

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

In the Matter of: )  
 )  
 T H ) OAH No. 14-1738-MDS  
 ) Agency Case No.

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**DECISION**

**I. Introduction**

The issue in this case is whether T H is entitled to receive certain respite, escort, and transportation services under the Medicaid Home and Community-Based Waiver Services Program (waiver services program).<sup>1</sup> The Division of Senior and Disabilities Services (DSDS or Division) approved Mr. H's initial Plan of Care (POC) as to the Supported Living Services (SLS), individual Day Habilitation Services (DHS), and Nursing Oversight and Care Management Services (NOCMS) which Mr. H's guardians had requested. The Division denied, however, certain hourly Respite Services, daily Respite Services, transportation services, and escort services which Mr. H's guardians had requested. The Division denied the requested respite services on the basis that Mr. H's mother is one of his paid caregivers, and paid caregivers are not eligible for respite services under the applicable regulations. The Division denied the requested transportation and escort services on the bases that (1) these services were already provided through Mr. H's Day Habilitation Services, and (2) transportation and escort services are available to Mr. H as a non-waiver service under "regular" Medicaid, and the applicable regulations require that, in these circumstances, the requested services be accessed through "regular" Medicaid.

This decision concludes that, under the applicable regulations, the Division was correct to deny the respite, escort, and transportation services requested in Mr. H's initial Plan of Care. The Division's denial of that portion of Mr. H's proposed initial Plan of Care, which requested hourly respite services, daily respite services, transportation services, and escort services, for the period from April 3, 2014 through April 2, 2015, is therefore affirmed.

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<sup>1</sup> All findings in this paragraph are based on Ex. D unless otherwise stated.

## II. Facts<sup>2</sup>

### A. *Mr. H's Medical Problems and Care Needs*

Mr. H is 24 years old.<sup>3</sup> He was born with his umbilical cord wrapped around his neck several times.<sup>4</sup> He suffers from cerebral palsy with spasticity, seizure disorder, and gastrostomy. He lives with his mother, who is also his legal guardian.<sup>5</sup> Their home has been modified to make it wheelchair-accessible.<sup>6</sup>

At age three, Mr. H began undergoing multiple surgeries to release tendons and to fix a chronic and painful dislocation of his hips.<sup>7</sup> By the time he was six years old he could use a wheelchair. In 2005 he had metal rods implanted on each side of his spine to straighten it. He graduated from high school in May 2010 but is currently unable to read or write due to immobility.<sup>8</sup>

Mr. H had some significant health problems in July 2013.<sup>9</sup> He was admitted to a hospital intensive care unit where he was treated for pneumonia with effusion and empyema, functional bowel obstruction, fecal impaction, chronic aspiration, reflux esophagitis, strictured gastrostomy tube site, grade 1-2 decubitus ulcer, sepsis, and malnutrition. He remained in the hospital for 13 days, during which time he underwent several medical procedures including the removal of a strictured g-tube, insertion of a right IJ central catheter, insertion of a left thoracotomy tube, thoracoscopy, insertion of a peg tube, decortication, a chest ultrasound, a chest computerized tomography (CT), an abdominal CT, and an esophagogastroduodenoscopy (EGD).

Since Mr. H's hospital discharge in July 2013, it has been necessary to keep his head elevated to avoid aspiration.<sup>10</sup> He is unable to receive food or fluids by mouth because of the risk of aspiration. He often requires oral suctioning to prevent aspiration.

Mr. H has impaired mobility due to his spastic cerebral palsy.<sup>11</sup> Both his ankles are contracted, and his right ankle is dislocated with his foot turned upside down. He is non-mobile and requires complete care, including medication administration, enteral feeding, hygiene, activities of

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<sup>2</sup> 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.

<sup>3</sup> All factual findings in this paragraph are based on Ex. E4 unless otherwise stated.

<sup>4</sup> Ex. E9.

<sup>5</sup> The court orders which appointed Ms. L as Mr. H's co-guardian and co-conservator state that she "is authorized to be paid as a personal care attendant and supported living" (Ex. 2 p. 2). This does not, however, negate the Division's regulations prohibiting paid caregivers from receiving respite services.

<sup>6</sup> Ex. E10.

<sup>7</sup> All factual findings in this paragraph are based on Exs. E9 - E10 unless otherwise stated.

<sup>8</sup> All factual findings in this paragraph are based on Ex. E4 unless otherwise stated.

<sup>9</sup> All factual findings in this paragraph are based on Exs. E4 - E5 unless otherwise stated.

<sup>10</sup> All factual findings in this paragraph are based on Ex. E5 unless otherwise stated.

<sup>11</sup> All factual findings in this paragraph are based on Exs. E5 - E6 unless otherwise stated.

daily living, and positioning / repositioning. He must be repositioned at least every two hours to prevent pressure ulcers. He must receive passive range of motion / stretching exercises every four hours. He must be fed four to five times per day, and his g-tube site must be monitored and cleaned as necessary. His teeth must be brushed three times per day. His diapers must be changed every two hours. He must be transferred from his bed to his chair using a Hoyer lift. Mr. H is also at high risk for infection.<sup>12</sup> Because his verbal communication is impaired, he must be monitored often for signs of infection.

To communicate with Mr. H, one must make his or her presence known, make eye contact with him, and speak to him slowly and clearly, face-to-face.<sup>13</sup> One must use simple sentences and yes-or-no questions, and avoid speaking loudly. Mr. H has a vocabulary of about 20 spoken words; he also communicates visually through gazing.

Mr. H's mother is currently his only natural support, and she also provides some of his personal care assistant (PCA) services.<sup>14</sup> This is in addition to her regular job as a dental hygienist. She works 12 hours per day, four days per week as a hygienist, and must drive over an hour each day commuting to and from work. She is not available to assist her son during the day on the days that she works; she usually does not get home until after 7:00 p.m.

Despite all the adversity in his life, Mr. H tends to be outgoing and cheerful.<sup>15</sup> He has a sense of humor and enjoys social interaction, but since he graduated from high school it has been difficult for him to find peers with whom he can interact.<sup>16</sup>

R L, the recipient's mother and guardian, testified at hearing in part as follows:

1. She originally began acting as a paid PCA for her son because there was a shortage of qualified workers. Her three able sons formerly assisted her with caring for Mr. H when they lived at home, but they are now adults and have moved away.
2. She has not used any respite services since approximately 1997.
3. She agrees that, based on the text of the current regulation, Mr. H is not eligible for respite services because she performs some services for her son as a paid PCA.
4. It often takes two people working together to safely move Mr. H.

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<sup>12</sup> All factual findings in the remainder of this paragraph are based on Ex. E6 unless otherwise stated.

<sup>13</sup> All factual findings in this paragraph are based on Exs. E6 and E10 unless otherwise stated.

<sup>14</sup> All factual findings in this paragraph are based on Ex. E10 unless otherwise stated.

<sup>15</sup> All factual findings in this paragraph are based on Ex. E9 unless otherwise stated.

<sup>16</sup> Ex. E12.

5. Mr. H needs transportation services to go to medical appointments, movies, and family and community events. Neither Ms. L nor Mr. H's waiver or PCA agencies have a wheelchair-accessible van to transport Mr. H.

**B. Relevant Procedural History**

Mr. H received Medicaid Home and Community-Based Waiver Services ("waiver services"), through the Children with Complex Medical Conditions (CMCC) waiver, prior to 2014.<sup>17</sup> In 2014, due to regulation changes, Mr. H ceased receiving services through the CMCC waiver, and began receiving services through the Intellectual and Developmental Disabilities (IDD) waiver, the waiver program at issue in this case.<sup>18</sup>

On July 3, 2014 Mr. H submitted his initial IDD POC for the period from April 3, 2014 through April 2, 2015.<sup>19</sup> Mr. H requested 1,836 units (nine hours per week for 52 weeks) of Day Habilitation services,<sup>20</sup> 9,180 units (48 hours per week for 52 weeks) of Supported Living services,<sup>21</sup> 52 weeks of Nursing Oversight and Care Management services,<sup>22</sup> 520 units (ten hours per week for 52 weeks) of Hourly Respite Services,<sup>23</sup> 14 days per year of Daily Respite Services,<sup>24</sup> 376 units (two to four trips per week) of Transportation Services,<sup>25</sup> and 376 units (two to four trips per week) of Escort Services.<sup>26</sup>

On September 4, 2014 the Division issued a letter approving Mr. H's POC in part and denying it in part.<sup>27</sup> The Division approved Mr. H's POC as to 1,836 units of individual Day Habilitation services, 9,180 units of Supported Living services, and 332 units of Nursing Oversight and Care Management Services. The Division denied Mr. H's POC as to 2,040 units of Hourly Respite Services, 14 days of Daily Respite Services, 208 units of Transportation Services, and 208 units of Escort Services.<sup>28</sup> On September 5, 2014 Mr. H's care coordinator, on behalf of Mr. H's mother and legal guardian, requested a hearing to contest the Division's determination.<sup>29</sup>

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<sup>17</sup> Undisputed hearing testimony.

<sup>18</sup> Undisputed hearing testimony. Both parties agreed at hearing that, because this case involves Mr. H's first Plan of Care under the IDD waiver, the case should be treated as involving an initial Plan of Care rather than a renewal Plan of Care.

<sup>19</sup> Exs. E1 - E102.

<sup>20</sup> Exs. E42, E95.

<sup>21</sup> Exs. E37, E90.

<sup>22</sup> Exs. E18, E89.

<sup>23</sup> Ex. E17.

<sup>24</sup> Ex. E16.

<sup>25</sup> Ex. E17.

<sup>26</sup> Ex. E17.

<sup>27</sup> All findings in this paragraph are based on Ex. D unless otherwise stated.

<sup>28</sup> Ex. D1.

<sup>29</sup> Ex. C.

Mr. H's hearing was held on November 24, 2014. Mr. H attended the hearing in person; he was represented by his mother and legal guardian R L,<sup>30</sup> who attended the hearing in person and testified on her son's behalf. B K also attended the hearing on Mr. H's behalf, but did not testify. The Division was represented by Victoria Cobo, who attended the hearing in person. Health Program Manager Keith Masker attended the hearing 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.<sup>31</sup> States may also, at their option, provide certain additional services, one of which is the Home and Community-Based Waiver Services program.<sup>32</sup> 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.<sup>33</sup> Federal regulations require that both mandatory *and* optional Medicaid services "be sufficient in amount, duration, and scope to reasonably achieve [their] purpose."<sup>34</sup> However, a state may "place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures."<sup>35</sup>

##### 2. Relevant State Medicaid Regulations

Each of the three types of waiver services at issue in this case (respite services, transportation services, and escort services), are defined by regulation. The respite services regulation, 7 AAC 130.280, provides in relevant part as follows:

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<sup>30</sup> See Letters of Guardianship and related documents at Exs. 1 - 3.

<sup>31</sup> 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.

<sup>32</sup> 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).

<sup>33</sup> 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].

<sup>34</sup> 42 CFR 440.230(b).

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

(a) The department will pay for respite care services that (1) are approved under 7 AAC 130.217 as part of the recipient's plan of care; (2) receive prior authorization; and (3) do not exceed the maximum number of hours and days in (c) of this section.

(b) The department will consider services to be respite care services if they provide alternative caregivers, regardless of whether the services are provided in the recipient's home or at another location, to relieve (1) primary unpaid caregivers, including family members and court-appointed guardians . . . (4) the department will not pay for respite care services to (A) allow a primary caregiver to work; (B) relieve other paid providers of Medicaid services, except providers of family home habilitation services under 7 AAC 130.265(b) . . . . .

(f) In this section, (1) "daily respite care services" means respite care services no less than 12 and no more than 24 hours in duration . . . .

The regulation governing transportation and escort services, 7 AAC 130.290, provides in relevant part as follows:

(a) The department will pay for transportation services that (1) are provided in accordance with the department's Transportation Services Conditions of Participation, adopted by reference in 7 AAC 160.900; (2) are approved under 7 AAC 130.217 as part of the recipient's plan of care; (3) receive prior authorization; and (4) are provided in a vehicle that is owned or commercially leased by an agency that is a home and community-based waiver services provider.

(b) The department will consider services to be transportation services under this section if the services enable a recipient and, if necessary, an escort that receives prior authorization under (a)(3) of this section, to travel round trip between the recipient's residence and another location where (1) home and community-based waiver services are provided; or (2) other services and resources are available. . . . .

(d) The department will not pay under this section for (1) medical transportation services that are authorized under 7 AAC 120.400 - 7 AAC 120.490 [non-waiver or "regular" Medicaid transportation services]; (2) transportation under 7 AAC 130.260 [Day Habilitation Services] or 7 AAC 130.265 [Residential Habilitation Services] . . . .

(e) In this section, (1) "escort" means an individual that (A) accompanies a recipient on round trip travel described in (b) and (c) of this section in order to meet the recipient's mobility needs; and (B) is not another recipient, the driver of the vehicle, or another member of the provider's staff . . . .

Non-emergency transportation services are authorized under "regular," non-waiver Medicaid by 7 AAC 120.410. Escort services are authorized under "regular," non-waiver Medicaid by 7 AAC 120.430.

The information which must be submitted in support of a Plan of Care, 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 . . . (B) is supported by the documentation required in this section; and (C) cannot be provided under 7 AAC 105 - 7 AAC 160, except as a home and community-based waiver service under this chapter . . . .

The issues in this case concern whether Mr. H's Plan of Care satisfies the requirements of the portions of 7 AAC 130.280 and 7 AAC 130.290 quoted above.

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

The bases for partial denial of Mr. H's Plan of Care are limited to those expressed in the Division's notice of September 4, 2014.<sup>36</sup> A fair reading of the Division's notice of adverse action reveals three bases for denial of the services at issue in this case:<sup>37</sup>

1. Respite Services: The Plan of Care states that Ms. L is a paid provider of PCA services for Mr. H, and pursuant to 7 AAC 130.280(b)(1), respite care services are only available to relieve primary unpaid caregivers.
2. Transportation and Escort Services: Mr. H already receives Day Habilitation Services under 7 AAC 130.260. Pursuant to subsection (b)(2) of that regulation, the Day Habilitation Services already approved for Mr. H includes transportation and escort services.
3. Transportation and Escort Services: Transportation services are available to Mr. H under "regular," non-waiver Medicaid pursuant to 7 AAC 120.410, and escort services are available to Mr. H under "regular," non-waiver Medicaid pursuant to 7 AAC 120.430. Subsection (d) of the waiver regulation governing transportation and escort services, 7 AAC 130.290, provides in relevant part that "the department will not pay under this section for (1) medical transportation services that are authorized under 7 AAC 120.400 - 7 AAC 120.490 [non-waiver or "regular" Medicaid transportation services] . . . ." Accordingly, since

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<sup>36</sup> 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).

<sup>37</sup> Ex. D2.

transportation and escort services are available to Mr. H as non-waiver services, he is not eligible to receive them as waiver services.

The Division's three bases for denial are addressed below in the order stated.

**C. *Does Ms. L's Status as a Paid Provider of PCA Services to her son Prevent her From Receiving Respite Services?***

The Division's asserted basis for denying the hourly and daily respite services requested on behalf of Mr. H is that his Plan of Care states that Ms. L is a paid provider of his PCA services, and pursuant to 7 AAC 130.280(b)(1), respite care services are only available to relieve primary unpaid caregivers.<sup>38</sup> At hearing, Ms. L testified she in fact acts as a paid PCA for her son, having originally begun working in that capacity due to a shortage of qualified workers. Ms. L also stated at hearing that, based on the text of 7 AAC 130.280(b)(1), she agrees that Mr. H is not eligible for respite services because she performs services for her son as a paid PCA.

In summary, it is undisputed that Ms. L performs services for her son as a paid PCA, and it is clear based on the plain text of the regulation that paid PCAs are not eligible to receive respite services. Accordingly, the Division was correct to deny Mr. H's request for daily and hourly respite services pursuant to 7 AAC 130.280(b).<sup>39</sup>

**D. *Does the Availability of Transportation and Escort Services as Part of Mr. H's Approved Day Habilitation Services Prevent him From Receiving Transportation and Escort as Separate Waiver Services?***

The first of the Division's two asserted basis for denying the transportation and escort services requested on behalf of Mr. H is that Mr. H already receives Day Habilitation Services under 7 AAC 130.260 and, pursuant to subsection (b)(2) of that regulation, the Day Habilitation Services already approved for Mr. H includes transportation and escort services.

Mr. H is authorized to receive nine hours of individual Day Habilitation Services per week.<sup>40</sup> Under subsection (b)(2) of the Day Habilitation regulation, 7 AAC 130.260, day habilitation services must "include round-trip transportation for the recipient between the site where services are provided and the personal residence, assisted living home, or foster home where the recipient resides *if the recipient's plan of care reflects that transportation will be provided by the day habilitation services provider . . .*" While the portion of Mr. H's Plan of Care dealing with Day Habilitation services does not expressly state that transportation will be provided as part of day

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<sup>38</sup> Ex. D2.

<sup>39</sup> Should Ms. L be able to obtain sufficient PCA services in the future such that she is no longer required to act as a paid PCA for Mr. H, then she would no longer be barred by 7 AAC 130.280(b) from receiving respite services.

<sup>40</sup> Ex. D1.



habilitation, it clearly implies this given that, under the POC, much of the Day Habilitation services are to take place out in the community.<sup>41</sup> Further, Ms. L did not dispute that transportation and escort services are being provided as part of Mr. H's Day Habilitation services, and she bears the burden of proof on this factual issue.

In summary, the preponderance of the evidence in the record indicates that transportation and escort services are being provided as part of Mr. H's Day Habilitation services. The regulation governing transportation and escort services, 7 AAC 130.290, provides in subsection (d) that "[t]he department will not pay under this section for . . . (2) transportation under 7 AAC 130.260 [Day Habilitation Services]." Accordingly, the Division was correct to deny Mr. H's request for transportation and escort services pursuant to 7 AAC 130.290(d)(2) and 7 AAC 130.260(b)(2).

***E. Does the Availability of Transportation and Escort Services to Mr. H Under "Regular" Medicaid Prevent him From Receiving Transportation and Escort as Waiver Services?***

The second of the Division's two bases for denying the transportation and escort services requested on behalf of Mr. H asserts that he is eligible for these services under "regular," non-waiver Medicaid, and therefore cannot receive these services as waiver services.

Transportation services are available under "regular," non-waiver Medicaid pursuant to 7 AAC 120.410, and escort services are available under "regular," non-waiver Medicaid pursuant to 7 AAC 120.430. Ms. L did not dispute that Mr. H is eligible to receive transportation and escort services through "regular," non-waiver Medicaid, and she bears the burden of proof on this factual issue. Subsection (d) of the waiver regulation governing transportation and escort services, 7 AAC 130.290, provides in relevant part that "the department will not pay under this section for (1) medical transportation services that are authorized under 7 AAC 120.400 - 7 AAC 120.490 [non-waiver or "regular" Medicaid transportation services] . . ." Accordingly, since transportation and escort services are available to Mr. H as non-waiver services, he is not eligible to receive them as waiver services. Accordingly, the Division was correct to deny Mr. H's request for transportation and escort services pursuant to 7 AAC 130.290(d)(1).

**IV. Conclusion**

Under the applicable regulations, the Division was correct to deny the respite, escort, and transportation services requested in Mr. H's initial Plan of Care. The Division's denial of that portion of Mr. H's proposed initial Plan of Care, which requested hourly respite services, daily

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<sup>41</sup> Exs. E42 - E44.

respite services, transportation services, and escort services, for the period from April 3, 2014 through April 2, 2015, is therefore affirmed.

DATED this 15<sup>th</sup> day of April, 2015.

*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 1<sup>st</sup> day of May, 2015.

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.]