

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

In the Matter of)	
)	OAH No. 13-1740-MDS
C C)	Agency No.
_____)	

REVISED DECISION

I. Introduction

C C is 17 years old, and has been receiving Home and Community Based Waiver Medicaid services under a plan of care. His care coordinator submitted an amendment to the previously approved plan of care. The Division of Senior and Disabilities Services (division) denied the amendment because it had not been submitted within ten days of its effective date, and because the division can only pay for services that have received prior approval. Mr. C contested that decision.

A hearing was held on January 8, 2014. Mr. C was represented by his mother, M E. C B, the care coordinator supervisor for No Name, presented the family’s position. The division was represented by its lay representative, Shelly Boyer-Wood. Summer Wheeler and Keith Masker testified on behalf of the division.

A proposed decision was issued on January 16, 2014. The Commissioner of Health and Social Services, through his delegee, declined to adopt the proposed decision. He stated, in part,

Since this proposed decision includes a regulatory interpretation that has not been addressed in prior decisions, there would likely be policy implications if I decide to adopt this decision in its current form. Given the new regulatory interpretation in this case and the likely policy implications, additional action is required before I can make a decision.^[1]

Pursuant to AS 44.64.060(e), this matter was returned to the Office of Administrative Hearings to take additional evidence on the proper interpretation of 7 AAC 130.217.²

¹ Non-Adoption Order dated February 13, 2014.

² The division’s supplemental brief says that the full implications of interpreting the time limits in 7 AAC 130.217 “were not raised in the course of the hearing, and therefore any discussion or position on those questions would not [be] sufficiently briefed and any decision would be advisory in nature.” Mr. C’s appeal raised the question of whether the division should deny an amendment simply because it was not made within ten days. The purpose of holding supplemental proceedings was to give the division time to analyze and brief the policy

A supplemental hearing was scheduled for March 7, 2014. At the time set for the hearing, neither party was prepared to fully address either the regulatory interpretation or the policy implications that might arise from the original proposed decision. The parties were given additional time to submit written briefs.³ After careful consideration of the facts and legal arguments raised, this decision concludes that although the division may not pay for services that are provided before they are approved, the division should have approved the requested plan of care amendment for services requested after the date of the amendment.

II. Facts

Mr. C receives services under the Intellectual and Developmental Disabilities Medical Home and Community Based Waiver program. On July 1, 2013, the division received a proposed annual renewal of Mr. C's plan of care, covering the period of June 8, 2013 through May 21, 2014.⁴ It included a request for 10 hours per week of day habilitation services for the entire time, plus an additional 20 hours per week that would be provided for 15 weeks during school vacations and school in-service days.⁵ On September 9, 2013, the division approved most of the plan of care, but denied the request for the addition of 20 hours per week of day habilitation services for 15 weeks of the year.⁶ In denying this additional time, Health Program Manager Summer Wheeler wrote that the goals and objectives did not appear to be an appropriate use of day habilitation services. She also stated:

Additionally, the POC does not describe, support, or justify why this additional time is requested or why C's current level of habilitative services are not meeting his needs to achieve the stated goals/objectives.^[7]

This determination was not appealed. Instead, Ms. B decided to submit a subsequent amendment that would more fully explain and justify the additional services sought.⁸

The amendment was received by the division on October 4, 2013.⁹ It requested an effective date of June 8, 2013.¹⁰ The amendment asked for an additional 20 hours per week

implications involved in interpreting the impact of those time limits. It is disconcerting that the division did not fully comply with the directive given when this matter was returned.

³ Order Regarding Supplemental Position Statements dated March 7, 2014.

⁴ Exhibit F, pages 1, 4.

⁵ Exhibit F, page 14.

⁶ *Id.*

⁷ Exhibit F, page 2.

⁸ Testimony of Ms. B.

for 13 weeks “during school breaks” (a slight reduction from the number of weeks requested in the July 1 proposed plan).¹¹ The dates of the school breaks were stated as June 8, 2013 – August 20, 2013, December 23, 2013 – January 3, 2014, and March 10, 2014 – March 14, 2014.¹²

In denying the amendment on November 21, 2013, Health Program Manager Keith Masker relied on two regulations: 7 AAC 130.217(d)(3) and 7 AAC 130.260.¹³ The first requires the care coordinator to submit an amendment within ten business days of a change in circumstances or a change in the amount of services provided.¹⁴ The second regulation provides that day habilitation services will not be paid for unless they have been approved as part of a plan of care and have “prior authorization.”¹⁵

III. Discussion

There is no dispute that Mr. C meets the eligibility requirements for home and community based services as an individual with intellectual and developmental disabilities.¹⁶ To assist an individual in receiving appropriate services, the Department pays for a care coordinator.¹⁷ Among other duties, the care coordinator is responsible for preparing an annual plan of care,¹⁸ and reviewing and revising the plan of care.¹⁹

Based on his plan of care, Mr. C is eligible for a variety of services, including day habilitation services. Day habilitation includes services that

- (3) assist the recipient with acquisition, retention, or improvement of skills in the areas of self-help, socialization, appropriate behavior, and adaptation;
- (4) promote the development of the skills needed for independence, autonomy, and full integration into the community;
- (5) reinforce the skills taught in school, therapy, or other settings[.]²⁰

⁹ Exhibit E, page 1.

¹⁰ *Id.*

¹¹ Exhibit E, page 3. The amendment did not request services during school in-service days.

¹² *Id.*

¹³ *See* Exhibit D.

¹⁴ There is an exception for unusual circumstances that prevent a more timely amendment. Neither party asserted that this exception was applicable.

¹⁵ 7 AAC 130.260(a)(3) & (4).

¹⁶ *See* 7 AAC 130.205(d)(3).

¹⁷ 7 AAC 130.240.

¹⁸ 7 AAC 130.240(b)(1).

¹⁹ 7 AAC 130.240(c)(4).

²⁰ 7 AAC 130.260(b).

In this case, the care coordinator identified a need for additional day habilitation services in the annual plan of care submitted in July, requesting 10 hours weekly throughout the year and 20 hours when school was not in session.²¹

As noted above, after the denial of the 20-hour component on September 9, a new request was submitted in October, which was more than ten business days after the need was first identified by the care coordinator. The new request was similar (though not identical) in the amount of services requested, but it provided additional justification for the request.

The framework for developing a plan of care and any amendment to that plan is set out in 7 AAC 130.217. Notably, this is a new regulation: it became effective on July 1, 2013.²² It was not effective when Mr. C's previous plan of care came up for renewal, but it was in effect on September 9, 2013, when the division's partial denial of the first plan triggered the care coordinator's decision to submit a more complete amendment proposal.

Under this regulation, the receipt of a notice that the recipient meets the level of care requirements triggers certain actions by the care coordinator.²³ The care coordinator must provide information to the recipient,²⁴ consult with each member of the planning team,²⁵ develop a written plan of care covering a variety of topics,²⁶ and obtain various signatures.²⁷ The plan of care must then be submitted to the division within 60 days if it is the first plan of care, or within 30 days if it is a renewed plan of care following reassessment.²⁸

If an amendment is needed after a plan of care is approved, the care coordinator has ten business days from any "change in circumstances or change in the number of service units" in which to prepare and submit the amendment.²⁹ The division must then approve or disapprove the amendment within 30 days.³⁰ Although this regulation contains specific deadlines for both the division and the care coordinator, it is silent as to what happens if those deadlines are not met.

²¹ Exhibit F, pages 4, 14.
²² Alaska Admin. Code, Register 206.
²³ 7 AAC 130.217(a).
²⁴ 7 AAC 130.217(a)(1).
²⁵ 7 AAC 130.217(a)(2).
²⁶ 7 AAC 130.217(a)(3).
²⁷ 7 AAC 130.217(a)(4).
²⁸ 7 AAC 130.217(a)(5).
²⁹ 7 AAC 130.217(d).
³⁰ 7 AAC 130.217(e).

In this case, the ten-business-day timeline for Mr. C's representatives to submit an amendment proposal presumably began to run on September 9, 2013. That was the date the division denied the original request for extra hours, indicating that it was not adequately supported. This triggered a need to submit a more complete justification, and the date by which it should have been submitted was September 23. Since it was not submitted until October 4, it was untimely.³¹

The division asserted at the first hearing that it has consistently denied amendments that occur more than ten days after the change has been identified, unless there are unusual circumstances justifying the delay.³² After this case was returned for additional proceedings, the division modified its position. It continues to assert that a request for an amendment cannot operate retrospectively,³³ but now agrees that it can be applied prospectively.

[Senior and Disability Services] concurs that the 10 day time limit for submitting waiver plan of care amendments retrospectively under 7 AAC 130.217(d)(3) does not preclude consideration of a waiver amendment prospectively on its merits. SDS should have considered the amendment on its merits for prospective approval[.³⁴]

The division is correct. While 7 AAC 130.217(d)(3) could be interpreted to preclude any consideration of a late plan of care amendment, the regulation does not specifically state that late amendment requests will be denied on timeliness grounds. Deadlines in regulations are sometimes considered directory rather than mandatory.³⁵ In this case, the division has agreed to a reasonable interpretation of this regulation which allows consideration prospectively. However, because 7 AAC 130.260(a)(3) & (4) prohibits payment for services that do not have prior authorization, the division is also correct in asserting that a plan of care amendment may not be applied retroactively.

In this case, Mr. Masker testified that even if the requested amendment had not been denied on timeliness grounds, he would have denied the amendment on its merits.

³¹ This might be considered a timely appeal of the denial except that Ms. B testified that she intentionally decided not to file an appeal.

³² Testimony of Ms. Wheeler.

³³ It's position is that it may approve and pay for services up to ten days before the submission of the plan of care amendment.

³⁴ Supplemental Brief

³⁵ See *South Anchorage Concerned Coalition, Inc. v. Municipality of Anchorage* 179 P.3d 768 (Alaska 2007).

However, the denial letter did not provide any information about why the amendment was denied except for the timeliness issue.³⁶ The only reasons stated for denial were that it was submitted late and payment cannot be made for services provided without prior authorization. Those were the only reasons Mr. C had notice of, and the only reasons he could prepare to rebut at the hearing. Accordingly, they are the only reasons that can be considered here.³⁷

As discussed above, the division erred in denying the additional day habilitation services for school vacation weeks simply because the request was not timely. However, the division was correct that retroactive approval to June 8, as requested by Mr. C's care coordinator, cannot be allowed due to the requirement for prior authorization. Accordingly, the requested amendment should have been approved, but only on a purely prospective basis.

IV. Conclusion

The division incorrectly denied the plan of care amendment simply because it was submitted late. The division should have considered the merits of the request, and should have approved it prospectively. The additional 20 hours per week of day habilitation services is approved. The approval applies only to March 10 through March 14, 2014 services.³⁸

Dated this 26th day of March, 2014.

By: Signed
Name: Jared C. Kosin, J.D., M.B.A.
Title: Executive Director
Agency: Office of Rate Review, DHSS

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

³⁶ Exhibit D.

³⁷ See 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).

³⁸ Arguably, the approval should have approved all services occurring after October 4, 2013, when the amendment was submitted. That approval would have included the winter break dates of December 23, 2013 – January 3, 2014. The hearing in this matter occurred after the winter break, and the parties did not address whether that time period should have been approved. This decision does not decide whether approval of an appealed amendment denial can be made retroactive more than ten days prior to the final decision.