

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

In the Matter of: )  
 )  
 D S ) OAH No. 14-1739-MDS  
 ) Agency No.  
\_\_\_\_\_)

**DECISION**

**I. Introduction**

The issue in this case is whether D S continues to require skilled or intermediate level nursing care, or otherwise qualifies for Medicaid Home and Community-Based Waiver services (waiver services) based on the level of assistance that she requires with activities of daily living (ADLs). The Division of Senior and Disabilities Services (DSDS or Division) conducted an assessment on February 26, 2014 and subsequently determined that Ms. S no longer requires skilled nursing care or intermediate level nursing care, and does not require enough assistance with her activities of daily living to qualify for waiver services on that basis.<sup>1</sup>

This decision concludes that although Ms. S has significant physical impairments, and although these impairments limit her ability to function independently, she does not currently require skilled or intermediate level nursing care. This decision further concludes that, although Ms. S requires a greater level of physical assistance with her activities of daily living (ADLs) than was originally determined by the Division, she does not currently require enough assistance with her activities of daily living to qualify for waiver services on that basis. As a result, Ms. S is not presently eligible to receive waiver services. The Division's termination of Ms. S's waiver services is therefore affirmed.<sup>2</sup>

**II. Facts**

**A. Ms. S's Medical Diagnoses and Health Problems**

Ms. S is 60 years old<sup>3</sup> and weighs about 130 pounds.<sup>4</sup> She lives in a single level apartment with one other person.<sup>5</sup> Her diagnoses include anxiety, bipolar disorder, bone and cartilage disorder nos, chronic pain nec, convulsive epilepsy, intervertebral disc disorder and spinal stenosis of the

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<sup>1</sup> Exs. D, E.

<sup>2</sup> Should Ms. S's condition worsen, she may reapply for waiver services at any time.

<sup>3</sup> Ex. E1.

<sup>4</sup> Ex. E10.

<sup>5</sup> Ex. E1.

cervical spine, disturbance of skin sensation, depression, gait abnormality, late effects of cerebrovascular disease, lesions of the brachial plexus, migraine headaches, osteoarthritis of the pelvic region and thighs, muscle spasms, schizophrenia nos, spastic hemiplegia and hemiparesis affecting her non-dominant side, vascular myelopathies, and vitamin D deficiency nos.<sup>6</sup>

Ms. S's hemiplegia affects the left side of her body.<sup>7</sup> Her seizures are petit mal seizures rather than grand mal seizures.

On March 13, 2014 the Division faxed a form to Dr. J, M.D. who is one of Ms. S's two primary treating physicians.<sup>8</sup> The form was accompanied by copies of the regulations defining intermediate nursing care and skilled nursing care.<sup>9</sup> In response to the question "[a]t this time, would you admit this patient to a skilled nursing facility?" Dr. J answered "no."<sup>10</sup> In response to the question "[a]t this time, does this patient have intermediate nursing needs?" Dr. J also answered "no."<sup>11</sup>

***B. The Division's Findings from its 2012 and 2014 Assessments***

Ms. S was previously assessed as to her eligibility for waiver services on September 27, 2012 by Division nurse-assessor T G, R.N.<sup>12</sup> Based on her 2012 assessment, Ms. G found that Ms. S required the following levels of assistance with her ADLs:<sup>13</sup> body mobility - independent (CAT score 0/0, frequency 0/0); transfers - required limited one-person physical assistance 14 times per week (CAT score 2/2, frequency 2/7); locomotion - required limited one-person physical assistance 14 times per week (CAT score 2/2, frequency 2/7); dressing - required limited one-person physical assistance 8 times per week (CAT score 2/2, frequency 2/4); eating - independent (CAT score 0/0, frequency 0/0); toilet use - required limited one-person physical assistance 14 times per week (CAT score 2/2, frequency 2/7); personal hygiene - independent (CAT score 0/0, frequency 0/0); and bathing - required extensive one-person physical assistance three times per week (CAT score 3/2, frequency 1/3).

In summary, at the time of the 2012 assessment, Ms. G found that Ms. S did not qualify for waiver services based on the level of her need for assistance with ADLs. Rather, Ms. G found that

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<sup>6</sup> Ex. E3.

<sup>7</sup> All factual findings in this paragraph are based on Ex. 4 unless otherwise stated.

<sup>8</sup> Ex. F33.

<sup>9</sup> Ex. F35.

<sup>10</sup> Ex. F34.

<sup>11</sup> Ex. F34.

<sup>12</sup> Exs. F1 - F31.

<sup>13</sup> All factual findings in this paragraph are based on Exs. F6 - F12 unless otherwise stated.

Ms. S qualified for waiver services based on her seizure disorder, which Ms. G found to be uncontrolled at that time.<sup>14</sup>

Ms. S was most recently assessed for continuing waiver services eligibility on February 26, 2014 by M N, R.N. of DSDS.<sup>15</sup> Ms. N's assessment is recorded and scored on the Division's Consumer Assessment Tool or "CAT." Ms. N found that Ms. S has the following physical abilities and limitations:<sup>16</sup>

Functional assessment:<sup>17</sup> Ms. N reported that Ms. S has no grip strength in her left hand, but strong grip strength in her right hand. Ms. N also reported that Ms. S cannot touch her hands together over her head or behind her back, and cannot stand up with her hands crossed on her chest, but can touch her feet while in a sitting position, and is able to raise her right hand over her head.

Physical Therapy:<sup>18</sup> Ms. N reported that Ms. S is not currently receiving speech / language therapy, respiratory therapy, physical therapy, or occupational therapy, and that she does not currently have any prescriptions for walking, range of motion, or foot care.

Body Mobility / Bed Mobility:<sup>19</sup> Ms. N reported that Ms. S told her that she does not require assistance to turn or reposition herself in bed (scored 0/0, frequency 0/0).<sup>20</sup>

Transfers:<sup>21</sup> Ms. N reported that Ms. S told her that she does not require assistance with transfers. Ms. N reported that she observed Ms. S move from a seated position on the floor to a standing position by pushing up from her coffee table (scored 0/0).

Locomotion (walking):<sup>22</sup> Ms. N reported that Ms. S told her that she had not fallen for five months prior to the assessment, does not require assistance with walking, and that she was working out on a stationary exercise bike to build leg strength. Ms. N reported that she observed Ms. S demonstrate walking, and that she did not need assistance but did require set-up and supervision (scored 1/1, frequency 0/0).

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<sup>14</sup> Ex. F29.

<sup>15</sup> Ex. E.

<sup>16</sup> Exs. E4 - E13.

<sup>17</sup> All references in this paragraph are based on Ex. E6 unless otherwise stated.

<sup>18</sup> Ex. E7.

<sup>19</sup> All references in this paragraph are based on Ex. E8 unless otherwise stated.

<sup>20</sup> The number before the first slash mark is the self-performance score; the number after the first slash mark is the support score; the number before the second slash mark is the number of times per day; and the number after the second slash mark is the number of days per week.

<sup>21</sup> All references in this paragraph are based on Ex. E8 unless otherwise stated.

<sup>22</sup> All references in this paragraph are based on Ex. E9 unless otherwise stated.

Dressing:<sup>23</sup> Ms. N reported that Ms. S told her that she always wears sweats and does not require assistance with dressing. Ms. N reported that she observed that Ms. S was dressed in sweats at the time of the assessment (scored 0/0, frequency 0/0).

Eating:<sup>24</sup> Ms. N reported that Ms. S told her that she needs assistance with meal preparation, but is able to feed herself, is not on any special diet, and does not have swallowing or choking problems (scored 0/0, frequency 0/0).

Toileting:<sup>25</sup> Ms. N reported that Ms. S told her that she does not have any problems with incontinence and does not require assistance with toilet use. Ms. N reported that she observed that Ms. S did not require assistance transfers or locomotion (scored 0/0).

Personal Hygiene:<sup>26</sup> Ms. N reported that Ms. S told her that she can perform all her personal hygiene tasks by herself. Ms. N reported that she observed that Ms. S was clean and well-groomed at the time of the assessment (scored 0/0, frequency 0/0).

Bathing:<sup>27</sup> Ms. N reported that Ms. S told her that she does not require any assistance with bathing (scored 0/0, frequency 0/0).

Professional Nursing Services:<sup>28</sup> Ms. N found that Ms. S has no current need for professional nursing services. Specifically, Ms. N found that Ms. S is currently receiving no injections, intravenous feedings, suctioning or tracheotomy care, or treatments for open lesions, ulcers, burns, or surgical sites.<sup>29</sup> Ms. N further found that Ms. S does not currently have any unstable medical conditions, and specifically, that she does not use a catheter or ventilator / respirator, is not comatose, and does not have an uncontrolled seizure disorder.<sup>30</sup> In addition, Ms. N found that Ms. S does not receive speech, respiratory, physical, or occupational therapy, and does not require professional nursing assessment, observation, and/or management at least once per month.<sup>31</sup> Ms. N also found that Ms. S does not receive medications via tube, does not require tracheostomy care, does not use a urinary catheter, and does not require venipuncture, injections, barrier dressings for ulcers, chest physical therapy by a registered nurse, or oxygen therapy

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<sup>23</sup> All references in this paragraph are based on Ex. E10 unless otherwise stated.

<sup>24</sup> All references in this paragraph are based on Ex. E11 unless otherwise stated.

<sup>25</sup> All references in this paragraph are based on Ex. E11 unless otherwise stated.

<sup>26</sup> All references in this paragraph are based on Ex. E12 unless otherwise stated.

<sup>27</sup> All references in this paragraph are based on Ex. E13 unless otherwise stated.

<sup>28</sup> Exs. E15 - E17.

<sup>29</sup> Ex. E15.

<sup>30</sup> Ex. E16. This finding is extremely significant because, as discussed above, Ms. S qualified for waiver services in 2012 based solely on an uncontrolled seizure disorder.

<sup>31</sup> Ex. E16.

performed by a nurse to treat an unstable chronic condition.<sup>32</sup> Finally, Ms. N found that Ms. S does not currently undergo chemotherapy, radiation therapy, hemodialysis, or peritoneal dialysis.<sup>33</sup>

Cognition:<sup>34</sup> Ms. N found that Ms. S has no short-term memory problem or long-term memory deficits. She also found that Ms. S is generally able to recall names and faces, where she is, the location of her room, and the current season. She rated Ms. S's cognitive status as independent. Finally, Ms. N determined that Ms. S's cognitive status does not require professional nursing assessment, observation, or management at least once per month.<sup>35</sup>

Behavioral Problems:<sup>36</sup> Ms. N found that Ms. S does not wander, is not verbally abusive, is not physically abusive, does not engage in socially inappropriate or disruptive behavior, and does not resist care. Ms. N also found that Ms. S does not need professional nursing assessment, observation, or management at least once per month due to any behavioral problems.<sup>37</sup>

Medication Management:<sup>38</sup> Ms. N reported that Ms. S takes four different prescription medications on a daily basis; that she prepares and administers all of her own medications, and that she is always compliant in taking her medications.

Communication:<sup>39</sup> Ms. N found that Ms. S has no difficulty hearing, speaking, understanding others, and making herself understood.

Mood:<sup>40</sup> Ms. N found that Ms. S exhibits no indication of depression, anxiety, or sleep issues.

Based on the foregoing CAT scores, Ms. N found that Ms. S does not currently require skilled level or intermediate level nursing care, and does not otherwise qualify for waiver services based on cognitive issues, behavioral issues, and/or her level of need for assistance with her activities of daily living (ADLs).<sup>41</sup> On May 29, 2014 a nurse-supervisor reviewed the nurse-assessor's waiver eligibility decision.<sup>42</sup> The nurse-supervisor agreed that Ms. S is not currently eligible to participate in the waiver services program. Finally, on June 16, 2014 the assessor's

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<sup>32</sup> Ex. E17.

<sup>33</sup> Ex. E17.

<sup>34</sup> Ex. E18.

<sup>35</sup> Ms. N did, however, complete the Division's supplemental screening tool (SST) for cognitive difficulties for Ms. S (Ex. E1). Ms. S received a total score of zero points on the cognitive SST.

<sup>36</sup> Ex. E19.

<sup>37</sup> Ms. N did, however, complete the Division's supplemental screening tool (SST) for behavioral problems for Ms. S (Ex. E2). Ms. S received a total score of zero points on the behavioral SST.

<sup>38</sup> Ex. E22.

<sup>39</sup> Ex. E24.

<sup>40</sup> Ex. E27.

<sup>41</sup> Exs. E31, E32.

<sup>42</sup> All factual findings in this paragraph are based on Ex. F44 unless otherwise stated.

eligibility decision underwent a second-level review by the Division's independent contractor Qualis Health.<sup>43</sup> Qualis Health also concurred with the nurse-assessor's determination that Ms. S is not currently eligible for waiver services.<sup>44</sup>

### **C. Relevant Procedural History**

The Division performed the assessment at issue on February 26, 2014.<sup>45</sup> Based on that assessment, the Division concluded that Ms. S is no longer eligible for participation in the waiver services program.<sup>46</sup> Accordingly, on August 14, 2014 the Division mailed a notice to Ms. S advising that her waiver services would end in thirty days.<sup>47</sup>

On September 7, 2014 Ms. S's PCA agency representative requested a hearing to contest the Division's determination.<sup>48</sup> Ms. S's hearing was held on November 19, 2014 and December 31, 2014. Ms. S participated in the hearing by phone, represented herself, and testified on her own behalf. Mr. L of No Name, Ms. S's care coordinator, Ms. S's PCA Agency Representative, and Ms. S's PCA, participated in the hearing by phone and testified on Ms. S's behalf. Victoria Cobo participated in the hearing by phone and represented the Division. Jan Bragwell, R.N. and David Chadwick participated in the hearing by phone and testified for the Division. 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, the Division bears the burden of proof in this case.<sup>49</sup> The standard of review in a Medicaid "Fair Hearing" proceeding, as to both the law and the facts, is *de novo* review.<sup>50</sup> In this case, evidence was presented at hearing that was not available to the Division's reviewers. The administrative law judge may independently weigh the evidence and reach a different conclusion than did the Division's staff and/or Qualis Health, even if the original decision is factually supported and has a reasonable basis in law.

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<sup>43</sup> Ex. D2.

<sup>44</sup> Ex. D3.

<sup>45</sup> Ex. E.

<sup>46</sup> Exs D, E31, E32.

<sup>47</sup> Ex. D. The Division's termination notice cited state Medicaid statute AS 47.07.045; state Medicaid regulations 7 AAC 130.205, 7 AAC 130.207, 7 AAC 130.213, 7 AAC 130.215, 7 AAC 130.219, 7 AAC 140.505, 7 AAC 140.505, 7 AAC 140.510, 7 AAC 140.515; and federal Medicaid statute 42 USC 1396r, in support of its determination.

<sup>48</sup> Ex. C.

<sup>49</sup> 42 CFR § 435.930, 7 AAC 49.135.

<sup>50</sup> 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).

## **B. Relevant Medicaid Waiver Services Statutes and Regulations**

States participating in the Medicaid program must provide certain mandatory services under the state's medical assistance plan.<sup>51</sup> States may also, at their option, provide certain additional services, one of which is the Home and Community-Based Waiver Services program<sup>52</sup> (“waiver services”).<sup>53</sup> Congress created the waiver services program in 1981 to allow states to offer long-term care, not otherwise available through the states' Medicaid programs, to serve eligible individuals in their own homes and communities instead of in nursing facilities.<sup>54</sup> Alaska participates in the waiver services program.<sup>55</sup>

There are three basic ways in which an applicant or recipient can qualify for waiver services. First, an individual is eligible for waiver services if he or she requires the level of care specified in 7 AAC 130.205. For older adults and adults with disabilities (such as Ms. S), 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.<sup>56</sup> Intermediate care, a lower level of care than skilled care, is defined by 7 AAC 140.510 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.

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<sup>51</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>52</sup> The program is called a “waiver” program because certain statutory Medicaid requirements are waived by the Secretary of Health and Human Services. See 42 U.S.C. § 1396n(c). Before a state receives federal funding for the program, the state must sign a waiver agreement with the United States Department of Health and Human Services. *Id.* The agreement waives certain eligibility and income requirements. *Id.*

<sup>53</sup> See 42 USC § 1396a(a)(10)(A).

<sup>54</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>55</sup> AS 47.07.045, the Alaska statute that authorizes Medicaid Waiver Services, states in relevant part: Home and community-based services. (a) The department may provide home and community-based services under a waiver in accordance with 42 USC 1396 – 1396p (Title XIX Social Security Act), this chapter, and regulations adopted under this chapter, if the department has received approval from the federal government and the department has appropriations allocated for the purpose. To supplement the standards in (b) of this section, the department shall establish in regulation additional standards for eligibility and payment . . .

<sup>56</sup> 7 AAC 130.215.

(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 . . . .

(c) Intermediate care may include occupational, physical, or speech-language therapy provided by an aide or orderly under the supervision of licensed nursing personnel or a licensed occupational, physical, or speech-language therapist.

The Division is required to incorporate the results of the Consumer Assessment Tool (CAT) in determining whether an applicant requires intermediate or skilled nursing care.<sup>57</sup>

The second way an individual may qualify for waiver services is by showing that the individual's requirements for physical assistance with his or her activities of daily living (ADLs) are sufficiently high.<sup>58</sup> Under the CAT, an individual can qualify for waiver services by demonstrating a need for extensive assistance with at least three designated ADLs, known as "shaded" ADLs, even without demonstrating a need for professional nursing care.<sup>59</sup> An individual may also qualify for waiver services by having a certain minimum level of nursing needs, *combined with* a certain minimum level of need for physical assistance with ADLs.<sup>60</sup>

Before a recipient's waiver services may be terminated, the Division must conduct an annual assessment to "determine whether the recipient continues to meet the [applicable] standards . . ."<sup>61</sup> To remove a recipient from the program, the assessment must find:

that the recipient's condition has materially improved since the previous assessment; for purposes of this paragraph, "materially improved" means that a recipient who has previously qualified for . . . . an older Alaskan or adult with a physical disability [waiver], no longer has a functional limitation or cognitive impairment that would result in the need for nursing home placement, and is able to demonstrate the ability to function in a home setting without the need for wavier services.<sup>[62]</sup>

Finally, in an order issued recently in the class action<sup>63</sup> case *Krone et. al. v. State of Alaska, Department of Health and Social Services et. al.*, Case No. 3AN-05-10283CI, an Anchorage Superior Court judge held that, "in order to determine if a recipient is 'materially

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<sup>57</sup> 7 AAC 130.215.

<sup>58</sup> Ex. E31.

<sup>59</sup> Ex. E31.

<sup>60</sup> Ex. E31.

<sup>61</sup> AS 47.07.045(b)(1).

<sup>62</sup> AS 47.07.045(b)(3).

<sup>63</sup> Although a Superior Court decision generally does not constitute binding precedent for the Office of Administrative Hearings (except in the particular case being appealed), a class action like the *Krone* case is binding in all cases involving class members, one of whom is Ms. S.



improved,' for purposes of AS 47.07.045(3)(C), the State must compare the results of the current assessment with those of the most recent assessment that concluded that the recipient was eligible for the Waiver program," and that "[t]he State may not conclude that a recipient is no longer eligible based only on the results of the current assessment."<sup>64</sup> The judge further held that "[t]he State may not base its annual determination of whether a recipient is 'materially improved' solely upon the scoring obtained from the CAT," and that "[t]he State must consider all reasonably available information relevant to that determination."

### ***C. The Consumer Assessment Tool (CAT)***

Under state 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 Department's Consumer Assessment Tool (CAT), which is adopted by regulation at 7 AAC 160.900(d)(6). The CAT covers both the recipient's need for nursing services, as well as the recipient's ability to perform his or her activities of daily living (ADLs). The ADLs scored by the CAT are body mobility, transfers (non-mechanical), transfers (mechanical), locomotion (in room, between levels, and to access apartment or living quarters), dressing, eating, toilet use, personal hygiene, and bathing.<sup>65</sup>

The CAT numerical scoring system has two components. The first component is the *self-performance score*. These scores rate how capable a person is of performing a particular ADL.<sup>66</sup> The possible scores 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); and **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).<sup>67</sup>

The second component of the CAT scoring system for ADLs is the *support score*. These scores rate the degree of assistance that a person requires in order to perform a particular ADL. The

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<sup>64</sup> *Krone* order dated October 1, 2014 at page 6.

<sup>65</sup> The CAT also scores the recipient's ability to perform Instrumental Activities of Daily Living (IADLs). However, although IADL scores are important for determining the recipient's eligibility for Medicaid Personal Care Assistant (PCA) services, the recipient's IADL scores are not considered in determining eligibility for waiver services.

<sup>66</sup> 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."

<sup>67</sup> *See*, for example, Ex. E8.

relevant scores are **0** (no setup or physical help required); **1** (only setup help required); **2** (one person physical assist required); and **3** (two or more person physical assist required).

***D. Does Ms. S Require Intermediate or Skilled Nursing Care?***

Based on the waiver regulations (which incorporate the CAT), there are several ways in which a waiver services applicant or recipient can qualify for (or remain qualified for) waiver services. The first way is to demonstrate a need for either skilled nursing care or intermediate level nursing care.<sup>68</sup> Because skilled care is a higher level of care than intermediate care, the minimum level of nursing care for which Ms. S must demonstrate a need, in order to remain eligible for waiver services on that basis, is intermediate care. Intermediate level nursing care is defined by 7 AAC 140.510 (quoted in Section III(A), above).

The evidence in the record demonstrates that Ms. S does not currently require the types of services which indicate a need for intermediate level care under 7 AAC 140.510. First, the Division's assessor, nurse-supervisor, and independent contractor all agreed that Ms. S does not require nursing services. Second, one of Ms. S's treating physicians has opined that Ms. S does not currently require nursing services. Third, Ms. S acknowledged at hearing that she has no nursing needs. Finally, Ms. S's care coordinator agreed at hearing that Ms. S currently has no nursing needs.

My independent review of the record likewise indicates that Ms. S has no nursing needs; the preponderance of the evidence indicates that Ms. S's seizure disorder is now controlled. Accordingly, the Division correctly determined that Ms. S does not qualify for waiver services based on a need for skilled or intermediate level nursing care. The next issue is whether Ms. S qualifies for waiver services based on the extent of her need for assistance with activities of daily living (ADLs).

***E. Does Ms. S Qualify for Waiver Services Based on her Need for Assistance with her Activities of Daily Living?***

The Consumer Assessment Tool's scoring summary is located at page 29 of the CAT.<sup>69</sup> As indicated by that summary, there are several scoring combinations through which one may demonstrate a need for a Nursing Facility Level of Care (NFLOC) or otherwise qualify for waiver services. The first way, discussed immediately above, is to require skilled or intermediate level nursing care, as defined by the regulations and the CAT. However, under

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<sup>68</sup> 7 AAC 140.510, 7 AAC 140.515.

<sup>69</sup> Ex. E p. 31.

the CAT, an individual may also qualify for waiver services, even without demonstrating a need for skilled or intermediate level nursing care, if the individual has serious cognitive or behavioral problems, and/or if his or her need for assistance with activities of daily living (ADLs) is sufficiently high.<sup>70</sup> The CAT divides the possible scoring 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. As discussed in the preceding section, Ms. S does not receive or require nursing services. The second way (under NF1(b)) is to require use of a ventilator or respirator at least three days per week. As discussed in the preceding section, Ms. S does not use a ventilator or respirator. The third way (under NF1(c)) is to require care due to uncontrolled seizures at least once per week. As discussed in the preceding section, Ms. S does not currently have uncontrolled seizures. The fourth way (under NF1(d)) is to receive some form of therapy from a qualified therapist at least five days per week. As discussed above, Ms. S was not receiving such therapy at the time of her assessment or at the time the Division issued its waiver termination letter.<sup>71</sup>

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 five "shaded" ADLs listed at page 18 of the CAT.<sup>72</sup> The CAT scores which the Division assigned to Ms. S with regard to the five "shaded" ADLs are: body mobility: 0/0; transfers: 0/0; locomotion: 1/1; eating: 0/0; and toilet use: 0/0.<sup>73</sup>

This waiver services case was consolidated for hearing with another Medicaid case involving Ms. S's Personal Care Assistant (PCA) services, (OAH Case No. 14-1400-MDS). The decision in that (PCA) case was issued earlier this week. As discussed in that decision, I agreed with some, but not all, of the ADL scores assigned by the Division. The revised scores for Ms. S's "shaded" ADLs, contained in Ms. S's PCA decision, are as follows: body mobility: 0/0; transfers: 2/2; locomotion: 2/2; eating: 0/0; and toilet use: 2/2. However, although the

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<sup>70</sup> Ex. E p. 31.

<sup>71</sup> There was testimony at hearing that Ms. S was about to begin, or had just recently begun, some type of therapy. Any such "new" therapy would have occurred outside the time frame at issue in this decision. If, however, Ms. S believes that she may re-qualify for waiver services based on her "new" therapy, she may re-apply for waiver services at any time.

<sup>72</sup> Ex. E20.

<sup>73</sup> Ex. E20.

PCA decision increased Ms. S's scores as to three of the "shaded" ADLs, Ms. S's revised ADL scores are still not high enough to qualify for waiver services under NF1(e).

*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. Because Ms. S does not require extensive assistance with three or more of the "shaded" ADLs, she does not qualify for waiver services under NF1(e).

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 needing injections and/or IV hookups, feeding tubes, tracheotomy care or nasopharyngeal suctioning, treatments or dressings, oxygen, requiring observation, assessment, and management of unstable conditions, catheter management, and/or care required due to a comatose condition. The record does not show that Ms. S requires any of these services, so she scores 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. S requires any of these therapies at least three days per week, 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, venipuncture, or barrier dressings for ulcers, at least three days per week. Again, the record does not show that Ms. S requires any of these procedures, so no points are awarded 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, the record does not show that Ms. S requires any of these treatments, so she receives 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. Ms. S has no short-term memory problems, so Ms. S receives no points under NF3(a).

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. N found that Ms. S is able to recall all four of these items, and Ms. S did not dispute this. Accordingly, Ms. S gets no points under NF3(b).

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. Ms. N found that Ms. S's cognitive skills for daily decision-making are unimpaired, and Ms. S did not contest this at hearing. Accordingly, Ms. S receives no points under NF3(c).

The last way to obtain points (under NF3(d)) is to require *either* professional nursing care at least three days per week 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 cognitive portion of the Division's Supplemental Screening Tool (SST). Ms. S scored 2/2 as to three shaded ADLs. However, she received a score of zero on the cognitive part of the SST, and she did not contest that at hearing. Accordingly, Ms. S 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. S received scores of zero on NF3(a), NF3(b), NF3(c), and NF3(d). Accordingly, Ms. S 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 abusive, or be physically abusive, at least four days per week, to receive a point.

Ms. N found that Ms. S does not wander, is not verbally abusive, is not physically abusive, does not engage in socially inappropriate or disruptive behavior, and does not resist care. Ms. S did not contest these findings at hearing. Accordingly, the preponderance of the evidence indicates that Ms. S should receive no points under NF4(a).

Under NF4(b), an applicant must *either* require professional nursing care *at least three days per week* 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 behavioral portion of the Division's Supplemental Screening Tool (SST). Ms. N found that Ms. S does not require or receive professional nursing assessment, observation, or management of behavioral problems three or more days per week. This finding is supported by the record and was not challenged.

Ms. S did receive scores of 2/2 as to three "shaded" ADLs. However, Ms. N gave Ms. S a score of zero on the behavioral portion of the SST,<sup>74</sup> which is not a sufficiently high score on the SST to receive a point at NF4(b). Ms. S did not contest this finding at hearing. Accordingly, Ms. S receives no points under NF4(b).

5. NF5

At NF5, the total scores from NF2, NF3, and NF4 are added together. If an applicant or recipient receives a score of one or more, then the analysis proceeds to NF6. In this case, however, Ms. S's overall score as to NF2, NF3, and NF4 is zero. Accordingly, in this case, the CAT's scoring analysis ends here and does not proceed to NF6 or NF7.

**IV. Conclusion**

Ms. S qualified for waiver services under the 2012 assessment based on an uncontrolled seizure disorder. However, the evidence in the record indicates that Ms. S's seizures are now controlled, which constitutes a material improvement of her condition. Based on the Division's 2012 and 2014 assessments, and the opinion of one of her own doctors, Ms. S does not currently require either an intermediate or skilled level of care as defined under the relevant regulations and the Consumer Assessment Tool. Further, although Ms. S requires limited assistance as to three "shaded" ADLs, these problems are not sufficient, under the regulations and the CAT, to qualify her for waiver services on that basis. Accordingly, the Division's decision that Ms. S is not currently eligible for the waiver services program is affirmed.

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

Signed

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Jay D. Durych  
Administrative Law Judge

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<sup>74</sup> Ex. E2.

## 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 28<sup>th</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.]