0963-MDS Ex. D.

III. Discussion

The Medicaid program has a number of coverage categories. One of those coverage categories is the Waiver program.¹² The Waiver program pays for specified individual services to Waiver recipients, if each of those services is “of sufficient amount, duration, and scope to prevent institutionalization.”¹³ The Division must approve each specific service as part of the Waiver recipient’s plan of care.¹⁴

The federal Medicaid regulations require that both mandatory *and* optional Medicaid services “be sufficient in amount, duration, and scope to reasonably achieve [their] purpose.”¹⁵ Courts have developed two general tests to determine whether a service offered only in part, or with other limitations, is nonetheless sufficient in “amount, duration, and scope.” First, a limited service meets the sufficiency requirements of the federal regulations if the service is distributed in a manner bearing a rational relationship to Medicaid's underlying purpose of providing the service to those in greatest need of it.¹⁶ Second, a limited service is sufficient in amount, duration, and scope if it adequately meets the needs of “most” Medicaid recipients who need the particular service.¹⁷ A state may “place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.”¹⁸

The *specific* type of waiver services at issue here, "Supported Employment Services," are defined by regulation in relevant part as follows:¹⁹

- (b) The department will consider services to be supported-employment services if
 - (1) they are provided at a work site in which individuals without disabilities are employed;
 - (2) they include only the adaptations, supervision, and training required by individuals receiving home and community-based waiver services as a result of their disabilities; and
 - (3) the recipient is unlikely to obtain competitive employment at or above the minimum wage and, because of the recipient’s disability, needs intensive ongoing support, including supervision and training, to perform in a work setting.

¹² 7 AAC 100.002(d)(8); 7 AAC 100.502(d).

¹³ 7 AAC 130.230(f)(1).

¹⁴ 7 AAC 130.230(f).

¹⁵ 42 CFR 440.230(b).

¹⁶ See *White v. Beal*, 555 F.2d 1146 (3d Cir. 1977) (discussing earlier version of amount, scope, and duration regulations); *Anderson v. Director, Department of Social Services*, 300 N.W.2d 921 (Mich. App. 1980).

¹⁷ See *Curtis v. Taylor*, 625 F.2d 645, 653 (5th Cir. 1980); *Charleston Memorial Hospital v. Conrad*, 693 F.2d 324, 330 (4th Cir. 1982); *King v. Sullivan*, 776 F. Supp. 645, 651 - 653 (D.R.I. 1991).

¹⁸ 42 CFR § 440.230(d); see also *DeLuca v. Hammons*, 927 F. Supp. 132 (S.D.N.Y. 1996).

¹⁹ 7 AAC 130.270.

If a recipient requests changes to his plan of care, the applicable regulation provides that “[t]he department will approve changes to a plan of care if the department determines that (1) the amount, scope, and duration of services to be provided will reasonably achieve the purposes of the plan of care, and are sufficient to prevent institutionalization.”²⁰

It is therefore necessary to determine whether an increase to Mr. N’s SES will “reasonably achieve the purposes of the plan of care, and [is] sufficient to prevent institutionalization.” As discussed in the Facts section above, Mr. N is not at risk of institutionalization regardless of whether he receives the additional SES time. As a result, the issue is whether the increase to his SES will “reasonably achieve the purposes” of his plan of care.

The question of whether the increase to Mr. N’s SES would “reasonably achieve the purposes” of his plan of care is resolved by looking to the regulatory definition of habilitation services, the general category of services such as SES. The regulation defines habilitation services as those which “help recipients acquire, retain, or improve skills related to activities of daily living and self-help, social, and adaptive skills necessary to enable the recipient to reside in a noninstitutional setting.”²¹

It is undisputed that the request for increased SES is due to Mr. N’s employer wanting Mr. N to work more hours. While Mr. N enjoys working the additional hours, there is no evidence presented that working the additional hours is necessary to help Mr. N “acquire, retain, or improve skills related to activities of daily living and self-help, social, and adaptive skills.” In addition, Mr. N’s job is not at risk if he does not receive the additional SES.

Mr. N has the burden of proof, both with regard to the 2012 – 2013 POC amendment and the 2013 – 2014 POC, since both of these requests involve an increase in his SES from the previously approved 20 hours per week.²² Mr. N has not met his burden of proof. The requested increase in SES is not driven by Mr. N’s needs, but rather by the needs of his employer.

IV. Conclusion

The Division’s decision to deny Mr. N’s request for increased SES, with regard to both his

²⁰ 7 AAC 130.230(g).

²¹ 7 AAC 130.319(3).

²² “For a request for new or additional benefits, the burden of proof is on the applicant or recipient requesting the service, and is by a preponderance of evidence.” 7 AAC 49.135.

requested amendment to his previously approved 2012 – 2013 POC and his proposed 2013 – 2014 POC, is affirmed.

DATED this 3rd day of September, 2013.

Signed

Lawrence A. Pederson
Administrative Law Judge

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 17th day of September, 2013.

By: *Signed*

Name: Lawrence A. Pederson
Title: Administrative Law Judge

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