

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

In the Matter of:)
)
 T E) OAH No. 14-1238-MDS
) HCS Case No.
_____)

DECISION

I. Introduction

The issue in this case is whether T E (age eight) is entitled to an additional 608 units of Day Habilitation services, and/or an additional 2,384 units of Residential Habilitation services (in-home supportive services), during the period from June 6, 2014 to June 5, 2015.¹ The Division of Senior and Disabilities Services (DSDS or Division) denied T's request to add these additional services, which request had been submitted in the context of T's annual Plan of Care (POC) renewal. The Division denied the services at issue on the basis that the level of waiver services approved for T, in conjunction with T's other supports, are already sufficient to meet his needs, allow him to remain in the community, and avoid placing him in an institution.

This decision concludes that T's parents met their burden and proved, by a preponderance of the evidence, that T's existing level of support is insufficient, and that T is at risk of being institutionalized if he does not receive the services requested. Accordingly, the Division's denial of that portion of T's proposed Plan of Care renewal, which requested an additional 608 units of Day Habilitation services and an additional 2,384 units of Residential Habilitation services for the period from June 6, 2014 to June 5, 2015, is reversed.

II. Facts²

A. T's Medical Condition, Behavioral Problems, and Care Needs

T is 8 years old.³ He has been diagnosed with Autistic Disorder, Developmental Coordination Disorder, Behavioral Disorder NOS, Oppositional Defiance Disorder, and Static Encephalopathy.⁴ These medical problems cause behavioral disinhibition which has resulted in aggressive and violent behavior, engaging in unsafe behaviors, and running away.⁵

¹ All findings in this paragraph are based on Ex. D.

² 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.

³ Ex. F3.

⁴ Ex. F10. NOS means "not otherwise specified."

⁵ Ex. F10.

T typically sleeps only about two hours each night.⁶ He often does not recognize basic bodily needs, such as being hungry, tired, or needing to use the bathroom. He often eats non-food items, such as fabric and plastic and metal items. He is overwhelmed by transitions from one activity to another. Morning and bed-time routines can take hours to complete. He can become violent to the point that he requires physical restraint. While in such a state T is unable to process information or communicate, and cannot be reasoned with.

T has in the past pushed his sister down the stairs and locked her in a closet.⁷ He has threatened people with knives, bit them, pulled their hair, punched them, and thrown things at them. He does not appear to comprehend that his actions can hurt other people. He cannot be left alone with children who are younger or smaller than him.

T lacks basic awareness concerning his own safety.⁸ He will attempt to climb out of upstairs windows and hang off of staircase bannisters. He will attempt to run into busy streets and parking lots.

T lives at home with his parents and three older siblings.⁹ During the fall semester of 2011, T started kindergarten in the autism program at No Name Elementary School, but because of his behavior problems he only lasted one week there.¹⁰ T then transferred to the autism program at No Name 2 Elementary School, where he was suspended almost every day for one month.¹¹ He was ultimately removed from No Name 2 for running away from school and attempting to stab another child with a pair of scissors, and was transferred to No Name 3 Elementary School where he could be provided with specialized behavioral support.¹²

While T attended No Name 3, he spent a lot of time in the safe room and/or restrained by staff (often up to five times per day) due to aggressive and violent behavior.¹³ T had to wear a safety vest with a four-point restraint system while riding to and from school on the school bus.¹⁴ T now attends No Name 4 Elementary School, where he is receiving special behavior-based support.

⁶ All factual findings in this paragraph are based on Ex. F11 unless otherwise stated.

⁷ All factual findings in this paragraph are based on Ex. F12 unless otherwise stated.

⁸ All factual findings in this paragraph are based on Ex. F12 unless otherwise stated.

⁹ Ex. F7.

¹⁰ Ex. F11.

¹¹ Exs. F7, F11.

¹² Ex. F11.

¹³ Ex. F11.

¹⁴ Ex. F7.

During the summer of 2013, T attempted to run away from his caregivers on an almost daily basis.¹⁵ During the period from June 2013 to June 2014, T attended the No Name Center at No Name Agency, Inc. (No Name Agency). On one occasion T ran in front of his care coordinator's car yelling "kill me now." His care coordinator was able to stop her car and avoid hitting T. However, when his care coordinator attempted to restrain T, he threw a handful of dust or dirt in her eyes. When additional No Name Agency staff tried to restrain T, he bit them and hit them, and this type of behavior is not infrequent for T. Because of these behaviors, as well as problems running away and activating fire alarms, T now receives one-on-one staffing while at the No Name Center.

V N, Ph.D. conducted a neuropsychological evaluation of T on August 14, 2013.¹⁶ Dr. N reported that, while at home during the summer months, T has "meltdowns," resulting in violence and the need for physical restraint, about twice per month. During the school year, this increases to about two meltdowns per week. Dr. N reported that, while at the No Name Center, T has had meltdowns and/or has attempted to run away multiple times each week. In Dr. N's opinion, T requires line of sight supervision at all times to ensure his safety.¹⁷ According to No Name Agency's staff, T's aggressive and sometimes violent behavior has gotten worse during the past year.¹⁸

B. Relevant Procedural History

T has received Medicaid Home and Community-Based Waiver Services ("waiver services") since 2013 or before.¹⁹ As of September 23, 2013 T was authorized to receive 2,528 units of Day Habilitation services (12 hours per week for 36 weeks, and 25 hours per week for eight weeks), 1,094 units of Residential Habilitation services (in-home supports) (6.2 hours per week for 44 weeks), 1,760 units of Hourly Respite services (10 hours per week for 44 weeks), and 14 units of Daily Respite services (a total of 14 days during a 44 week period).²⁰

On October 9, 2013 T submitted a renewal POC for the period from June 6, 2013 through June 5, 2014.²¹ The Division subsequently issued a Plan of Care renewal authorization dated November 21, 2013 which authorized T to receive 3,460 units of Day Habilitation services (15 hours per week for 36 weeks, and 25 hours per week for 13 weeks), 1,240 units of Residential

¹⁵ All factual findings in this paragraph are based on Exs. F7, F8, F10, and F11 unless otherwise stated.

¹⁶ All factual findings in this paragraph are based on Exs. F7 - F11 unless otherwise stated.

¹⁷ Ex. F11.

¹⁸ Ex. F12.

¹⁹ Ex. E6.

²⁰ Exs. G1 - G3.

²¹ Exs. E5 - E63.

Habilitation services (in-home supports) (five hours per week for 36 weeks, and 10 hours per week for 13 weeks), 2,080 units of Hourly Respite services (520 hours over a 49 week period), and 14 units of Daily Respite services (a total of 14 days during a 49 week period).²²

On May 7, 2014 T submitted a renewal POC for the period from June 6, 2014 through June 5, 2015.²³ Among other services, the renewal POC sought 17 hours per week of individual Day Habilitation services during the school year (for 36 weeks), 30 hours per week of individual Day Habilitation services during school breaks (for 16 weeks), 14 hours per week of Residential Habilitation services (in-home supports) during the school year (for 36 weeks), and 27 hours per week of Residential Habilitation services (in-home supports) during school breaks (for 16 weeks).²⁴

On June 19, 2014 the Division approved T's renewal POC as to 1,360 units of In-Home Support services, 3,760 units of Day Habilitation services, 520 units of hourly Respite services, and seven units of daily Respite services, but denied that portion of renewal POC seeking an additional 2,384 units of In-Home Support services, and 608 units of Day Habilitation services.²⁵

On July 15, 2014 T's mother, C E, requested a hearing to contest the Division's determination.²⁶ Ms. E's hearing request stated in relevant part as follows:²⁷

T needs the supports we requested through our plan of care to keep T home and safe [W]e cannot provide him with that support without the waiver services that we requested. We have a family of six [with] four children total, [one other of whom also] experiences mental health challenges. T requires one-on-one care 24 hours per day, seven days per week. He needs to be within line of sight and no more than a few feet away at any given time. This is the only way we can keep T safe and alive, and our other children safe, as T does not have any awareness of safety and [has] extreme behavior problems. T needs more in-home supports than most children with his special needs because, even when our entire family is home, we need that extra set of eyes and hands with another support person to keep T safe If one parent is cooking a meal and the other parent is trying to help T's three sisters with [anything], that leaves no one to care for T [T]he parent cooking the meal is left to try to keep T safe while managing a hot stove that [T] cannot be around. [If the parent with the other three children also] has T, T is so disruptive to the other children that nothing can get done. [In addition, leaving T without additional supervision puts him at risk] as he may run away / elope, [or] ingest something harmful [H]e often tries to jump from the second story of our home down the stairwell, which

²² Exs. E1 - E3.

²³ Exs. F1 - F50.

²⁴ Exs. F18, F22.

²⁵ Ex. D1.

²⁶ Ex. C-1.

²⁷ Ex. C-1. Because it captures and summarizes much of the testimony Ms. E later presented at hearing, Ms. E's hearing request is quoted here at length. Some of the formatting in the original hearing request has been modified here for brevity.

could easily kill him. He has no awareness and often puts his own life at risk if he is not monitored incredibly closely.

We are putting everything we have as a family towards . . . keep[ing] T home and out of a facility. T has been placed in a more restrictive environment at school for the last three school years . . . due to increased [unmanageable behaviors]. These in-home supports allow us a chance to . . . [teach] T to . . . be more independent so he can safely be at home

Our challenges with [day habilitation services] are similar If we as a family go shopping, it is hard enough to make sure that we get what we need, and manage four children. We also need to manage T's behavior[s,] ensure his safety, [and] make sure he does not [run off] or damage store goods [W]e desperately need these supports . . . to teach T skills he needs in order to live and be safe and stay home in his community [among other things].

Our family desperately needs these services Without these hours we are at grave danger [of] not being able to support T, which puts him at risk for facility placement

T's hearing was held on August 25, 2014. T did not participate, but was represented by his parents W E and C E; they participated by phone and testified on their son's behalf. T's case manager, S D, also participated by phone. The Division was represented by Victoria H. Cobo, who participated by phone. Health Program Managers Jenna L. Farrally and Summer R. Wheeler participated by phone and testified on behalf of the Division. The record closed at the end of the hearing.

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.²⁸ States may also, at their option, provide certain additional services, one of which is the Home and Community-Based Waiver Services program.²⁹ 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.³⁰

²⁸ 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.

²⁹ 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).

³⁰ 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:

Federal regulations require that both mandatory *and* optional Medicaid services “be sufficient in amount, duration, and scope to reasonably achieve [their] purpose.”³¹ However, a state may “place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.”³²

2. Relevant State Medicaid Regulations

There are two types of waiver services at issue in this case. The first type, "Day Habilitation services," are defined by regulation in relevant part as follows:³³

- (b) The department will consider habilitation services to be Day Habilitation services if the services
 - (1) are provided in a nonresidential setting, separate from the recipient's private residence or another residential setting . . .
 - (2) include round-trip transportation for the recipient between the site where services are provided and . . . where the recipient resides if the recipient's plan of care reflects that transportation will be provided by the Day Habilitation services provider;
 - (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;
 - (6) do not duplicate or supplant services provided in accordance with 7 AAC 130.265(b) ; and
 - (7) do not replace, enhance, or supplement educational services for which the recipient is eligible under 4 AAC 52.

The second type of waiver services at issue in this case, "Residential Habilitation Services," are defined by regulation in relevant part as follows:³⁴

- (h) The department will consider residential habilitation services to be in-home support habilitation services if they are provided on a one-to-one basis to a recipient younger than 18 years of age living full-time in that recipient's private residence where an unpaid primary caregiver resides.

(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].

³¹ 42 CFR 440.230(b).

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

³³ 7 AAC 130.260.

³⁴ 7 AAC 130.265.

(i) [I]f a recipient is eligible for in-home support habilitation services, the department will not make separate payment for (1) personal care services . . . (2) chore services . . . (3) transportation services . . . (4) meal services . . . or (5) services provided by another resident of the home or by the primary unpaid caregiver.

The information which must be submitted in support of a POC renewal or amendment request, and the substantive standards for their approval, 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 . . . and
 - (3) if nursing oversight and care management services are to be provided, a nursing plan in accordance with 7 AAC 130.235 is included.

The only issues in this case are whether T's POC renewal satisfies the requirements of the portions of 7 AAC 130.260, 7 AAC 130.265, and 7 AAC 130.217 quoted above.

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

The bases for denial of T's POC renewal are limited to those expressed in the Division's notice of June 19, 2014.³⁵ A fair reading of the Division's notice of adverse action reveals three asserted bases for denial:³⁶

1. "T also participates in school and mental health services through No Name Agency. The POC states T goes to school 7.5 hours per day five days per week for 38 weeks. According to T's Mental Health Treatment Rehabilitation Plan, T receives eight hours per week of TBHS individual treatment for 52 weeks. When combined with his educational and mental health programs, T would be engaged in active skill building . . . an average of 15 hours per day (when calculated over five days) or an average of 11 hours per day (when calculated over seven days) [during] the school year, and 13 hours per day (when calculated over five days) or an average of nine hours per day (when calculated over seven days) [during] the summer. This amount of active skill building time may be counterproductive to [T's] current developmental presentation and needs, leaving very little time for him to

³⁵ See *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"); *compare* 42 CFR 431.241(a) (only matters to be considered at a Medicaid hearing are those pertaining to the agency's action).

³⁶ Ex. D2.

participate in typical family activities. The POC does not provide any information that [indicates] T is able to tolerate this daily level of active habilitation time."

2. "Additionally, the POC does not describe [why] previously approved habilitation hours are no longer sufficient to meet T's needs."

3. "[The] overall approved level of support, along with school [and] community resources, [and] family activities that occur naturally, are of sufficient amount, duration, and scope to meet T's needs."

Each of these three asserted bases for denial is addressed separately below.

C. *Must T Show he can Tolerate the Level of Habilitation Services Requested?*

The Division's first basis for denying the additional Day Habilitation and/or In-Home Supportive Services requested by T is essentially that the amount of these services requested may not be good for T ("be counterproductive"), and that T's POC does not show that T is able to tolerate the requested level of active habilitation time. This argument fails for several reasons.

First, this argument is rebutted by Dr. N's neuropsychological evaluation which, in finding that T requires line of sight supervision at all times, actually justifies a level of supervision and activity *in excess* of that requested by T's POC. The opinion of an examining physician such as Dr. N is generally entitled to substantial weight in a Medicaid case.³⁷ Further, an administrative law judge may generally reject the opinion of a treating or examining physician *only* "for specific and legitimate reasons that are supported by substantial evidence in the record."³⁸ The opinion of a Division medical reviewer who has never examined T is not the sort of substantial evidence which could be considered sufficient to overcome the opinion of a psychologist who has personally examined T.

Second, nothing in the text of 7 AAC 130.217, 7 AAC 130.260, or 7 AAC 130.265 require that a recipient prove that requested services will not be "counterproductive." Any denial of a request for services must be based on the text of the regulation authorizing or defining the services.

In summary, the Division's denial of additional services, based on the argument that the services would be "counterproductive" and/or that the recipient has not demonstrated he or she can "tolerate" the level of services requested, has no basis in the waiver services regulations. Further, even if the Division's position *did* have a basis in regulation, the weight of the evidence shows that the services requested would not be intolerable or counterproductive for T.

³⁷ See *Rush v. Parham*, 625 F.2d 1150, 1156 (5th Cir. 1980); *Weaver v. Reagan*, 886 F.2d 194, 200 (8th Cir. 1989); *Holman v. Ohio Dept. of Human Services*, 757 N.E.2d 382 (Ohio App. 7th Dist. 2001).

³⁸ See *Lester v. Chater*, 81 F.3d 821, 830 - 831 (9th Cir.1996).

D. Does T's Renewal Plan of Care Describe why his Previously Approved Level of Habilitative Services are no Longer Sufficient for his Needs?

The Division's second basis for denying the additional services sought for T is that his renewal POC "does not describe [why] previously approved habilitation hours are no longer sufficient to meet T's needs." However, at page 11 of the renewal POC³⁹ it specifically states that, "[i]n the past year, T's behaviors have continued *and increased*" (emphasis added). This statement was corroborated at hearing by the sworn testimony of C E and S D, each of whom have personal knowledge of T. Further, this statement is not at all inconsistent with T's neuropsychological evaluation. Accordingly, not only is there a statement in the proposed renewal plan of care describing why T's "previously approved habilitation hours are no longer sufficient to meet [his] needs"; in addition, as a factual matter, the preponderance of the evidence clearly indicates that T's existing service level is insufficient to meet his needs.

E. Are T's Other Services of Sufficient Amount, Duration, and Scope to Meet his Needs?

The Division's third and last asserted basis for denial of the services at issue is that the "overall approved level of support, along with school [and] community resources, [and] family activities that occur naturally, are of sufficient amount, duration, and scope to meet T's needs." This assertion is based on the explicit requirements of 7 AAC 130.217(b) and, if supported by the evidence, would be a legitimate basis for denial. However, as discussed above, the preponderance of the evidence shows that T's behavioral problems *have gotten worse* with his existing level of service. This demonstrates that, in fact, T's existing waiver services *are not* of sufficient amount, duration, and scope to meet T's needs.

IV. Conclusion

The three bases for denial of additional services, asserted by the Division in its notice letter, were either not based on the waiver regulations (and were thus legally incorrect), or were factually incorrect. T's parents met their burden and proved, by a preponderance of the evidence, that T's existing level of support is insufficient, and that T is at risk of being institutionalized if he does not receive the services requested. Accordingly, the Division erred when it denied that portion of T's proposed Plan of Care renewal which requested an additional 608 units of Day Habilitation services

³⁹ Ex. F12.

and an additional 2,384 units of Residential Habilitation services for the period from June 6, 2014 to June 5, 2015. The Division's determination is therefore reversed.

DATED this 9th day of October, 2014.

Signed _____

Jay D. Durych
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 21st day of October, 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.]