

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

In the Matter of:)	
)	
E D)	OAH No. 13-1369-MDS
)	HCS Case No.
_____)	Medicaid ID No.

DECISION

I. Introduction

The issue in this case is whether Mr. E D is entitled to 1,536 units (eight hours per week for 48 weeks) of Supported Employment Services (SES) under the Medicaid Home and Community-Based Waiver Services Program. The Division of Senior and Disabilities Services (Division) denied Mr. D's proposed Plan of Care (POC) renewal as to these new services on three separate bases. The Division was correct as to one of its bases for denial. Accordingly, the Division's denial of eight hours per week of Supported Employment Services, is affirmed.

II. Facts

A. Mr. D's Condition, Needs, Abilities, and Limitations¹

Mr. D is 29 years old.² He has a primary diagnosis of mental retardation and a secondary diagnosis of schizophrenia.³

Prior to his current waiver plan year, Mr. D tried working as a member of No Name grounds maintenance crew, as part of a job exploration project, and found he liked it.⁴ He was hired by No Name on June 6, 2013, and began working as a Supported Employment Crew Member for \$7.75 per hour.⁵ As part of the grounds maintenance crew, Mr. D performs general grounds maintenance for properties in the No Name area.⁶ The job primarily involves mowing, raking, and fertilizing lawns in the spring, summer, and fall, and shoveling and snow-blowing snow, chipping ice, and applying ice melt in the winter.⁷ Pay statements provided by No Name confirm that Mr. D worked and was paid by No Name from June 6, 2013 through August 18, 2013.⁸

¹ To avoid duplication, discussion of some facts, specifically relevant to the legal issues raised, has been deferred until the discussion of those issues in Section III, below.

² Ex. E3.

³ Ex. E4.

⁴ Ex. E7.

⁵ Ex. 2 p. 1.

⁶ Ex. E7.

⁷ Ex. E7.

⁸ Ex. 3.

On June 26, 2013, shortly after Mr. D began working for No Name, an annual renewal POC was submitted for waiver services on Mr. D's behalf.⁹ The proposed renewal POC requested, among other services, eight hours per week of SES for Mr. D's grounds maintenance job.¹⁰ The justification for the SES, as stated in the proposed renewal POC, was as follows:¹¹

[No Name] will provide [Mr. D] with [SES] for 8 hours a week so that he is able to build employment skills and improve his overall independence and employability. E requires a high level of supervision while in the community to ensure his safety as he has a history of wandering off and aggressively posturing with staff when they have attempted to redirect him. [Mr. D] also needs support to help him communicate effectively and appropriately with his coworkers and supervisors. [Mr. D] needs assistance from staff to learn the various tasks expected of him while working [and to stay] on task [and complete] the tasks to the standards required.

B. Relevant Procedural History

Mr. D was found eligible for and began receiving Medicaid Home and Community-Based Waiver Services ("waiver services") at some time prior to August 2012.¹² On June 26, 2013 Mr. D submitted a proposed renewal Plan of Care which sought Care Coordination Services, Group Home Habilitation Services, Day Habilitation Services, and Supported Employment Services (SES).¹³ On August 23, 2013 the Division notified Mr. D's legal guardian, the Office of Public Advocacy (OPA), that his proposed POC renewal had been approved in part and denied in part.¹⁴ The Division approved 337 units of Group Home Habilitation Services, and 3,840 units of Day Habilitation Services.¹⁵ The Division denied Mr. D's request for 1,536 units (8 hours per week for 48 weeks) of Supported Employment Services.¹⁶ On September 23, 2013 OPA requested a hearing on behalf of Mr. D to contest the Division's denial of the SES.¹⁷

Mr. D's hearing was held on November 25, 2013. Mr. D was represented by Tom Fernette of The Office of Public Advocacy. Q T, No Name Director of Supportive Employment, testified on Mr. D's behalf. The Division was represented by Assistant Attorney General Kimberly Allen. Heather Chord, a Health Program Manager employed by the Division, testified on behalf of the

⁹ Ex. E.

¹⁰ Ex. E20. This was a waiver service which had not been included in Mr. D's prior POC (*see* Ex. F).

¹¹ Ex. E20.

¹² Ex. F.

¹³ Ex. E. The renewal POC was for the period June 26, 2013 through May 28, 2014 (*Id.*).

¹⁴ Ex. D1.

¹⁵ Ex. D1. For unknown reasons, the Division's letter did not address (*i.e.* neither approved nor denied) Mr. D's request for Care Coordination Services. However, the Care Coordination Services are not at issue in this case.

¹⁶ Ex. D1.

¹⁷ Ex. C.

Division. Following the hearing, the record was left open for post-hearing briefing through December 19, 2013, at which time the record closed.

III. Discussion

A. *Medicaid Home and Community-Based Waiver Services Program - Overview*

1. *Relevant Federal Medicaid Statutes and Regulations*

States participating in Medicaid must provide certain mandatory services under a state medical assistance plan.¹⁸ States may also, at their option, provide certain additional services, one of which is the Home and Community-Based Waiver Services program.¹⁹ Congress created the Waiver Services program to allow states to offer long-term care, not otherwise available through Medicaid, to serve recipients in their own homes and communities instead of in nursing facilities.²⁰

Federal regulations require that both mandatory *and* optional Medicaid services “be sufficient in amount, duration, and scope to reasonably achieve [their] purpose.”²¹ However, states may “place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.”²²

2. *Relevant State Medicaid Regulations*

The type of waiver services at issue here, "Supported Employment Services," are defined by regulation 7 AAC 130.270 in relevant part as follows:²³

¹⁸ See 42 USC §§ 1396a(a)(10)(A); 1396d(a)(1) -(5), 1396a(a)(17), and 1396a(a)(21); see also 42 CFR 440.210 & 440.220.

¹⁹ See 42 USC § 1396a(a)(10)(A). The program is called a “waiver” program because certain statutory Medicaid requirements are waived by the Secretary of Health and Human Services. See 42 USC 1396n(c).

²⁰ See 42 USC 1396n(c)(1); 42 CFR §§ 435.217; 42 CFR §§441.300 - 310. Federal Medicaid regulation 42 CFR 440.180, titled “Home or Community-Based Services,” provides in relevant part:

(a) Description and requirements for services. “Home or community-based services” means services, not otherwise furnished under the State's Medicaid plan, that are furnished under a waiver granted under the provisions of Part 441, subpart G of this chapter . . .

(b) Included services. Home or community-based services may include the following services . . . (1) Case management services. (2) Homemaker services. (3) Home health aide services. (4) Personal care services. (5) Adult day health services. (6) Habilitation services. (7) Respite care services. (8) Day treatment . . . (9) Other services requested by the agency and approved by CMS *as cost effective and necessary to avoid institutionalization*. [Emphasis added].

²¹ 42 CFR 440.230(b).

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

²³ The version of 7 AAC 130.270 set forth here incorporates the amendments from AAC Register 206 which became effective on July 1, 2013. This is the version of the regulation in effect at the time the Division denied Mr. D's request for Supported Employment Services on August 23, 2013 (see Ex. D). The Division asserts that, because the POC was backdated and retroactive, the prior version of the regulation (*i.e.* the one in effect at the time the POC was submitted) should be applied here. However, “a court is to apply the law in effect at the time it renders its decision,” and this rule applies equally to administrative decisions. See *Bradley v. Richmond School Board*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974), cited in *Allen v. State*, 945 P.2d 1233 (Alaska App. 1997); see also *Hall v. Beals*, 396 U.S. 45, 90 S.Ct. 200, 24 L.Ed.2d 214 (1969); and *Thorpe v. Housing Authority of City of Durham*, 393 U.S.

(b) The department will consider services to be supported employment services if the services

- (1) prepare a recipient for work;
- (2) provide support, if needed to enable a recipient to be employed, at a worksite where (A) individuals without disabilities are employed . . .
- (3) assist a recipient to develop the skills needed to obtain or maintain employment;
- (4) develop a job for the recipient or assist the recipient to locate suitable employment;
- (5) assist a recipient to become self-employed
- (6) include only the adaptations, supervision, and training needed to compensate for the recipient's disabilities; and
- (7) are provided to the recipient because the recipient (A) is unlikely to obtain competitive employment at or above the minimum wage; and (B) needs intensive ongoing support, including supervision and training, to perform in a work setting because of the recipient's disability.

(c) The department will not pay for . . . (6) a service that is available under a program funded under 20 U.S.C. 1400 - 1482 (Individuals with Disabilities Education Act) or 29 U.S.C. 730 (Rehabilitation Act).

The substantive standards for approval of an initial Plan of Care are specified by 7 AAC 130.217, which provides in relevant part as follows:

- (b) The department will approve a plan of care if the department determines that
- (1) the services specified in the plan of care are sufficient to prevent institutionalization and to maintain the recipient in the community;
 - (2) each service listed on the plan of care (A) is of sufficient amount, duration, and scope to meet the needs of the recipient; (B) is supported by the documentation required in this section; and (C) cannot be provided under 7 AAC 105 - 7 AAC 160, except as a home and community-based waiver service under this chapter; and

268, 282, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969). Accordingly, the version of the regulation in effect at the time the Division made its decision is the version of the regulation that must be followed in this case.

B. The Bases for Denial as Framed by the Division's Notice of Adverse Action

The bases for partial denial of Mr. D's proposed POC are limited to those expressed in the Division's August 23, 2013 partial denial notice.²⁴ A fair reading of that notice reveals that the Division asserted three separate bases for denial:²⁵

1. Mr. D was not formally employed by No Name at the time he submitted his proposed POC renewal, and Supported Employment Services cannot be authorized unless / until Mr. D is formally employed.
2. Other than the No Name staff member(s) providing the support for the Supported Employment Services, all of the persons on the grounds maintenance crew are persons with disabilities. However, SES can only be approved where the recipient works at an "integrated" job site where individuals without disabilities are also employed.
3. Pursuant to 7 AAC 130.270(c)(6), waiver services cannot be used to pay for a service that is available under a program funded under 20 U.S.C. 1400 - 1482 (Individuals with Disabilities Education Act) or 29 U.S.C. 730 (Rehabilitation Act). Mr. D's proposed POC renewal did not demonstrate that the services he seeks are not available from another agency under one or both of these acts.

Because Mr. D did not receive SES under his prior Plan of Care, he bears the burden of proof as to all facts needed to demonstrate his eligibility for the Supported Employment Services now requested.²⁶

C. May Mr. D Receive SES While Working in a Non-Integrated Setting?

One of the Division's bases for denial is that, under 7 AAC 130.270(b)(2), SES can only be approved where the recipient works at an "integrated" job site where individuals without disabilities are also employed. The SES regulation, 7 AAC 130.270, clearly provides, at subsection (b)(2), that services are considered to constitute SES only if, among other things, they "provide support . . . at a worksite where (A) *individuals without disabilities* are employed" (emphasis added). Mr. D

²⁴ See 42 CFR 431.241(a) (only matters to be considered at a Medicaid hearing are those pertaining to the agency's action); 7 AAC 49.070 (written notice must include reasons for the proposed action as well as the statute, regulation, or policy relied on by the division); *compare Algonquin Gas Transmission Company v. FERC*, 948 F.2d 1305, 1312 n. 12 (D.C.Cir.1991) (an administrative determination "must stand or fall on the grounds articulated by the agency" in that determination); *In Cherokee Nation of Oklahoma v. Norton*, 389 F.3d 1074, 1078 (10th Cir. 2004), *cert. denied*, 546 U.S. 812, 126 S.Ct. 333, 163 L.Ed.2d 46 (2005), (agency action must be upheld, if at all, on the basis articulated by the agency); *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 539, 101 S.Ct. 2478, 69 L.Ed.2d 185 (1981) (an agency's *post hoc* rationalizations are an insufficient basis for agency action); 2 Charles H. Koch, Jr., *Administrative Law & Practice* § 8.22 (2nd Edition 1997) ("[t]he number of cases rejecting agency efforts to justify actions after the fact shows the strength of the prohibition against post hoc rationalization").

²⁵ Exs. D1, D2. At hearing, and in its post-hearing brief, the Division also asserted that the supported employment for which Mr. D sought SES services is better characterized as, or can be authorized as, Day Habilitation Services. However, this argument was not made in the Division's letter of August 23, 2013, or in a supplemental notice, and so this argument will not be considered here.

²⁶ See 7 AAC 49.135.

acknowledges in his post-hearing briefing that the two other persons on the grounds maintenance crew receive waiver services (and are thus considered "disabled"), and that the only non-disabled person working with Mr. D is the No Name staff person who supervises the crew members.²⁷ Accordingly, the Division was correct, under 7 AAC 130.270(b)(2)(a), to deny Mr. D's request for SES on this basis. Because this reason is independently sufficient to support the Division's denial, there is no need to rule on the other reasons advanced in support of the denial.

IV. Conclusion

Under 7 AAC 130.270(b)(2), Medicaid-funded SES can only be approved where the recipient works at an "integrated" job site where individuals without disabilities are also employed. The parties agree that Mr. D's grounds maintenance duties do not occur in an integrated setting. Accordingly, the Division was correct to deny Mr. D's request for SES. The Division's decision is therefore affirmed.

DATED this 21st day of January, 2014.

Signed _____
Jay Durych
Administrative Law Judge

²⁷ See Mr. D's post-hearing brief at page 3.

**BEFORE THE STATE OF ALASKA
COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of:)	
)	
E D)	OAH No. 13-1369-MDS
)	HCS Case No.
_____)	Medicaid ID No.

COMMISSIONER'S DECISION

After due deliberation, for the reasons specified below, and in accordance with AS 44.64.060(e)(5), the Commissioner of the State of Alaska Department of Health and Social Services declines to adopt the proposed decision of the Administrative Law Judge (ALJ) as issued, and instead modifies and revises the disposition of the case as set forth below.

I. Introduction.

The issue in this case is whether Mr. E D is entitled to 1,536 units (eight hours per week for 48 weeks) of Supported Employment Services (SES) under the Medicaid Home and Community-Based Waiver Services Program. The Division of Senior and Disabilities Services (Division) denied Mr. D's proposed Plan of Care (POC) renewal as to these new services on three separate bases. The Division's bases for denial can be summarized as follows:

1. Mr. D was not formally employed by No Name at the time he submitted his proposed POC renewal, and Supported Employment Services cannot be authorized unless / until Mr. D is formally employed.
2. Other than the No Name staff member(s) providing the support for the Supported Employment Services, all of the persons on the grounds maintenance crew are persons with disabilities. However, SES can only be approved where the recipient works at an "integrated" job site where individuals without disabilities are also employed.
3. Pursuant to 7 AAC 130.270(c)(6), waiver services cannot be used to pay for a service that is available under a program funded under 20 U.S.C. 1400 - 1482 (Individuals with Disabilities Education Act) or 29 U.S.C. 730 (Rehabilitation Act). Mr. D's proposed POC renewal did not demonstrate that the services he seeks are not available from another agency under one or both of these acts.

The administrative law judge (ALJ) found that the two other persons working with Mr. D on the grounds maintenance crew receive waiver services (and are thus considered "disabled"), and that the only non-disabled person working with Mr. D is the No Name staff person who supervises the crew members. Based on these factual findings, the ALJ concluded that the Division was correct, under 7 AAC 130.270(b)(2)(a), to deny Mr. D's request for SES. Because the ALJ found that this

basis for denial (number two, above) was independently sufficient to support the Division's denial, the ALJ declined to rule on the other two reasons advanced in support of the denial (numbers 1 and 3, above).

Following issuance of the ALJ's decision, both parties filed Proposals for Action (PFAs). Mr. D's PFA essentially reiterated the arguments he made before the ALJ on the Division's third asserted basis for denial (see page one, above). The Division's PFA essentially asserted that the ALJ reached the correct conclusion, but should have applied the prior version of 7 AAC 130.270 instead of the current version of the regulation. Based on the parties' PFAs, the ALJ's decision is supplemented and amended as set forth below.

II. Revised Legal Analysis.

The undersigned, in accordance with AS 44.64.060(e)(5), rejects, modifies or amends the interpretation or application of a statute or regulation in the decision as follows and for the reasons stated below.

In the proposed decision, the ALJ applied the version of 7 AAC 130.270 that became effective on July 1, 2013. However, this version of the regulation was not the law in effect at the time Mr. D submitted his application. The version of the regulation that was in effect at the time Mr. D submitted his application should govern this matter.

Applying the version of the regulation that was in effect at the time Mr. D submitted his application is supported by research of Medicaid program cases. Specifically, in *Lewis v. Grinker*, 1987 WL 8412 (E.D.N.Y. 1987), it was stated that eligibility under the Medicaid statute is appropriately determined at the time of the Medicaid application. In *Ross v. Giardi*, 680 A.2d 113 (Conn.1996), the court likewise applied the regulation in effect at the time of the claimant's Medicaid application. In *Pack v. Osborn*, 881 N.E.2d 237 (Ohio 2008), the court held that whether a trust was an available resource had to be determined under the Medicaid-eligibility rules in effect at the time of the claimant's application. Finally, in *Dambach v. Department of Social Services, Family Support Division*, 313 S.W.3d 188 (Mo.App. E.D. 2010), the court determined that the version of a regulation in effect at the time the claimant filed her application for Medicaid applied.

Accordingly, the ALJ should have applied the version of 7 AAC 130.270 that was in effect prior to July 1, 2013, and the ALJ's decision is hereby amended to do so. Application of the prior version of 7 AAC 130.270 reaches the same conclusion of that in the proposed decision because the analysis of the "integrated job site issue" is substantively identical. Therefore, the final result is unchanged and the Division's decision is affirmed.

III. Proposed Decision Adopted as Modified Above.

Except to the extent modified above, all factual findings contained in the ALJ's proposed decision, and all legal conclusions not inconsistent with the above, are hereby adopted. This Commissioner's Decision, and the ALJ's proposed decision (as modified above), together constitute the final decision of the Commissioner in this case.

APPEAL RIGHTS

This decision is the final administrative action in this proceeding. Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 25th day of February, 2014.

By: *Signed*
Jared C. Kosin
Executive Director, Office of Rate Review
Department of Health and Social Services

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