

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

In the Matter of: )  
 )  
 C T ) OAH No. 14-1947-MDS  
 ) Agency Case No.

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**DECISION**

**I. Introduction**

The issue in this case is whether C T 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 July 9, 2014 and subsequently determined that Ms. T no longer requires skilled nursing care, intermediate level nursing care, or extensive assistance with three or more designated ("shaded") activities of daily living.<sup>1</sup>

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

**II. Facts**

**A. Ms. T's Current Diagnoses and Relevant Medical History**

Ms. T is a 62-year-old woman who lives in an assisted living home (ALH); she has lived in the same ALH since August 2011.<sup>3</sup> Her diagnoses include cerebrovascular accident (CVA), ataxia / late effects of cerebrovascular disease, arteriosclerotic delusions, cognitive

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

<sup>2</sup> Should Ms. T's condition worsen, she may reapply for waiver services at any time. In the interim, Ms. T may be eligible for financial assistance with her assisted living home (ALH) expenses through the General Relief program, a state-funded program provided by the Department of Health and Social Services (DHSS).

<sup>3</sup> Ex. E p. 1; Ex. F. p. 21.

deficits, vascular dementia with delusions and behavioral disturbances, intracranial brain injury NEC, epilepsy, gastroesophageal reflux disease (GERD), hepatic encephalopathy, hypertension, psychophysical visual disturbances, seizure disorder, and schizoaffective disorder.<sup>4</sup> Ms. T's diagnosis of schizophrenia is longstanding; she sustained a head injury in the 1990s, and she had a stroke in 2010.<sup>5</sup>

A critical incident report dated July 28, 2013 indicates that Ms. T had a seizure on that date.<sup>6</sup> Another critical incident report dated September 27, 2013 indicates that Ms. T suffered a fall on or about that date.<sup>7</sup>

On July 21, 2014 Ms. T's doctor completed a form sent to her by the Division.<sup>8</sup> In response to the question "would you admit this patient to a skilled nursing facility?" the doctor wrote "[n]eeds help with all ADLs." In response to the question "[d]oes this patient have intermediate nursing needs?" the doctor left the form blank.

Notes from Ms. T's doctor dated August 20, 2014 state that Ms. T had a seizure on August 18, 2014 because she had run out of her anti-seizure medications for one day.<sup>9</sup> The doctor's notes also indicate that, as long as Ms. T is able to take her medications, she has no seizures.<sup>10</sup> The doctor's notes further state that Ms. T "has difficulty with memory," has an abnormal gait and stance, "has difficulty ambulating," uses a wheelchair in the clinic, and "needs significant help using the bathroom, showering, . . . transferring from bed," and transferring to the exam table.<sup>11</sup> Finally, the doctor's notes state that, during the exam, Ms. T was oriented as to person, place, and time, and that her mood was normal, but that her affect was abnormal.<sup>12</sup>

At the hearing, B R, a member of the staff of Ms. T's ALH, testified:

1. She was present during Mr. Gamel's assessment of Ms. T.
2. At night, Ms. T must call for the ALH staff to help her reposition in bed. During the day, if Ms. T is sitting on a couch and wants to lie down on it, she needs assistance

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<sup>4</sup> Ex. E p. 5; Ex. F. pp. 55, 56.

<sup>5</sup> Ex. F p. 3.

<sup>6</sup> Ex. F. p. 58.

<sup>7</sup> Ex. F. pp. 67, 68, 73.

<sup>8</sup> Ex. F. p. 32.

<sup>9</sup> Ex. F p. 33.

<sup>10</sup> Ex. F p. 33.

<sup>11</sup> Ex. F pp. 33, 35.

<sup>12</sup> Ex. F p. 35.

from the ALH staff to do so. She participates in the repositioning, but is physically assisted by staff. She needs this repositioning assistance three to four times per week.

3. Ms. T does not require weight-bearing assistance with transfers; the type of assistance she needs is hands-on assistance with balancing.

4. Ms. T is very unsteady when she walks, and is given hand-holding and standby assistance. She has recently (January 2014) begun using a walker based on her doctor's recommendation.

5. Ms. T always requires some level of assistance with dressing.

6. The ALH staff cuts Ms. T's food up into small pieces so she does not choke, but Ms. T can otherwise feed herself.

7. Sometimes Ms. T requires weight-bearing assistance with getting on and off the toilet; sometimes she just needs balancing assistance with toileting.

8. Ms. T can brush her teeth and wash her face, but needs assistance shaving and doing her hair.

9. Ms. T requires extensive assistance with bathing.

10. She believes that Ms. T's cognitive problems are more severe than reported by Mr. Gamel. Ms. T has dementia and hallucinations. She knows where her room is, but cannot always remember the names of ALH staff members. She must be escorted to her appointments because otherwise she would wander.

11. Ms. T's seizures are controlled as long as she takes her medications.

At the hearing, D Q, Ms. T's daughter and power-of-attorney holder, testified in relevant part as follows:

1. She and her husband live in Hawaii. She visits her mother in Alaska about once a year for about ten days. During these visits she takes her mother to doctor appointments, and to activities outside the ALH in which her mother would ordinarily not be able to participate.

2. She must provide weight-bearing assistance transferring Ms. T in and out of the car.

3. Her mother does not have very good balance or equilibrium. Her mother either holds Ms. Q's hand, or uses her wheelchair, when they go out.

4. She does not need to assist her mother with eating, but must always assist her mother with toileting.

5. She agrees that her mother has no nursing needs with regard to *physical* problems (as opposed to cognitive and behavioral problems).
6. She disagrees with the finding that her mother's cognition is only "moderately" impaired. She believes her mother's cognitive impairments are severe. Her mother cannot make any decisions by herself, cannot be left by herself, and would not be able to live by herself. Her mother has been excused from jury duty indefinitely due to cognitive issues.
7. Her mother is verbally abusive to some persons.
8. Her mother has benefitted greatly from waiver services, and her condition will deteriorate if her waiver services are withdrawn.

***B. Ms. T's Care Needs and Functional Abilities as Determined by the CAT***

Ms. T has received waiver services since 2011 or before.<sup>13</sup> In an assessment conducted in 2011 or before, Ms. T was found to require extensive assistance with bed / body mobility, transfers, dressing, toileting, personal hygiene, and bathing.<sup>14</sup> These scores would have qualified Ms. T for waiver services even without any need for professional nursing services.

The assessment immediately prior to the current assessment was conducted by Susan Findley, R.N. on November 1, 2012.<sup>15</sup> Ms. Findley used the Consumer Assessment Tool or "CAT" (a system for scoring a person's level of need for nursing assistance and physical assistance, described in detail in Part III, below), to record the results of the assessment.<sup>16</sup> Ms. Findley assigned the following CAT scores to Ms. T for her activities of daily living (ADLs): bed / body mobility - 0/0; transfers - 0/0; locomotion - 0/0; dressing - 2/2; eating - 0/0; toilet use - 2/2; personal hygiene - 1/1; and bathing 3/2.<sup>17</sup> Ms. Findley found Ms. T to be eligible for waiver services in 2012 because Ms. Findley found that Ms. T's seizure disorder was uncontrolled at that time, and because Ms. Findley found that Ms. T required nursing care and monitoring three or more days per week because of the psychotropic side effects of her medications.<sup>18</sup>

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<sup>13</sup> Ex. F p. 1.

<sup>14</sup> Ex. F p. 12. Notably, this assessment appears to have occurred close in time to Ms. T's 2010 stroke. Ms. Q testified that her mother had to be placed in a nursing home for about nine months immediately after her stroke.

<sup>15</sup> Ex. F.

<sup>16</sup> Exs. E, I.

<sup>17</sup> Ex. F pp. 6 - 12.

<sup>18</sup> Ex. F pp. 14, 24, 29. However, at pp. 3 and 21 of the CAT (Ex. F pp. 3, 21), Ms. Findley wrote that Ms. T had not had a seizure since September 2011, when her medications were adjusted, which would seem to indicate that her seizure disorder *was* controlled by November 2012.

The assessment which resulted in the filing of this case was performed on July 9, 2014 by Robert Gamel, R.N. of DSDS.<sup>19</sup> Mr. Gamel reported that, as of that date, Ms. T had the following abilities, impairments, and care needs:<sup>20</sup>

Functional Assessment:<sup>21</sup> Mr. Gamel reported that Ms. T is able to touch her hands together over her head, can touch her feet while sitting, and has good grip strength, but cannot touch her hands together behind her back, cannot place her hands across her chest and stand up, and needed to use her hands to help stand up.

Physical Therapy:<sup>22</sup> Mr. Gamel reported that Ms. T 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.

Bed / Body Mobility:<sup>23</sup> Mr. Gamel reported that Ms. T told him that she has no skin breakdown problems and can lie down, sit up, turn from side to side, and reposition herself in bed without assistance. Mr. Gamel reported that he observed Ms. T lie down, turn from side to side, and then sit back up, without assistance, and that she has a sleeps on a hospital bed with a standard mattress. Mr. Gamel scored Ms. T as being independent with bed / body mobility (CAT score 0/0).

Transfers:<sup>24</sup> Mr. Gamel reported that Ms. T told him that she can arise from, and alight to, her bed and all chairs in the ALH without assistance. Mr. Gamel reported that he observed Ms. T stand up from and sit down on her bed, a sofa, and kitchen chairs without assistance (CAT score 0/0).

Locomotion:<sup>25</sup> Mr. Gamel reported that Ms. T told him that she can walk from room to room on the same floor of the ALH without any help and without using any assistive devices. Mr. Gamel also reported that the ALH staff told him that Ms. T is usually "pretty steady" on her feet, but requires assistance going up and down the stairs. Mr. Gamel reported that he observed Ms. T walk from room to room on the same floor of the ALH, occasionally leaning on the walls or nearby furniture for stability. Mr. Gamel scored Ms. T as independent with single-level locomotion (CAT score 2/2), and as requiring limited assistance with multi-level and out-of-home locomotion (CAT score 2).

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<sup>19</sup> Ex. E.  
<sup>20</sup> Ex. E pp. 1 - 32.  
<sup>21</sup> Ex. E p. 6.  
<sup>22</sup> Ex. E p. 7.  
<sup>23</sup> Ex. E p. 8.  
<sup>24</sup> Ex. E p. 8.  
<sup>25</sup> Ex. E p. 9.

Dressing:<sup>26</sup> Mr. Gamel reported he was told by Ms. T that "she just needs a little help changing clothes." Mr. Gamel reported that the ALH staff told him that they must help Ms. T get her legs into her pant legs and her arms into her shirt sleeves, and use buttons and zippers, but that otherwise Ms. T can dress and undress on her own. Mr. Gamel reported that he saw Ms. T put on a jacket; she had trouble with the arm holes initially, but was ultimately successful. Mr. Gamel concluded that Ms. T requires limited assistance with dressing (CAT score 2/2).

Eating:<sup>27</sup> Mr. Gamel reported he was told by Ms. T that she can feed herself using standard utensils, takes her medications with water independently, and is not on any special diet. Mr. Gamel reported that he observed Ms. T drink from an open-top cup without difficulty, and that her grip and coordination appeared to be adequate for the task (CAT score 0/0).

Toileting:<sup>28</sup> Mr. Gamel reported he was told by Ms. T that she can transfer on and off the toilet by herself and perform post-toileting hygiene by herself. Mr. Gamel reported that he was told by the ALH staff that Ms. T has frequent incontinence, uses adult diapers at all times, and that they assist Ms. T with post-toileting hygiene. Mr. Gamel did not observe Ms. T toileting, but wrote that Ms. T "would need assistance with toileting" (CAT score 2/2).

Personal Hygiene:<sup>29</sup> Mr. Gamel reported he was told by Ms. T that she can brush her teeth and wash and dry her face and hands, but that the ALH staff must assist her with skin, nail, and hair care. Mr. Gamel did not observe Ms. T perform any personal hygiene tasks, but relied on Ms. T's functional assessment, discussed above (CAT score 2/2).

Bathing:<sup>30</sup> Mr. Gamel reported he was told by Ms. T that she requires assistance getting into and out of the shower, and also requires assistance with washing / showering. Mr. Gamel reported that the ALH staff told him that Ms. T sits on a shower chair and holds onto a grab bar while they wash and rinse her. Mr. Gamel did not observe Ms. T shower or bathe, but noted Ms. T's performance on the functional assessment (above), and concluded that she "would need assist[ance] with bathing" (CAT score 3/2).

Professional Nursing Services:<sup>31</sup> Mr. Gamel found that Ms. T has no current need for professional nursing services. Specifically, Mr. Gamel found that Ms. T is currently receiving no injections, intravenous feedings, suctioning or tracheotomy care, or treatments for open lesions,

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<sup>26</sup> Ex. E p. 10.

<sup>27</sup> Ex. E p. 11.

<sup>28</sup> Ex. E p. 11.

<sup>29</sup> Ex. E p. 12.

<sup>30</sup> Ex. E p. 13.

<sup>31</sup> Ex. E pp. 15 - 17.

ulcers, burns, or surgical sites.<sup>32</sup> Mr. Gamel further found that Ms. T 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>33</sup> In addition, Mr. Gamel found that Ms. T 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>34</sup> Mr. Gamel also found that Ms. T 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 performed by a nurse to treat an unstable chronic condition.<sup>35</sup> Finally, Mr. Gamel found that Ms. T does not currently undergo chemotherapy, radiation therapy, hemodialysis, or peritoneal dialysis.<sup>36</sup>

Cognition:<sup>37</sup> Mr. Gamel found that Ms. T has a short-term memory problem, but no long-term memory deficits. He also found that Ms. T is generally able to recall names and faces, where she is, the location of her room, and the current season. He rated Ms. T's cognitive deficits as moderately impaired, with poor decision-making abilities requiring supervision and cueing. Mr. Gamel determined that Ms. T's memory and cognitive deficits do not require professional nursing assessment, observation, or management even once per month.

Mr. Gamel did, however, complete the Division's supplemental screening tool (SST) for cognitive difficulties for Ms. T.<sup>38</sup> Mr. Gamel found that Ms. T can follow simple written instructions, but has minor difficulties with speech, has some minimal difficulties remembering and using information, and requires reminders and/or direction from others one to three times per day. Ms. T received a total score of two points on the cognitive SST.

Behavioral Problems:<sup>39</sup> Mr. Gamel found that Ms. T does not wander, is verbally abusive one to three days per week but is not physically abusive; does not engage in socially inappropriate or disruptive behavior; and resists care one to three days per week. Mr. Gamel also found that Ms. T does not need professional nursing assessment, observation, or management at least once per month due to her behavioral problems. Mr. Gamel did, however, complete the Division's

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<sup>32</sup> Ex. E p. 15.

<sup>33</sup> Ex. E p. 16.

<sup>34</sup> Ex. E p. 16.

<sup>35</sup> Ex. E p. 17.

<sup>36</sup> Ex. E p. 17.

<sup>37</sup> Ex. E p. 18.

<sup>38</sup> Ex. E p. 1.

<sup>39</sup> Ex. E p. 19.

supplemental screening tool (SST) for behavioral problems for Ms. T.<sup>40</sup> Mr. Gamel found that Ms. T's attitudes, habits, and/or emotional states limit her circle of friends and her living arrangements. Ms. T received a total score of one point on the behavioral SST.

Medication Management:<sup>41</sup> Mr. Gamel reported that Ms. T takes seven different prescription medications on a daily basis; that she does not prepare her own medications, but does self-administer her medications, and that she is "always compliant" in taking her medications.

Balance:<sup>42</sup> Mr. Gamel found that Ms. T had no falls, no emergency room visits, and no hospitalizations during the year prior to the assessment, but that she limits her activities due to a fear of falling.

Communication:<sup>43</sup> Mr. Gamel found that Ms. T has some minimal difficulties hearing, speaking, understanding others, and making herself understood.

Mood:<sup>44</sup> Mr. Gamel found that Ms. T has an unpleasant mood in the morning, but otherwise exhibits no indication of depression, anxiety, or sleep issues.

Based on the foregoing CAT scores, Mr. Gamel found that Ms. T 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>45</sup>

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

Based on the assessment performed on July 9, 2014, the nurse-assessor (Mr. Gamel) concluded that Ms. T is no longer eligible for participation in the waiver services program.<sup>46</sup> Accordingly, on September 25, 2014 the Division mailed a notice to Ms. T advising that her waiver services would end in thirty days.<sup>47</sup> On October 29, 2014 Ms. T's daughter and power-of-attorney holder, D Q, requested a hearing to contest the Division's decision.<sup>48</sup>

Ms. T's hearing was held on February 6, 2015. Ms. T did not participate, but was represented by her daughter, D Q. Ms. Q participated by phone and testified on her mother's

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<sup>40</sup> Ex. E p. 2.

<sup>41</sup> Ex. E p. 22.

<sup>42</sup> Ex. E pp. 23, 25.

<sup>43</sup> Ex. E p. 24.

<sup>44</sup> Ex. E p. 27.

<sup>45</sup> Ex. E pp. 31, 32.

<sup>46</sup> Ex. E pp. 31 - 32.

<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 140.510, 7 AAC 140.515; and federal Medicaid statute 42 USC 1396r, in support of its determination.

<sup>48</sup> Ex. C p. 1.



behalf. B R, of Ms. T's ALH, participated in the hearing by phone and testified on Ms. T's behalf. Ms. T's care coordinator, H L, participated by phone but did not testify. Tammy Smith participated by phone and represented the Division. Robert Gamel, R.N., a nurse employed by the Division, testified by phone on behalf of 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, even if the original decision is factually supported and has a reasonable basis in law.

#### 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>

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<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).

<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.

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. T), 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.

(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

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(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.

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

<sup>58</sup> Ex. E p. 31.

<sup>59</sup> Ex. E p. 31.

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 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 activities of daily living (ADLs) scored by the CAT are body mobility, transfers (non-mechanical),

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<sup>60</sup> Ex. E p. 31.

<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. T.

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

transfers (mechanical), locomotion (in room), locomotion (between levels), locomotion (to access apartment or living quarters), dressing, eating, toilet use, personal hygiene, and bathing.

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>65</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>66</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 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. T 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>67</sup> Because skilled care is a higher level of care than intermediate care, the minimum level of nursing care for which Ms. T 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. T does not currently require the types of services which indicate a need for intermediate level care under 7 AAC 140.510 and the CAT. Mr. Gamel testified that Ms. T currently has no nursing needs, and Ms. Q agreed that, aside from cognitive and behavioral problems (discussed below), her mother has no nursing needs. The only potential nursing need indicated in the record is Ms. T's seizure disorder. However, the preponderance of the evidence indicates that Ms. T's seizure disorder is controlled as long as Ms. T takes her anti-seizure medications. Accordingly, the Division

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<sup>65</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>66</sup> See, for example, Ex. E, p. 8.

<sup>67</sup> 7 AAC 140.510, 7 AAC 140.515.

correctly determined that Ms. T does not qualify for waiver services based on a need for intermediate level nursing care. The next issue is whether Ms. T qualifies for waiver services based on her cognitive and behavioral problems and the extent of her need for assistance with activities of daily living (ADLs).

***E. Does Ms. T 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>68</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 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>69</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. T 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. T 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. T does not have uncontrolled seizures as long as she takes her anti-seizure medications. 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 in the preceding section, Ms. T does not receive such therapy.

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

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<sup>68</sup> Ex. E p. 31.

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

portion of three or more of the five "shaded" ADLs listed at page 18 of the CAT.<sup>70</sup> The CAT scores which the Division assigned to Ms. T with regard to the five "shaded" ADLs are: bed mobility: 0/0; transfers: 0/0; locomotion: 0/0; eating: 0/0; and toilet use: 2/2.<sup>71</sup> The evidence concerning Ms. T's ability to perform the shaded ADLs is addressed below.

a. Body / Bed Mobility

For purposes of waiver services eligibility, body / bed mobility is defined as how a person moves to and from a lying position, turns side to side, and positions his or her body while in bed.<sup>72</sup> In order to receive a self-performance score of three (extensive assistance) with regard to bed / body mobility, a person must require either weight bearing support three or more times per week, or full caregiver performance of the activity part of the time.<sup>73</sup>

Mr. Gamel reported that he was told that Ms. T is independent as to bed mobility. In addition, Mr. Gamel's assessment states that he actually observed Ms. T lie down, reposition her body, and then sit back up independently (scored 0/0). On the other hand, Ms. R testified that, at night, Ms. T must call for the ALH staff to help her reposition in bed, and that, during the day, if Ms. T is sitting on a couch and wants to lie down on it, she needs assistance from the ALH staff to do so. Ms. R testified that Ms. T participates in the repositioning, but is physically assisted by staff to some degree.

Mr. Gamel's testimony at hearing appeared to be credible. However, the weight of his testimony is undercut by two factors beyond his control. First, experience with the waiver and Personal Care Assistant (PCA) programs indicates that many, perhaps most, applicants and recipients overstate their own functional abilities to some degree due to embarrassment. Second, Mr. Gamel was only able to observe Ms. T over the course of a two hour assessment, whereas Ms. R sees and works with Ms. T almost every day. For these reasons, I find that the preponderance of the evidence indicates that Ms. T requires limited assistance with bed / body mobility. However, the body mobility scoring analysis does not end there.

The body mobility regulation, 7 AAC 125.030(b)(1), now defines the ADL of body mobility such that positioning or turning in a bed or chair is a covered activity *only if the applicant or recipient is nonambulatory*. The regulation governing locomotion, 7 AAC 125.030(b)(3), defines locomotion as including ambulation by means of a walker, cane, gait

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<sup>70</sup> Ex. E p. 20.

<sup>71</sup> Ex. E p. 20.

<sup>72</sup> Ex. E p. 8.

<sup>73</sup> Ex. E p. 8.

belt, braces, crutches, or a manual wheelchair. As discussed below in the section on locomotion, I find that Ms. T is capable of single-level locomotion, by means of standby assistance, non-weight bearing "balance" assistance, or by using her walker. Accordingly, under the Division's regulations, Ms. T is considered ambulatory for purposes of the regulation on bed / body mobility. Because she is ambulatory, under the regulation, Ms. T is considered not to require assistance with bed / body mobility, even if she does. In other words, because Ms. T is ambulatory, the Division's regulations create an irrebuttable presumption that Ms. T does not require assistance with bed / body mobility. Accordingly, for CAT scoring purposes, Ms. T is considered independent with regard to bed / body mobility (CAT score 0/0).

*b. Transfers*

For purposes of waiver services eligibility, a transfer is defined as how a person moves between surfaces (with the exception of the toilet and bathtub or shower, which are handled as separate ADLs).<sup>74</sup> In order to receive a self-performance score of three (extensive assistance) with regard to transfers, a person must require either weight bearing support three or more times per week, or full caregiver performance of the activity part of the time.<sup>75</sup>

Mr. Gamel reported he was told by Ms. T that she arise from, and alight to, her bed and all chairs in the ALH without assistance and he reported that he observed Ms. T stand up from and sit down on her bed, a sofa, and kitchen chairs without assistance (CAT score 0/0).

On the other hand, Ms. Q testified that she must provide weight-bearing assistance when transferring Ms. T in and out of the car. Ms. R testified that Ms. T does not need weight-bearing assistance with transfers, but does need hands-on assistance with balance.

I do not doubt that Mr. Gamel heard what he said he heard, and saw what he said he saw, during the assessment, and that Ms. T can at times transfer independently. I also do not doubt that, at times, Ms. T requires weight-bearing assistance as Ms. Q testified. However, of the witnesses who testified at hearing, the one who spends the most time with Ms. T is Ms. R. Accordingly, I find that Ms. R's testimony on this issue is likely to be the most reliable. Ms. R's testimony was that Ms. T normally requires assistance with transfers, but that the assistance rendered is not weight bearing assistance. Accordingly, the preponderance of the evidence indicates that Ms. T requires limited assistance with transfers (CAT score of 2/2).

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<sup>74</sup> Ex. E p. 8.

<sup>75</sup> Ex. E p. 8.

c. Locomotion

For purposes of waiver services eligibility, locomotion is defined as how a person moves between locations in his or her room and other areas on the same floor / level.<sup>76</sup> In order to receive a self-performance score of three (extensive assistance) for locomotion, a person must require either weight bearing support three or more times per week, or full caregiver performance part of the time.<sup>77</sup>

Mr. Gamel reported he was told by Ms. T that she can walk from room to room on the same floor of the ALH without any help and without using any assistive devices. Mr. Gamel also reported that the ALH staff told him that Ms. T is usually "pretty steady" on her feet, but requires assistance going up and down the stairs. Mr. Gamel reported that he observed Ms. T walk from room to room on the same floor of the ALH, occasionally leaning on the walls or nearby furniture for stability. Mr. Gamel scored Ms. T as independent with single-level locomotion (CAT score 0/0), and as requiring limited assistance with multi-level and out-of-home locomotion (CAT score 2). On the other hand, Ms. R testified that Ms. T is very unsteady when she walks, is given hand-holding and standby assistance, and recently began using a walker based on her doctor's recommendation. Similarly, Ms. Q testified that her mother does not have very good balance or equilibrium, and that she either holds her mother's hand, or uses a wheelchair, when they go out.

I do not doubt that Mr. Gamel heard what he reported he heard, and saw what he reported he saw, during the assessment, and that Ms. T can at times walk independently. However, given Ms. T's medical diagnoses, and Ms. R's greater familiarity with Ms. T, I find that her testimony is most persuasive. Ms. R's testimony describes limited (non-weight bearing) assistance. Accordingly, I find that the preponderance of the evidence indicates that Ms. T generally requires limited one-person assistance with locomotion (CAT score 2/2).

d. Eating

For purposes of waiver services eligibility, eating is defined as how a "person eats or drinks regardless of skill."<sup>78</sup> In order to receive a self-performance score of three (extensive assistance) with regard to eating, a person must require either weight bearing support three or more times per week, or full caregiver performance of the activity part of the time.<sup>79</sup>

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<sup>76</sup> Ex. E p. 9.

<sup>77</sup> Ex. E p. 9.

<sup>78</sup> Ex. E p. 11.

<sup>79</sup> Ex. E p. 11.



Mr. Gamel reported he was told by Ms. T that she can eat, drink, and take her pills without assistance. Mr. Gamel therefore scored Ms. T as being able to eat independently (CAT score 0/0). At hearing, Ms. R and Ms. Q both testified that Ms. T does not need physical assistance with eating. Accordingly, this score is undisputed, and the preponderance of the evidence indicates that Ms. T can eat independently (CAT score 0/0).

*e. Toilet Use*

For purposes of waiver services eligibility, toilet use is defined as how a "person uses the toilet room (or commode, bedpan, urinal); transfers on/off toilet, cleanses, changes pads, manages ostomy or catheter, adjusts clothes."<sup>80</sup> In order to receive a self-performance score of three (extensive assistance) with regard to toilet use, a person must require either weight bearing support three or more times per week, or full caregiver performance of the activity part of the time.<sup>81</sup> Mr. Gamel reported he was told by Ms. T that she can transfer on and off the toilet by herself and perform post-toileting hygiene by herself. However, Mr. Gamel reported that he was told by the ALH staff that they assist Ms. T with post-toileting hygiene. Based on this information, Mr. Gamel concluded that Ms. T "would need assistance with toileting (CAT score 2/2. Ms. R testified that sometimes Ms. T requires weight-bearing assistance with getting on and off the toilet, and sometimes she just needs balancing assistance with toileting; Ms. Q's testimony was similar.

Based on Ms. T's diagnoses, it would not be surprising if Ms. T required extensive assistance with toileting. However, Ms. T's prior CAT score for toileting was 2/2. To receive a score of 3/2 or higher would require evidence of weight bearing support three or more times per week, or full caregiver performance of the activity part of the time. Neither Ms. R nor Ms. Q were able to specify in their testimony whether Ms. T receives weight bearing assistance at least three day per week, and neither testified that Ms. T is completely dependent (*i.e.* requires full caregiver performance) at least part of the time. Accordingly, the preponderance of the evidence in the record indicates that Ms. T requires limited one-person assistance with toileting (CAT score 2/2).

*f. Summary - Degree of Assistance Required With Shaded ADLs*

Independent review indicates that Ms. T requires a greater degree of assistance than was found by the Division with regard to the "shaded" ADLs of body mobility, transfers, and toilet use. However, this review indicates that Ms. T requires *limited assistance* with three shaded ADLs. In order to qualify for waiver services under NF1(e), a person must demonstrate either

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<sup>80</sup> Ex. E p. 11.

<sup>81</sup> Ex. E p. 11.

full dependence, or a need for extensive assistance, *as to at least three* of the shaded ADLs. Because Ms. T does not require extensive assistance with regard to three or more of the "shaded" ADLs, she does not meet NFLOC 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. T 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. T 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. T 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. T 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. T has short-term memory problems, so Ms. T receives one point 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. Mr.

Gamel found that Ms. T is able to recall all four of these items. Ms. R testified that Ms. T cannot always remember the names of ALH staff members. I find it more probable that not that Ms. T is sometimes unable to recall the names of the ALH staff. However, this results in a checkmark as to only one of four items at page 16, section (C)(2) of the CAT. Accordingly, Ms. T 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. Mr. Gamel found that Ms. T's cognitive skills for daily decision-making are moderately impaired. Accordingly, Ms. T receives one point under NF3(c).<sup>82</sup>

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. T scored 2/2 as to three shaded ADLs, so, if she scores 13 or more on the cognitive part of the SST, she will receive a point under NF3(d).

Mr. Gamel assigned Ms. T a score of two on the cognitive portion of the SST.<sup>83</sup> The undersigned finds, based on the testimony of Ms. R and Ms. Q, and on Ms. T's 2012 and 2014 assessments, that:

- i. Ms. T often cannot recall entire events, or the names of some close friends and relatives, without prompting (score of 2);
- ii. Ms. T has difficulty remembering and using information, cannot follow written instructions, and requires direction and reminders from others four or more times per day (score of 3);
- iii. Ms. T has periodic confusion (score of 2);
- iv. Ms. T would get lost outside her ALH were it not for the intervention of the ALH staff (score of 2); and
- v. Ms. T is able to carry out only simple conversations (score of 2).

Based on the above, I find that Ms. T should receive a total score of 11 on the SST for cognitive issues. This does not help Ms. T's overall score, however, because she would need to receive a score of 13 or more on the cognitive portion of the SST in order to receive one point under NF3(d). Accordingly, Ms. T receives no points under NF3(d).

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<sup>82</sup> Based on the scoring matrix at page 29 of the CAT, even were Ms. T's cognitive abilities found to be severely impaired, she would still receive only one point under NF3(c).

<sup>83</sup> Ex. E. p. 1.

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. T received one point under NF3(a) and another under NF3(c), but received no points under the other two subsections. Accordingly, Ms. T 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.

Mr. Gamel found that Ms. T does not wander; is verbally abusive one to three days per week but is not physically abusive; does not engage in socially inappropriate or disruptive behavior; and resists care one to three days per week. While Ms. R and Ms. Q disagreed with Mr. Gamel as to the severity of Ms. T's *cognitive* problems (discussed above), they did not contest his findings as to the severity of Ms. T's *behavioral* problems. Accordingly, the preponderance of the evidence indicates that Ms. T 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). Mr. Gamel found that Ms. T 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 seriously challenged.

Ms. T did receive scores of 2/2 as to three "shaded" ADLs. However, Mr. Gamel gave Ms. T a score of one on the behavioral portion of the SST,<sup>84</sup> which is not a sufficiently high score on the SST to receive a point at NF4(b). My review of the record indicates that Ms. T should have received a score of eight on the behavioral portion of the SST.<sup>85</sup> However, this does not help Ms. T's overall score, because she would need to receive a score of 14 or more

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<sup>84</sup> Ex. E p. 2.

<sup>85</sup> See Section II(A) at pages 2 - 4, above.

on the behavioral portion of the SST in order to receive one point under NF4(b). Accordingly, Ms. T gets 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. T'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. T qualified for waiver services under the 2012 assessment based on an uncontrolled seizure disorder. However, Ms. T's seizures are now controlled through medication, which is a material improvement of her condition. Based on the 2012 and 2014 assessments, and the hearing testimony of Ms. R and Ms. Q, Ms. T does not require either an intermediate or skilled level of care as defined under the relevant regulations and the Consumer Assessment Tool. Further, although Ms. T has significant cognitive problems, minor behavioral problems, and 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. T is no longer eligible for the waiver services program is affirmed.

Dated this 21st day of April, 2015.

Signed

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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.]