

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

In the Matter of	)	
	)	OAH No. 14-0121-MDS
K O	)	Division No.
_____	)	

**DECISION**

**I. Introduction**

K O is a disabled young adult who receives Medicaid Home and Community-based Waiver (Waiver) services. His 2013 – 2014 Plan of Care (POC) included a request that he receive 15 hours per week of Supported Employment Services (SES). The Division of Senior and Disabilities Services (Division) denied that request. Mr. O requested a hearing to challenge the denial.

Mr. O’s hearing was held on April 14, 2014. U O, Mr. O’s mother and legal guardian, represented him. Angela Ybarra, a Medical Assistance Administrator employed by the Department of Health and Social Services, represented the Division.

The evidence shows that the SES requested for Mr. O is for a work site that only employs disabled persons. As a result, Mr. O does not qualify for SES. The Division’s denial of the requested SES is affirmed.

**II. Facts**

Mr. O is a disabled young adult (age 23). He is a client of No Name Community Resources. Mr. O works part-time on a grounds crew for No Name Community Resources. He has been working on the grounds crew for approximately three years. The entire grounds crew, with the exception of the supervisor, is composed of disabled persons.<sup>1</sup>

Mr. O’s POC, for the period running from December 16, 2012 through October 17, 2013, states that Mr. O had been working on the No Name grounds crew during the past year, and that he was able to operate all of the power tools, was a hard worker who rarely missed work, and who volunteered for extra shifts. However, Mr. O had anger, concentration, and social skills

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<sup>1</sup> N “Q” S testimony.

issues which required work.<sup>2</sup> Mr. O's 2012 – 2013 POC provided for his supported employment service under his 15 hours per week of day habilitation services.<sup>3</sup>

Mr. O submitted a proposed POC for the period running from October 18, 2013 through October 17, 2014. That plan of care lowered his day habilitation services to eight hours per week and requested 15 hours per week of SES for his grounds crew job. The Division approved the day habilitation services but denied Mr. O's request for SES. Its reasoning was that SES was not available for a worksite where only disabled persons were employed.<sup>4</sup>

Mr. O's history includes sexual predation and he has a felony conviction for sexual assault upon a minor.<sup>5</sup> Due to his high risk behavior, it is unlikely that he will ever be able to work outside of a sheltered environment.

### III. Discussion

The Medicaid program has a number of coverage categories. One of those coverage categories is the Waiver program.<sup>6</sup> The Waiver program pays for specified individual services to Waiver recipients, if each of those services is "sufficient to prevent institutionalization and to maintain the recipient in the community."<sup>7</sup> The Division must approve each specific service as part of the Waiver recipient's POC.<sup>8</sup>

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

- (a) The department will pay for supported-employment services that
  - (1) are provided in accordance with the department's *Supported Employment Conditions of Participation*;

\* \* \*
- (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 . . .

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<sup>2</sup> Ex. F, p. 8.

<sup>3</sup> Ex. F, p. 16; N "Q" S testimony.

<sup>4</sup> Ex. D, p. 2.

<sup>5</sup> Ex. E, pp. 7 – 8, 11 – 12; N "Q" S testimony.

<sup>6</sup> 7 AAC 100.002(d)(8); 7 AAC 100.502(d).

<sup>7</sup> 7 AAC 130.217(b)(1).

<sup>8</sup> 7 AAC 130.217(b).

- (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.<sup>[9]</sup>

The Department's *Supported Employment Conditions of Participation* reads as follows:

*Supported employment services may be offered in a variety of settings, but, because independence and community integration are significant goals for these services, they may not be provided in sheltered workshops or other similar specialized vocational facilities.*<sup>[10]</sup>

Mr. O argued that his SES should be covered because it provided him with job development skills which would help him obtain or continue employment.<sup>11</sup> The Division argued that SES was not an available Waiver service for Mr. O because he was working in a sheltered environment, *i.e.*, working only with other disabled persons, whereas the regulation required that SES was only available to persons who worked with non-disabled persons.<sup>12</sup>

The Division's argument is more persuasive than Mr. O's because regulation 7 AAC 130.270 is clear, by its reference to the *Supported Employment Conditions of Participation* in section (a)(1) and by its statement in section (b)(2), that SES is not available for persons working in a sheltered environment.<sup>13</sup> It should also be noted that Mr. O has been working on the grounds crew for three years. He is able to operate the power tools required by the job. Given his experience, he is beyond the job training stage. Consequently, Mr. O is not eligible for SES.

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<sup>9</sup> 7 AAC 130.270.

<sup>10</sup> *Supported Employment Conditions of Participation*, p. 1 (emphasis in original). This is available online at <http://dhss.alaska.gov/dsds/Documents/regspackage/SupportedEmploymentServicesCOP.pdf>

<sup>11</sup> 7 AAC 130.270(b)(3).

<sup>12</sup> 7 AAC 130.270(b)(2).

<sup>13</sup> 7 AAC 130.270(a)(1) and (b)(2); *In re ED*, OAH No. 13-1369-MDS at 7-8 (Comm'r Health and Soc. Serv. 2014). This is available online at <http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS131369.pdf>

#### **IV. Conclusion**

The Division's decision to deny Mr. O's request for 15 hours per week of SES is affirmed.

DATED this 23<sup>rd</sup> day of April, 2014.

*Signed*

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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 7<sup>th</sup> day of May, 2014.

By: *Signed*

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Name: Lawrence A. Pederson

Title: Administrative Law Judge

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