

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

In the Matter of:)
)
 N Y) OAH No. 14-1449-MDS
) Agency Case No.

DECISION

I. Introduction

The issue in this case is whether Mr. N Y is entitled to receive 600 units¹ of Supported Employment Services (SES) under the Medicaid Home and Community-Based Waiver Services program. The Division of Senior and Disabilities Services (Division) approved most of the services requested in Mr. Y's most recent Plan of Care (POC) renewal application. However, the Division denied Mr. Y's request for SES based on the assertion that the information supporting his request for SES, contained in Mr. Y's renewal application, was not related to working toward obtaining employment, in a chosen field, within a defined amount of time.²

This decision concludes that the Division's denial of Mr. Y's request for Supported Employment Services was incorrect for two reasons. First, the "SDS E-Alert," on which the Division relied in part, does not have the force of law, and therefore cannot be construed as adding additional substantive requirements to those contained in the SES regulation. Second, the information, goals and objectives contained in Mr. Y's POC renewal application are reasonably related to preparing Mr. Y for work, assisting Mr. Y with developing the skills needed to obtain employment, and assisting Mr. Y in locating suitable employment, as required by 7 AAC 130.270(b)(1), 7 AAC 130.270(b)(3), and 7 AAC 130.270(b)(4). Accordingly, the Division's denial of that portion of Mr. Y's proposed Plan of Care renewal application, which requested 600 units of Supported Employment Services, is reversed.³

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¹ The 600 units of Supported Employment Services consist of three hours per week for 50 weeks, effective December 31, 2013.

² Ex. D2.

³ This decision should not be read as indicating that Mr. Y necessarily has any *continuing* eligibility for Supported Employment Services under subsequent POC renewals. Rather, this decision simply finds that the bases for denial of Mr. Y's request for SES, *as stated in the specific denial letter at issue here*, were legally inadequate.

II. Facts

A. *Mr. Y's Medical Condition and Employment / Work Training History*

Mr. Y is 23 years old.⁴ He has a primary diagnosis of seizure disorder, and secondary diagnoses of mild cognitive impairment, anxiety, mood disorder, pervasive personality disorder, and pain disorder.⁵ He lives with his family (*i.e.* his mother, stepfather, and sister).⁶ He is currently receiving other waiver services to assist him with developing social skills, healthy eating habits, healthy exercise habits, good personal hygiene, and the ability to adhere to a regular schedule.⁷

Mr. Y is not currently working.⁸ He has previously held several jobs, albeit for fairly short periods of time.⁹ He worked for a time as a dishwasher at a restaurant. Although his work was thorough, he lost that job because he worked too slowly and was unable to keep pace. Mr. Y also worked one summer cleaning restrooms at state parks on the No Name Peninsula.

Mr. Y was also previously employed part-time by the local council of No Name Agency, in two different capacities.¹⁰ First, Mr. Y worked at the No Name Agency's Anchorage office in an uncompensated volunteer position. Mr. Y also worked for the No Name Agency as a facility manager for the No Name Agency's camp at No Name Location; this work involved a modest stipend. At No Name Location Mr. Y would check groups who had rented the camp in and out of the facility. He also acted as a counselor for camp attendees in the 11-13 year old age range. Mr. Y did well working with children, but did not work well with adults. Mr. Y was working for the No Name Agency at the time the Plan of Care at issue here was written. However, by the time of the hearing, Mr. Y was no longer working for the No Name Agency; his mother / guardian testified at hearing that she felt the No Name Agency had taken advantage of her son.¹¹

Mr. Y has stated that he does not want to work in a clerical capacity or do accounting work.¹² He would like to obtain employment in the information technology (IT) field. However, at this point he does not feel that he has the skills necessary to successfully locate, apply, and interview for a job.

⁴ Ex. E3.

⁵ Ex. E4.

⁶ Ex. E7.

⁷ Ex. E.

⁸ K C's hearing testimony.

⁹ All factual findings in this paragraph are based on Ex. E9 unless otherwise indicated.

¹⁰ All factual findings in this paragraph are based on Exs. E8 - E9 unless otherwise indicated.

¹¹ K C's hearing testimony.

¹² All factual findings in this paragraph are based on Exs. E8 - E9 unless otherwise indicated.

Mr. Y has spoken on two occasions with a counselor from the Division of Vocational Rehabilitation (DVR) about job training and employment.¹³ However, he has never turned in an application for assistance through DVR because (he indicates) DVR did not acknowledge his need for special accommodation in DVR's testing and evaluation process. Mr. Y has not returned to seek further services from DVR because of extreme anxiety, which his mother / guardian believes would be detrimental to his mental health.¹⁴

On December 20, 2013 K C, Mr. Y's mother and guardian, submitted the annual POC renewal application at issue here.¹⁵ The proposed renewal POC requested, among other services, 600 units of individual Supported Employment Services (i.e. three hours per week for 50 weeks).¹⁶ The justification for the SES, as stated in the proposed POC, was as follows:¹⁷

Description / Justification of Service that will meet recipient needs . . .

[No Name Agency 2] will provide [Mr. Y] with job development to assist him in finding a position which is a good fit for him. In the past [Mr. Y] has held jobs that either have requirements that he is unable to complete, or are not satisfying to him. Although [Mr. Y] currently holds a part-time job on contract, it is not for many hours, is not very satisfying, and will not lead to a regular position. [Mr. Y] needs a job developer to assist him in exploring, applying for, and interviewing for positions that are more appropriate for him. Once [Mr. Y] obtains a position, he needs someone to assist him in learning the employer's expectations and developing good communication between them. The job coach will check in on [Mr. Y] frequently and maintain contact with the employer to ensure the job is going well.

....

Goal . . . [Mr. Y] will obtain and maintain a job in the community . . .

....

List . . . steps of skill development . . . which the person will use to reach the goal . . .

1. [Mr. Y] will be ready to meet with the job developer and complete applications, business visits, and interviews as scheduled.
2. [Mr. Y] will initiate conversations with the job developer / coach when he is having concerns about his employment or job search.

¹³ All factual findings in this paragraph are based on Ex. E9 unless otherwise indicated.

¹⁴ Ex. E12.

¹⁵ Ex. E1.

¹⁶ Ex. E21.

¹⁷ Exs. E21 - E22. Because this portion of the POC is crucial to this decision, it is quoted at length. Portions of the quoted material have been reformatted for purposes of brevity.

3. [Mr. Y] will follow the employer's instructions with no more than one suggestion that he gives per work shift. If it is not accepted, [Mr. Y] will let it go.
....

List methodology / intervention for each objective . . .

1. Staff will assist [Mr. Y] in researching potential jobs. They will discuss how they might or might not be of interest to him or fit his skills. Staff will assist [Mr. Y] with completing the job application and answering any on-line questionnaires. Staff will coach [Mr. Y] on meeting employers and answering interview questions. Staff will assist in arranging job interviews and following up later. Staff will help negotiate the job requirements if needed.
2. Staff will encourage [Mr. Y] to talk about his preferences and concerns as they relate to jobs. If staff receives feedback from the employer about issues, staff will discuss it with [Mr. Y] and plan how he should respond . . .
3. Staff will pre-teach with [Mr. Y] the balancing of the employer's directions with [Mr. Y's] ideas. If [Mr. Y] has trouble letting go of an issue, he will discuss it with staff.

The Division denied Mr. Y's request for SES by letter dated July 25, 2014.¹⁸ The bases for the Division's denial of the SES were as follows:¹⁹

Per 7 AAC 130.270 and the clarifying SDS E-Alert [titled] *Guidance on Supported Employment Services* dated 09/10/2013, section (b)(4) refers to time-limited job exploration activities such as job-related discover, detailed assessment, and person-centered employment planning, with an expectation that the recipient achieves specific outcomes. As presented in the POC, the [SES] request does not meet these conditions . . . [N]one of the information presented with this request, including the stated goals and objectives, is related to [Mr. Y] working toward obtaining employment in his chosen field in a defined amount of time. Therefore, the department denies the request for [SES] for lack of justification and supporting documentation.

B. Relevant Procedural History

Mr. Y was found eligible for, and began receiving, Medicaid Home and Community-Based Waiver Services ("waiver services") in 2012 or before.²⁰ On December 20, 2013 the POC renewal application at issue here was submitted to the Division.²¹ The POC renewal requested, among other services, 600 units of individual Supported Employment Services (i.e. three hours per week for 50

¹⁸ Ex. D1.

¹⁹ Ex. D2.

²⁰ Ex. F32.

²¹ Ex. E1.

weeks).²² The Division requested additional information on January 22 and January 28, 2014, and the requested information was received by the Division on January 29, 2014.²³

On July 25, 2014 the Division notified Mr. Y's mother / legal guardian that his proposed POC renewal had been approved in part and denied in part.²⁴ The Division approved 1764 units of Supported Living services and 832 units of individual Day Habilitation services.²⁵ However, the Division denied Mr. Y's request for 600 units (4 hours per week for 52 weeks) of SES.²⁶

On August 13, 2014 Mr. Y's mother / legal guardian requested a hearing to contest the Division's denial of the SES.²⁷ Mr. Y's hearing was held on October 7 and October 16, 2014. Mr. Y did not participate, but was represented by his mother / guardian, K C, who attended the hearing and testified on her son's behalf. The Division was represented by Victoria Cobo. Summer Wheeler, a Health Program Manager employed by the Division, attended the hearing and testified on the Division's behalf. The record closed at the end of the hearing.

III. Discussion

A. *Applicable Burden of Proof and Standard of Review*

Pursuant to applicable state and federal regulations, Mr. Y bears the burden of proof in this case.²⁸ The standard of review in a Medicaid "Fair Hearing" proceeding, as to both the law and the facts, is *de novo* review.²⁹ The substantial evidence test is the standard of review that would be applied to factual determinations only *after* a final decision is made by the agency and an appeal is made to the Superior Court. Likewise, the reasonable basis test is the standard of review for questions of law involving agency expertise only *after* a final decision is made by the agency and the case is appealed to the Superior Court.³⁰ The administrative law judge may independently weigh the evidence and reach a different conclusion than did the Division's staff, even if the original decision is factually supported and has a reasonable basis in law.

²² Ex. E21.

²³ Ex. D1.

²⁴ Ex. D1.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Ex. C.

²⁸ 42 CFR § 435.930, 7 AAC 49.135.

²⁹ See 42 CFR 431.244; *Albert S. v. Dept. of Health and Mental Hygiene*, 891 A.2d 402 (2006); *Maryland Dept. of Health and Mental Hygiene v. Brown*, 935 A.2d 1128 (Md. App. 2007); *In re Parker*, 969 A.2d 322 (N.H. 2009); *Murphy v. Curtis*, 930 N.E.2d 1228 (Ind. App. 2010).

³⁰ See *Simpson v. State, Commercial Fisheries Entry Commission*, 101 P.3d 605, 609 (Alaska 2004).

B. 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.³¹ States may also, at their option, provide certain additional services, one of which is the Home and Community-Based Waiver Services program.³² 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.³³

Federal regulations require that both mandatory *and* optional Medicaid services "be sufficient in amount, duration, and scope to reasonably achieve [their] purpose."³⁴ However, states may "place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures."³⁵

2. Relevant State Medicaid Regulations

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

- (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 [emphasis added] . . .
 - (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

³¹ 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.

³² 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).

³³ 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].

³⁴ 42 CFR 440.230(b).

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

(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 . . . (4) more than three months of services under (b)(1) of this section unless the home and community-based waiver services provider demonstrates that the recipient (A) needs additional preparation for employment; or (B) is preparing for a new job placement . . .

C. Were the Division's Reasons for Denying SES Legally Adequate?

First, it is axiomatic that the Division's bases for denial of Mr. Y's request for SES are limited to the reasons expressed in the Division's notice letter dated July 25, 2014; the Division may not assert additional bases for denial at hearing.³⁶ A fair reading of the Division's notice letter reveals two asserted bases for denial.³⁷ These are (1) that Mr. Y's POC does not comply with "the clarifying SDS E-Alert [titled] Guidance on Supported Employment Services dated 09/10/2013;" and (2) that Mr. Y's POC does demonstrate that Mr. Y is seeking SES coverage to pursue "job exploration activities such as job-related discovery, detailed assessment, and person-centered employment planning, with an expectation that the recipient achieves specific outcomes;" and that "none of the information presented with [Mr. Y's SES] request . . . is related to [Mr. Y] working toward obtaining employment in his chosen field."³⁸ Each of these bases for denial is examined separately below.

1. Are the Additional Criteria From the SDS E-Alert Enforceable?

The first of the Division's stated reasons for denial of Mr. Y's request for SES was based on the Division's E-Alert dated September 10, 2013.³⁹ That E-Alert constitutes the Division's interpretation of its SES regulation, 7 AAC 130.270. The general rule, applicable here, is that an agency interpretation of a regulation that supplements, revises, or makes a regulation more

³⁶ See 42 CFR 431.241(a) (only matters to be considered at a Medicaid hearing are those pertaining to the agency's action); 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").

³⁷ Ex. D2.

³⁸ Ex. D2.

³⁹ A copy of the Division's E-Alert is included in the record at Exs. D3 - D4. The E-Alert is also available online at <http://list.state.ak.us/soalists/SDS-E-News/a/2013-09/00000529.htm>.

specific is itself a regulation and must be adopted pursuant to the Administrative Procedure Act (APA).⁴⁰ When the Division's SES regulation is juxtaposed against the Division's E-Alert, it is clear that the Division's E-Alert goes far beyond the fairly broad terms of the SES regulation and establish new criteria. Accordingly, the E-Alert constitutes a *de facto* regulation that should have been promulgated in accordance with the Administrative Procedure Act.

The APA⁴¹ requires that state agencies publish public notice of, and allow public comment on, all proposed regulations prior to their adoption.⁴² There is no evidence in the record indicating that the Division's E-Alert complied with these statutory requirements.

In summary, because the criteria set forth in the Division's E-Alert were not promulgated using the procedures required by Alaska's Administrative Procedure Act (APA), they cannot be used to support the Division's determination in this case, and the Division is required to follow its Supported Employment Services regulation as currently written.⁴³

2. *Is There a Sufficient Nexus Between the Regulation and the Plan of Care?*

The second of the Division's stated reasons for denial of Mr. Y's request for SES asserts that Mr. Y's POC does demonstrate that Mr. Y is seeking SES coverage to pursue "job exploration activities such as job-related discovery, detailed assessment, and person-centered employment planning, with an expectation that the recipient achieves specific outcomes"; and that "none of the information presented with [Mr. Y's SES] request . . . is related to [Mr. Y] working toward obtaining employment in his chosen field." The undersigned disagrees. One must only read the provisions of Mr. Y's Plan of Care concerning Supported Employment Services, quoted at pages 3-4, above to conclude that Mr. Y's Plan of Care specifically addresses the requirements of 7 AAC 130.270, specifically subsections (b)(1), (b)(3), and (b)(4). Accordingly, the Division erred in denying Mr. Y's request for Supported Employment Services on this basis.

⁴⁰ See *Matanuska-Susitna Borough v. Hammond*, 726 P.2d 166 (Alaska 1986); *Reichmann v. State, Dept. of Natural Resources*, 917 P.2d 1197 (Alaska 1996); *Jerrel v. State, Department of Natural Resources*, 999 P.2d 138, 144 (Alaska 2000) (rehearing denied); *Alyeska Pipeline Serv. Co. v. State, Department of Environmental Conservation*, 145 P.3d 561, 573 (Alaska 2006); *Squires v. Alaska Bd. of Architects, Engineers & Land Surveyors*, 205 P.3d 326, 335 (Alaska 2009).

⁴¹ Alaska's Administrative Procedures Act is codified at A.S. 44.62.010 - A.S.44.62.950.

⁴² See AS 44.62.190 (requiring public notice of the proposed agency action); AS 44.62.200 (specifying the content of the public notice); AS 44.62.210 (requiring a public hearing); AS 44.62.215 (requiring the keeping of a record of all public comments received).

⁴³ "Administrative agencies are bound by their regulations just as the public is bound by them." *Burke v. Houston NANA, L.L.C.*, 222 P.3d 851, 868 – 869 (Alaska 2010).

IV. Conclusion

The Division's denial of Mr. Y's request for Supported Employment Services was incorrect for two reasons. First, the "SDS E-Alert," on which the Division relied in part, does not have the force of law, and therefore cannot be construed as adding additional substantive requirements to those contained in the SES regulation. Second, the information, goals and objectives contained in Mr. Y's POC renewal application are reasonably related to preparing Mr. Y for work, assisting Mr. Y with developing the skills needed to obtain employment, and assisting Mr. Y in locating suitable employment, as required by 7 AAC 130.270(b)(1), 7 AAC 130.270(b)(3), and 7 AAC 130.270(b)(4). Accordingly, the Division's denial of that portion of Mr. Y's proposed Plan of Care renewal application, which requested 600 units of Supported Employment Services, is reversed.⁴⁴

DATED this 11th day of December, 2014.

Signed _____
Jay 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 26th day of December, 2014.

By: *Signed* _____
Name: Christopher M. Kennedy
Title: Administrative Law Judge

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

⁴⁴ Again, this decision should not be read as indicating that Mr. Y necessarily has any continuing eligibility for SES under subsequent POC renewals. This decision finds only that the bases for denial of Mr. Y's request for SES, as stated in the specific denial letter at issue here, were legally inadequate.