

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

In the Matter of:)	
)	OAH No. 13-1789-MDS
H U)	HCS Case No.
_____)	Medicaid ID No.

DECISION

I. Introduction

The issue in this case is whether Ms. H U is eligible to participate in the Medicaid Home and Community-Based Waiver Services Program (Waiver Services program). Based on the applicable regulations, an applicant is eligible to receive waiver services if he or she requires either skilled nursing care, intermediate level nursing care, or extensive assistance with three or more activities of daily living (ADLs). The Division of Senior and Disabilities Services (DSDS or Division) conducted an assessment on October 9, 2013 and subsequently determined that Ms. U does not require skilled or intermediate level nursing care, and does not require extensive assistance with three or more ADLs.¹ At hearing, Ms. U's representatives conceded that she has no skilled or intermediate level nursing needs, but asserted that she requires extensive assistance with three or more ADLs.²

This decision concludes that Ms. U requires significantly more physical assistance with two of her ADLs than was indicated in her assessment. Specifically, Ms. U requires extensive assistance with transfers and toileting. However, under the Division's regulations, an applicant or recipient must require extensive assistance with three or more ADLs in order to qualify for waiver services on that basis. As a result, Ms. U is not presently eligible to participate in the waiver services program.³ The Division's decision denying Ms. U's application for participation in the Waiver Services program is therefore affirmed.

II. Facts

A. Ms. U's Medical Diagnoses and Care Needs

Ms. U is a 21-year-old woman who lives in a private residence with her parents, brothers, and sisters.⁴ She contracted poliomyelitis⁵ when she was about 11 months old, and

¹ Ex. D.

² E T' hearing testimony.

³ However, should Ms. U's medical condition decline, she may wish to re-apply for waiver services in the future.

⁴ Ex. E1.

polio is her primary diagnosis.⁶ Ms. U's secondary diagnoses include polio-related osteopathy,⁷ lower limb monoplegia,⁸ lower limb mononeuritis,⁹ pure hypercholesterolemia, urinary incontinence, and dysthymic¹⁰ disorder.¹¹ Ms. U currently weighs 210 pounds.¹²

Mr. U testified at hearing in relevant part that his daughter's legs are weak, and that he and his wife must help her with eating, drinking, using the toilet, taking a bath or shower, and with shopping.

Ms. W testified at hearing in relevant part as follows:

1. She is her daughter's PCA.
2. Her daughter's legs are weak and have little muscle strength or energy.
3. Her daughter cannot stand on her own and must be lifted in and out of her wheelchair.
4. Her daughter needs help getting in and out of bed, using the toilet, and taking a bath or shower.

E T, Ms. U's Care Coordinator, testified at hearing that:

1. Ms. U can eat and drink independently, and does not require assistance with personal hygiene.

⁵ Poliomyelitis (also known as polio) is a highly contagious disease caused by a virus that attacks the nervous system. *See* article on Medline Plus, a service of the U.S. National Library of Medicine and the National Institutes of Health, accessed online at <http://www.nlm.nih.gov/medlineplus/ency/article/001402.htm> (date accessed April 3, 2014). Children younger than five years old are more likely to contract the virus than any other group. *Id.* Approximately 90% of polio infections cause no symptoms at all. *Id.* However, in about 1% of cases, the virus enters the central nervous system, preferentially infecting and destroying motor neurons, leading to muscle weakness and paralysis. *Id.* This most commonly results in asymmetric paralysis of the legs. *Id.*

⁶ Ex. E3; N W's hearing testimony.

⁷ Polio-related osteopathy is a type of post-polio syndrome (PPS), is a condition that affects polio survivors years after recovery from an initial acute attack of the poliomyelitis virus. *See* article at National Institute of Neurological Disorders and Stroke, accessed online at http://www.ninds.nih.gov/disorders/post_polio/detail_post_polio.htm (date accessed April 3, 2014). The term describes the gradual new weakening in muscles that were previously affected by the polio infection. *Id.* The most common symptoms include slowly progressive muscle weakness, fatigue (both generalized and muscular), and a gradual decrease in the size of muscles (muscle atrophy). *Id.*

⁸ Monoplegia is the paralysis of a single limb, muscle, or muscle group. *See* American Heritage Medical Dictionary (Houghton Mifflin Company 2007), accessed online at <http://medical-dictionary.thefreedictionary.com/monoplegia> (date accessed April 3, 2014).

⁹ Mononeuritis is the inflammation of a single nerve. *See* Dorland's Medical Dictionary for Health Consumers (Saunders 2007), accessed online at <http://medical-dictionary.thefreedictionary.com/mononeuritis+multiplex> (date accessed April 3, 2014).

¹⁰ Dysthymic disorder is a mood disorder characterized by chronic mildly depressed or irritable mood, often accompanied by other symptoms such as eating and sleeping disturbances, fatigue, and poor self-esteem. *See* Merriam-Webster's online dictionary at <http://www.merriam-webster.com/dictionary/dysthymia> (date accessed April 3, 2014).

¹¹ Ex. E3.

¹² Ex. E9.

2. Ms. U cannot move well from the waist down and requires assistance with bed mobility and transfers.
3. With regard to locomotion, the hallway to the bathroom at Ms. U's home is very narrow, so Ms. U cannot use her wheelchair there and must be carried through the hallway to use the toilet and/or to bathe.
4. Ms. U has been in a wheelchair for a long time and has no upper body strength. She is not strong enough to propel her own wheelchair, even in those rooms and hallways which are wide enough for her to use a wheelchair.
5. Ms. U requires assistance transferring on and off the toilet, and with post-toilet-use hygiene.
6. Ms. U needs help dressing and undressing her lower body.

K S, Ms. U's PCA agency representative, testified at hearing that:

1. He has assisted Ms. U with completing and submitting applications for Medicaid services.
2. Ms. U can eat and drink independently.
3. Ms. U's lower body is essentially paralyzed. As a result of this, she has poor balance, and so even if she is able to stand on her better leg, she will topple over due to her inability to balance.
4. He was involved in ordering Ms. U's wheelchair. Ms. U tried using the wheelchair, but her arms are weak and she says that using the wheelchair hurt her arms. Accordingly, her parents must push her in the wheelchair.
5. Ms. U's parents must lift her to transfer her from her wheelchair to another surface. She requires two-person assistance with transfers.
6. Ms. U is incontinent as a result of her paralysis.

B. Ms. U's Functional Abilities as Determined by the CAT

On October 9, 2013 Ms. U was assessed as to her eligibility for the Waiver Services program by Scott Chow, R.N. of DSDS.¹³ Mr. Chow assessed Ms. U using the Consumer Assessment Tool or "CAT," a system for scoring disabilities that is described in detail in Part III. A Hmong-speaking interpreter was present for and used during the assessment.¹⁴

¹³ Ex. E.

¹⁴ E T' hearing testimony.

Mr. Chow reported that Ms. U had a flat affect during the assessment and would not speak unless questioned directly.¹⁵ He reported that Ms. U answered questions appropriately, but intermittently ceased responding, gave up drawing a clock face about half way through, and was unable to perform a test in which she was asked to recall three designated words within five minutes. Ms. U was able to reach above her head and back and touch her hands together, touch her feet, sit cross-legged, and grip strongly with both her hands. However, she was not able to stand up with her arms crossed on her chest.

Mr. Chow determined, based on the assessment he conducted, that Ms. U has the following abilities and limitations with regard to her Activities of Daily Living (ADLs):¹⁶

Bed Mobility:¹⁷ Mr. Chow reported that Ms. U's parents told him that they have to make Ms. U get out of bed because "all she wants to do is sleep." Mr. Chow reported that he observed Ms. U demonstrate "strength and coordination in her arms to reposition and turn herself 180 degrees on the couch without using her legs." From this Mr. Chow concluded that Ms. U "is not paralyzed¹⁸ and has no disability to prevent her from repositioning herself" (scored 0/1; frequency 0/0).

Transfers:¹⁹ Mr. Chow reported that Ms. U's parents told him she does not like to get up at all. Mr. Chow reported that he observed that (1) Ms. U "has problems with one of her legs and it was observed to be smaller than the other one;" (2) Ms. U uses a wheelchair to assist with transfers "and has weight bearing ability with her good leg and her arms to help her;" (3) Ms. U's parents demonstrated that they transfer her by picking her up under each arm and lifting her; and (4) after being placed on a couch, Ms. U repositioned herself and turned around using her arms to sit in a cross-legged position (scored 5/5; frequency 0/0).

Locomotion:²⁰ Mr. Chow reported that Ms. U's parents told him that Ms. U (1) can propel herself in her wheelchair, but chooses not to do so most of the time; and (2) will sit most of the time and not want to do anything. Mr. Chow reported that he observed Ms. U

¹⁵ All factual findings in this paragraph are based on Ex. E4.

¹⁶ Exs. E6 - E11. The numeric scores referenced are the CAT scores assigned by Mr. Chow.

¹⁷ All factual findings in this paragraph are based on Ex. E6.

¹⁸ This is not correct; the information from Ms. U's health care provider at Ex. E3 and Ms. U's parents' testimony shows that, due to her polio, one of Ms. U's legs is paralyzed, and the other has no feeling in it.

¹⁹ All factual findings in this paragraph are based on Ex. E6.

²⁰ All factual findings in this paragraph are based on Ex. E7.

demonstrate "strength and coordination during her transfer from the wheelchair to the couch" (scored 5/5; frequency 0/0).

Dressing:²¹ Mr. Chow reported that Ms. U's parents told him that they help Ms. U get dressed because she needs encouragement and will not change her clothes by herself. Mr. Chow reported that he observed that Ms. U has strong grips and good motor skills (scored 5/5; frequency 0/0).

Eating:²² Mr. Chow reported that Ms. U's parents told him that Ms. U is independent with eating and has no trouble chewing or swallowing (scored 5/5; frequency 0/0).

Toileting:²³ Mr. Chow reported that Ms. U's parents told him that Ms. U refuses to use the bathroom by herself, but does not need a bedpan or adult diapers because "she knows when she has to go" and gets someone to help her (scored 1/1; frequency 0/0).

Personal Hygiene:²⁴ Mr. Chow reported that Ms. U's parents told him that Ms. U is physically able to perform her own personal hygiene independently, and that Ms. U also agreed that she can do so (scored 0/0; frequency 0/0).

Bathing:²⁵ Mr. Chow reported that Ms. U's parents told him that they help Ms. U in the shower because she "does not like to help herself" (scored 5/5; frequency 0/0).

C. *Relevant Procedural History*

At some time prior to October 9, 2013 Ms. U's Care Coordinator submitted an application to the Division for Ms. U's participation in the Waiver Services program.²⁶ As discussed above, on October 9, 2013 a nurse-assessor employed by the Division conducted an in-person assessment using the CAT.²⁷ The nurse found that Ms. U requires neither a nursing facility level of care, nor extensive assistance with three or more ADLs, and therefore concluded that Ms. U is not eligible for participation in the Waiver Services program.²⁸

On December 5, 2013 the Division mailed a notice to Ms. U advising her that it had denied her application for waiver services.²⁹ The letter cited state Medicaid regulations 7 AAC 130.205, 7 AAC 130.207, 7 AAC 130.213, and 7 AAC 130.215 in support of its

²¹ All factual findings in this paragraph are based on Ex. E8.

²² All factual findings in this paragraph are based on Ex. E9.

²³ All factual findings in this paragraph are based on Ex. E9.

²⁴ All factual findings in this paragraph are based on Ex. E10.

²⁵ All factual findings in this paragraph are based on Ex. E11.

²⁶ Exhibit D1. The exact date of the submittal of Ms. U's application is not at issue in this case.

²⁷ Exhibits E1 - E31.

²⁸ Exhibits D, E29 - E30.

²⁹ Exhibit D.

determination.³⁰ On December 6, 2013 Ms. U's Care Coordinator requested a hearing to contest the Division's denial of Ms. U's waiver services application.³¹

Ms. U's hearing was held on January 22, 2014. Ms. U participated by phone but did not testify. Her father, A U, her mother and PCA, N W, her Care Coordinator, E T, and her PCA agency representative, K S, all participated in the hearing by phone, helped represent Ms. U, and testified on her behalf. A Hmong interpreter, Kaitlyn Yang, was employed to translate for Ms. U and her parents.

The Division was represented by Angela Ybarra, who participated by phone. Scott Chow, a registered nurse employed by DSDS, participated in the hearing by phone and testified on the Division's behalf. The record closed at the end of the hearing.

III. Discussion

A. Relevant Alaska Medicaid Statutes and Regulations

Alaska's Medicaid Waiver Services Program provides eligible Alaskans with a choice between home and community based care and institutional care.³² An applicant who otherwise satisfies the eligibility criteria is eligible for waiver services if he or she requires the level of care specified in 7 AAC 130.230(b).³³ For adults such as Ms. U, that level of care must be either "intermediate care" as defined by 7 AAC 140.510, or "skilled care" as defined by 7 AAC 140.515.³⁴ Intermediate level care is a lower standard of nursing care than skilled level care and is thus the easier of the two standards for an applicant to meet. Medicaid regulation 7 AAC 140.510 defines "Intermediate Care Facility Services" in relevant part as follows:

(a) The department will pay an intermediate care facility for providing the services described in (b) and (c) of this section if those services are (1) needed to treat a stable condition; (2) ordered by and under the direction of a physician, except as provided in (c) of this section; and (3) provided to a recipient who does not require the level of care provided by a skilled nursing facility.

(b) Intermediate nursing services are the observation, assessment, and treatment of a recipient with a long-term illness or disability whose condition is relatively stable and where the emphasis is on maintenance rather than rehabilitation, or care for a recipient nearing recovery and discharge whose condition is relatively stable but who continues to require professional medical or nursing supervision.

³⁰ Exhibit D1.

³¹ Exhibit C.

³² 7 AAC 130.200.

³³ 7 AAC 130.205(d)(2).

³⁴ 7 AAC 130.230(b)(2).

Thus, in order to qualify for an intermediate level of care under 7 AAC 140.510, the applicant must, among other things, require professional medical or nursing supervision.

B. The Consumer Assessment Tool (CAT)

Pursuant to Alaska Medicaid regulation 7 AAC 130.230(b)(2)(B), level of care determinations for waiver services applicants seeking services under the "adults with physical disabilities" or "older adults" categories must incorporate the results of the Consumer Assessment Tool (CAT). The CAT is adopted into regulation by 7 AAC 160.900(d)(6).

The CAT numerical coding system has two components. The first component is the *self-performance code*. These codes rate how capable a person is of performing a particular activity of daily living (ADL).³⁵ The possible codes are **0** (the person is independent and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance); **3** (the person requires extensive assistance); **4** (the person is totally dependent). There are also codes that are not treated as numerical scores for purposes of calculating a service level: **5** (the person requires cueing); and **8** (the activity did not occur during the past seven days).³⁶

The second component of the CAT scoring system is the *support code*. These codes rate the degree of assistance that a person requires for a particular activity of daily living (ADL). The possible codes are **0** (no setup or physical help required); **1** (only setup help required); **2** (one person physical assist required); **3** (two or more person physical assist required). Again, there are additional codes that do not add to the service level: **5** (cueing required); and **8** (the activity did not occur during the past seven days).³⁷

The ADLs scored by the CAT are body mobility, transfers (non-mechanical), transfers (mechanical), locomotion (in room), locomotion (between levels), locomotion (to access apartment or living quarters), dressing, eating, toilet use, personal hygiene, personal hygiene-shampooing, and bathing.

³⁵ According to the federal Medicaid statutes, the term "activities of daily living" includes tasks such as eating, toileting, grooming, dressing, bathing, and transferring. See 42 USC § 1396n(k)(6)(A). In Alaska, pursuant to AS § 47.33.990(1), "activities of daily living" means "walking, eating, dressing, bathing, toileting, and transfer between a bed and a chair."

³⁶ See, for example, Ex. E at page 6.

³⁷ See, for example, Ex. E at page 6.

C. Ms. U Does Not Require Skilled or Intermediate Nursing Care as Defined by Alaska Medicaid Regulations

A person can qualify for the waiver services program if he or she requires skilled level nursing services as defined by 7 AAC 140.515, or intermediate level nursing services as defined by 7 AAC 140.510. At hearing, however, Ms. U's Care Coordinator conceded that Ms. U has no skilled or intermediate level nursing needs. Rather, she asserted that Ms. U qualifies for waiver services because she requires extensive assistance with three or more activities of daily living (ADLs).

Because Ms. U does not require professional medical or nursing supervision, she does not satisfy the intermediate level of care criteria as stated in 7 AAC 140.510. However, this does not end the inquiry because, under the CAT, an applicant can qualify for waiver services, even without requiring professional medical or nursing supervision, if the applicant's CAT scores in other areas are sufficiently high.

D. Does Ms. U Qualify for Waiver Services Based on her Need for Assistance With Activities of Daily Living?

The Consumer Assessment Tool's nursing facility level of care scoring summary is located at page 29 of the CAT.³⁸ As indicated by that scoring summary, there are numerous scoring combinations through which one may qualify for waiver services. Some of these combinations (discussed below) allow a person to meet the Nursing Facility Level of Care (NFLOC), without a need for professional nursing services, based on the level of assistance which the person requires in order to perform their ADLs. The CAT divides these possible combinations into six different areas, designated "NF1" through "NF6."

1. NF1

There are five different ways to meet NFLOC under NF1. The first way (under NF1(a)) is to require nursing services seven days per week. Ms. U did not assert that she satisfies NF1(a), and the record indicates that she does not.³⁹ The second way (under NF1(b)) is to require use of a ventilator or respirator at least three days per week. Ms. U did not assert that she satisfies NF1(b), and the record indicates that she does not.⁴⁰ The third way (under NF1(c)) is to require care due to uncontrolled seizures at least once per week. Ms. U did not

³⁸ Ex. E29.

³⁹ Exs. E13, E14.

⁴⁰ Ex. E14.

assert that she satisfies NF1(c), and the record indicates that she does not.⁴¹ The fourth way (under NF1(d)) is to receive some form of therapy at least five days per week. Ms. U did not assert that she satisfies NF1(d), and the record indicates that she does not.⁴²

The fifth/last way to meet NFLOC under NF1, under NF1(e), is to score a three (extensive assistance required) or a four (completely dependent) in the self-performance portion of three or more of the "shaded" ADLs listed at page 18 of the CAT.⁴³ The "shaded" ADLs are bed mobility, transfers, locomotion, eating, and toilet use. The CAT scores which the Division assigned to Ms. U for the "shaded" ADLs are bed mobility: 0/1; transfers: 5/5; locomotion: 5/5; eating: 5/5; and toileting: 1/1.⁴⁴ Ms. U asserts that she requires a minimum of extensive assistance by one person (*i.e.* a score of 3/2) as to three or more of these ADLs. Ms. U's need for assistance with the five "shaded" ADLs is analyzed below.

a. Body / Bed Mobility

For purposes of waiver services eligibility, body / bed mobility is defined as how a person moves to and from a lying position, turns side to side, and positions his or her body while in bed.⁴⁵ In order to receive a self-performance score of three (extensive assistance) with regard to bed / body mobility, a person must require either weight bearing support three or more times per week, or full caregiver performance of the activity part of the time.⁴⁶

Mr. Chow reported that he observed Ms. U demonstrate "strength and coordination in her arms to reposition and turn herself 180 degrees on the couch without using her legs." From this Mr. Chow concluded that Ms. U "is not paralyzed and has no disability to prevent her from repositioning herself" while in bed.⁴⁷ On the other hand, Ms. W and Ms. T both testified that Ms. U requires assistance to reposition herself in bed.

The body mobility regulation, 7 AAC 125.030(b)(1), makes resolution of this factual issue unnecessary because it defines the ADL of body mobility such that positioning or turning in a bed or chair is a covered activity only if the applicant or recipient is *nonambulatory*. The regulation governing locomotion, 7 AAC 125.030(b)(3), defines locomotion as including ambulation by means of a walker, cane, gait belt, braces, crutches, or a manual wheelchair. As

⁴¹ Ex. E14.
⁴² Ex. E5.
⁴³ Ex. E18.
⁴⁴ Ex. E18.
⁴⁵ Ex. E6.
⁴⁶ Ex. E6.
⁴⁷ Ex. E6.

discussed below in the section on locomotion, the undersigned finds that Ms. U is capable of propelling her wheelchair without assistance in at least some portions of her home. Accordingly, under the Division's regulations, Ms. U is considered ambulatory for purposes of the regulation on bed / body mobility. Because she is ambulatory, under the regulation, Ms. U is considered not to require assistance with bed / body mobility, even if she does. In other words, because Ms. U is ambulatory using a wheelchair, the Division's regulations create an irrebuttable presumption that Ms. U does not require assistance with bed / body mobility. Accordingly, for CAT scoring purposes, Ms. U is considered independent with regard to bed / body mobility (CAT score 0/0).

b. Transfers

For purposes of waiver services eligibility, a transfer is defined as how a person moves between surfaces (with the exception of the toilet and bathtub or shower, which are handled as separate ADLs).⁴⁸ In order to receive a self-performance score of three (extensive assistance) with regard to transfers, a person must require either weight bearing support three or more times per week, or full caregiver performance of the activity part of the time.⁴⁹

Mr. Chow reported that he observed (1) that Ms. U "has problems with one of her legs and it was observed to be smaller than the other one;" (2) that Ms. U uses a wheelchair to assist with transfers "and has weight bearing ability with her good leg and her arms to help her;" (3) that Ms. U's parents demonstrated that they transfer her by picking her up under each arm and lifting her; and (4) that after being placed on a couch, Ms. U repositioned herself and turned around using her arms to sit in a cross-legged position. Based on these findings, Mr. Chow scored Ms. U as requiring only cueing for her transfers (scored 5/5).⁵⁰

On the other hand, Ms. W, Ms. T, and Mr. S each testified that, due to her polio, Ms. U's legs are weak and have little muscle strength, and that Ms. U therefore generally requires a two-person physical assist to accomplish a transfer.

The undersigned finds that, given Ms. U's diagnoses and her weight, her witnesses' testimony regarding her need for two-person weight bearing assistance with transfers was credible. Accordingly, the preponderance of the evidence indicates that Ms. U requires extensive assistance by two persons to perform transfers (CAT score 3/3).

⁴⁸ Ex. E6.

⁴⁹ Ex. E6.

⁵⁰ Ex. E6.

c. Locomotion

For purposes of waiver services eligibility, locomotion is defined as how a person moves between locations in his or her room and other areas on the same floor / level.⁵¹ In order to receive a self-performance score of three (extensive assistance) with regard to locomotion, a person must require either weight bearing support three or more times per week, or full caregiver performance of the activity part of the time.⁵²

Mr. Chow reported that Ms. U's parents told him that Ms. U can propel herself in her wheelchair, but chooses not to do so most of the time. Mr. Chow also inferred Ms. U's ability to propel her wheelchair herself based on his observation that Ms. U demonstrated strength during a transfer from her wheelchair to a couch.

On the other hand, Ms. T and Mr. S testified that (1) the hallway to the bathroom at Ms. U's home is very narrow, so Ms. U cannot use her wheelchair there and must be carried through the hallway to use the toilet and/or to bathe; and (2) Ms. U has no upper body strength, and she is not strong enough to propel her own wheelchair even in those rooms and hallways which are wide enough for her to use a wheelchair.

The undersigned finds that Ms. U lives in a trailer that is not completely wheelchair-accessible, and that the physical layout of the home limits her ability to navigate the home with her wheelchair. Specifically, the hallway to the bathroom is too narrow for her wheelchair. However, there was no testimony at hearing that the rest of the home was that narrow. It is true that Ms. U is overweight and that her range of motion in her upper body is somewhat limited. However, it is undisputed that she can use her upper extremities to touch her feet and straighten out her legs. Since she is strong enough and limber enough to do this, it follows that she is also strong enough and limber enough to propel her own wheelchair, even though she may prefer not to do so. Accordingly, the preponderance of the evidence indicates that Ms. U may require supervision or cueing as to locomotion, but she does not require limited or extensive assistance as to locomotion.

d. Eating

For purposes of waiver services eligibility, eating is defined as how a "person eats or drinks regardless of skill."⁵³ In order to receive a self-performance score of three (extensive

⁵¹ Ex. E7.

⁵² Ex. E7.

⁵³ Ex. E9.

assistance) with regard to eating, a person must require either weight bearing support three or more times per week, or full caregiver performance of the activity part of the time.⁵⁴

Mr. Chow reported that Ms. U's parents told him that Ms. U is independent with eating and has no trouble chewing or swallowing (scored 5/5; frequency 0/0). Ms. T and Mr. S also testified at hearing that Ms. U can eat and drink independently. Ms. U's father was the only person who testified that Ms. U requires assistance with eating and drinking, and Mr. U's testimony on this issue was not specific. Accordingly, the preponderance of the evidence indicates that Ms. U can eat and drink independently, requiring at most supervision and cueing (CAT score 1/1 or 5/5).

e. Toilet Use

For purposes of waiver services eligibility, toilet use is defined as how a "person uses the toilet room (or commode, bedpan, urinal); transfers on/off toilet, cleanses, changes pads, manages ostomy or catheter, adjusts clothes."⁵⁵ To receive a self-performance score of three (extensive assistance) as to toilet use, a person must receive either weight bearing support three or more times per week, or full caregiver performance of the activity part of the time.⁵⁶

Mr. Chow reported that Ms. U's parents told him that Ms. U refuses to use the bathroom by herself, inferring that she is physically capable of using the bathroom by herself, but that she chooses not to. On the other hand, Mr. U, Ms. W, and Ms. T all testified that Ms. U generally requires weight-bearing assistance to get to the toilet and to transfer on and off the toilet. Based on the testimony, Ms. U's diagnoses, and the fact that her bathroom is not wheelchair accessible, the preponderance of the evidence indicates that Ms. U at minimum requires extensive assistance from one person with toileting (CAT score 3/2).

f. Summary - Degree of Assistance Required With Shaded ADLs

In order to qualify for waiver services under NF1(e), a person must demonstrate either full dependence, or a need for extensive assistance, *as to at least three* of the shaded ADLs. Independent review by the undersigned indicates that Ms. U requires extensive assistance as to transfers and toileting, but not as to bed mobility, locomotion, or eating. Because Ms. U does not require extensive assistance with three or more of the "shaded" ADLs, she does not qualify for waiver services on that basis.

⁵⁴ Ex. E9.

⁵⁵ Ex. E9.

⁵⁶ Ex. E9.

2. NF2

An applicant cannot meet NFLOC under NF2 alone. However, under NF2 an applicant can obtain points towards qualifying for NFLOC which, when added to points obtained under *other* subsections of NF1 - NF6, can qualify the applicant for NFLOC. The first way (under NF2(a)) is to obtain a score of two or three with regard to injections and/or IV hookups, feeding tubes, tracheotomy care or nasopharyngeal suctioning, applying treatments or dressings, administering oxygen, observing, assessing, and managing unstable conditions, catheter management, and/or care required due to a comatose condition. The record does not show that Ms. U requires any of these services,⁵⁷ so she gets no points under NF2(a).

The second way to obtain points (under NF2(b)) is to require speech therapy, respiratory therapy, physical therapy, and/or occupational therapy at least three days per week. However, the record does not show that Ms. U requires any of these therapies,⁵⁸ so she receives no points under NF2(b).

The third way to obtain points (under NF2(c)) is to require medications via tube, tracheotomy care, urinary catheter changes or irrigation, veni-puncture, or barrier dressings for ulcers, at least three days per week. Again, however, the record does not show that Ms. U requires any of these procedures,⁵⁹ so she gets no points under NF2(c).

The fourth/last way to obtain points (under NF2(d)) is to require chemotherapy, radiation therapy, hemodialysis, and/or peritoneal dialysis, at least three days per week. Again, however, the record does not show that Ms. U requires any of these treatments,⁶⁰ so she gets no points under NF2(d).

3. NF3

An applicant cannot meet NFLOC under NF3 alone. However, under NF3 an applicant can obtain points towards qualifying for NFLOC which, when added to points obtained under *other* subsections of NF1 - NF6, can qualify the applicant for NFLOC. The first way (under NF3(a)) is to have short-term memory problems. The record shows that Ms. U has short-term memory problems, and Ms. U received the maximum score (one) in this category.⁶¹

⁵⁷ Exs. E13, E14.

⁵⁸ Exs. E5, E14.

⁵⁹ Ex. E15.

⁶⁰ Ex. E15.

⁶¹ Exs. E16, E29.

The second way to obtain points (under NF3(b)) is to be generally unable to recall names and faces, the season of the year, where you are, and the location of your room. Ms. U was able to recall three of these four specific items of information during the assessment, and so she received no points in this category.⁶²

The third way to obtain points (under NF3(c)) is to be moderately or severely impaired in one's cognitive skills for daily decision-making. The Division found that Ms. U is only slightly impaired as to her cognitive skills for daily decision-making, and her witnesses did not argue otherwise at hearing. Accordingly, Ms. U received one point under this subsection.⁶³

The fourth/last way to obtain points (under NF3(d)) is to require *either* professional nursing care due to cognitive problems, *or both* (1) score at least a 2/2 as to any shaded ADL, *and* (2) score 13 or more on the Division's Supplemental Screening Tool (SST) for cognitive issues. The Division found that Ms. U does not require professional nursing care to manage her cognitive problems.⁶⁴ This finding is supported by the record, and Ms. U's witnesses did not assert otherwise. As discussed above, Ms. U receive a score equal to or greater than 2/2 as to one or more shaded ADLs. However, Ms. U's cognitive problems were not severe enough to require use of the Division's SST, and so she received no score on the SST. Because Ms. U satisfied only one of the three elements of NF3(d), and because NF3(d) requires that all three of its elements be met in order to receive a single point, Ms. U receives no points under NF3(d).

Under NF3, an applicant must receive a score of one *on all four subsections* in order to receive a single "overall" point at the conclusion of NF3. Here, Ms. U received one point under subsections NF3(a) and NF3(c), but scored no points under subsections NF3(b) or NF3(d). Accordingly, Ms. U receives an overall score of zero on NF3.

4. NF4

An applicant cannot meet NFLOC under NF4 alone. However, under NF4 an applicant can obtain one point towards qualifying for NFLOC which, when added to points obtained under other subsections of NF1 - NF6, can qualify the applicant for NFLOC.

There are two subsections to NF4, and an applicant must qualify under both of these subsections in order to receive the one point available under NF4. Under NF4(a), an applicant must either wander, engage in socially inappropriate or disruptive behavior, be verbally

⁶² Exs. E16, E29.

⁶³ Exs. E16, E29.

⁶⁴ Ex. E16.

abusive, or be physically abusive at least four days per week. The Division found that Ms. U does not engage in these behaviors, and Ms. U's witnesses did not assert otherwise.⁶⁵ Accordingly, Ms. U gets no points under NF4(a).

Under NF4(b), an applicant must *either* require professional nursing care as a result of problem behaviors, *or both* (1) score at least 2/2 as to any shaded ADL, *and* (2) score 14 or more on the portion of the Division's Supplemental Screening Tool (SST) dealing with problem behavior. In this case, the Division found that Ms. U has no significant behavioral problems and that she does not require professional nursing care for any behavioral problems.⁶⁶ This finding is supported by the record, and Ms. U's witnesses did not assert otherwise.

As discussed above, Ms. U did receive a score of 2/2 or more as to one or more shaded ADLs. However, Ms. U has no significant behavioral problems, did not require use of the Division's SST for behavioral issues, and so she received no score for behavioral issues on the SST. Accordingly, Ms. U receives no points under NF4(b), and in turn Ms. U receives no "overall" points under NF4.

5. NF5

At NF5, the scores from NF2, NF3, and NF4 are added together. If an applicant receives a score of one or more, then the analysis proceeds to NF6. In this case, Ms. U scored no "overall" points at NF1, NF2, NF3, or NF4, giving her a total score of zero at NF5. Accordingly, the analysis in this case does not proceed to NF6, and Ms. U is considered currently ineligible for waiver services based on her CAT scores.

IV. Conclusion

The Division correctly determined that Ms. U does not currently require skilled or intermediate level nursing services as defined by the applicable regulations. The Division also correctly determined that Ms. U's CAT scores are currently not high enough to allow her to qualify for waiver services on that basis. Accordingly, the Division's decision that Ms. U is not currently eligible to participate in the Medicaid Home and Community-Based Waiver Services Program is affirmed.

DATED this 8th day of April, 2014.

Signed

Jay Durych
Administrative Law Judge

⁶⁵ Exs. E17, E29.

⁶⁶ Ex. E17.

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 April, 2014.

By: Signed _____
Name: Jay D. Durych
Title: Administrative Law Judge, DOA/OAH

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