

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

In the Matter of:)
)
C V) OAH No. 14-2184-MDS
) Agency Case No.

**FINAL DECISION
(REVISED DECISION FOLLOWING REMAND)**

I. Introduction

The issue in this case is whether Mr. C V is entitled to payment, through the Medicaid program, of an additional 32 units of one-with-one day habilitation services (two hours per day for four days), and/or an additional 32 units of supported living services (two hours per day for four days), for the period from October 29, 2014 through November 1, 2014.¹ Mr. V requested ten hours per day of one-with-one day habilitation services, and six hours per day of supported living services, during this four day period.² The Division of Senior and Disabilities Services (DSDS or Division) approved eight of the requested ten hours per day of one-with-one day habilitation services, and four of the requested six hours per day of supported living services.³ Mr. V's request for these services was submitted in the context of a Plan of Care (POC) amendment request to provide services for Mr. V while on a four day vacation.⁴ The Division denied the services at issue based on the assertion that the total level of waiver services requested by Mr. V would have exceeded the amount allowed under 7 AAC 130.231 because they would have put Mr. V's total waiver service level while on vacation above the level he normally receives, under his annual POC, while living at his group home.⁵

This decision concludes that the amount of waiver services requested by Mr. V during his vacation exceeded the amount that the Division was allowed to approve under 7 AAC 130.231(b). Accordingly, the Division did not err in denying the four additional hours per day of waiver services sought by Mr. V in this case. The Division's denial of those four additional hours of waiver services, requested in Mr. V's POC amendment, is therefore affirmed.

¹ Ex. D; Ex. E3.
² Ex. E3.
³ Ex. D.
⁴ Ex. E3.
⁵ Ex. D2.

II. Facts

A. *Mr. V's Medical Condition, Limitations, and Care Needs*

Mr. V is 48 years old.⁶ He has been diagnosed with mental retardation and epilepsy, and has had these medical problems his entire life.⁷

Mr. V's communication skills are limited.⁸ He is friendly, sometimes overly so; he needs assistance setting personal boundaries. He is a vulnerable adult because he cannot make safe decisions for himself, and is at risk of being taken advantage of by others.

Mr. V lives in a group home operated by No Name.⁹ He requires staff assistance (via prompting and sometimes demonstration) to perform personal hygiene tasks, bathe, select his daily clothing, plan and prepare meals, wash his dishes, wash and dry his laundry, clean his apartment, go shopping, and manage his money.¹⁰ Mr. V works part time, at a gym, with supported employment services (SES) provided through the waiver services program.¹¹

Mr. V's sister, J K, is his guardian.¹² During the summer of 2014 Ms. K made arrangements to take her brother on a four day vacation to Disneyland, along with her husband and her two autistic children.¹³ The vacation was scheduled for October 29, 2014 through November 1, 2014. Because Ms. K would be busy taking care of her own children while on vacation, arrangements were made for a staff person from No Name to accompany Mr. V. On October 1, 2014 Ms. K submitted a proposed Plan of Care amendment to the Division requesting certain waiver services during the four days that Mr. V would be on vacation.¹⁴

B. *Relevant Procedural History*

Mr. V has received Medicaid Home and Community-Based Waiver Services ("waiver services") since 2013 or before.¹⁵ As of November 7, 2013¹⁶ (retroactive to September 25, 2013), Mr. V was authorized to receive 307 days of 24/7 group home habilitative services,¹⁷ 832 units of one-with-one day habilitation services (16 hours per week for the 52 week duration of the POC),¹⁸

⁶ Ex. F4.

⁷ Ex. F5; Ex. 1 p. 1.

⁸ All factual findings in this paragraph are based on Exs. F11 - F12 unless otherwise stated.

⁹ Ex. E6.

¹⁰ All factual findings in this paragraph are based on Exs. E7, E8, and E17 unless otherwise stated.

¹¹ Ex. F4.

¹² All factual findings in this paragraph are based on Ex. E-3 and Ex. 1 pp. 1 - 3 unless otherwise stated.

¹³ Ex. E3, Ex. 1 p. 3.

¹⁴ Ex. D1, Ex. E1.

¹⁵ Ex. F.

¹⁶ Ex. F1.

¹⁷ Ex. F16.

¹⁸ Ex. F20. This averages out to about 2.3 hours per day.

1,248 units of supported employment services (two hours per day, three days per week for the 52 week duration of the POC),¹⁹ and 2,288 units of group day habilitation - supported living services (44 hours per week for the 52 week duration of the POC).²⁰ This service level lasted through the end of Mr. V's 2013 - 2014 POC year, which ended on September 24, 2014.²¹

Sometime after September 24, 2014, the Division approved a new annual / renewal plan of care for Mr. V.²² Pursuant to the new (2014 - 2015) plan of care, Mr. V was authorized to receive a year of group home habilitative services, three hours per week of one-with-one day habilitation services, 12 hours per week of group day habilitation - supported living services, and six hours per week of supported employment services.²³

On October 1, 2014 Mr. V's guardian and care coordinator submitted the POC amendment request for the period at issue here,²⁴ which request stated in relevant part as follows:²⁵

C [will] go to Disneyland . . . with a [No Name] staff person who knows him, and whom C chose to go with! C and his support will travel with his sister and her family. C's nephews, his sister and brother in law will be staying together, and C and his staff will stay in a room together. Although they will be together for dinners and some activities, C will be . . . with his [support person] full time throughout this vacation

We are reducing group home days on submitted POC for the vacation duration, as well as all day habilitation hours for that week. Supported employment will [also] be reduced as [it] will not be utilized during this vacation

C will be supported one on one throughout the vacation, 24/7, for 4 full days. C and his support staff will stay in their own hotel room. We are requesting 6 hours of supported living services for this "in hotel room" time.^[26] [This] time will be spent . . . in the mornings getting ready to go to the parks, in/out during daytime for breaks, changing [clothes], and in the evening for R&R time, movies, chilling before sleep, and for C's safety and health.

Day habilitation hours are being . . . increased during the vacation, as C and his staff will be at the parks, pools, and restaurants every day of their trip. They will be

¹⁹ Ex. F23.

²⁰ Ex. F25. This averages out to about 6.3 hours per day.

²¹ Ex. F. A new annual / renewal plan of care should have been submitted on or after September 25, 2014, but that plan of care is not in the record.

²² Neither party introduced a copy of the new (2014 - 2015) plan of care into the hearing record. However, when the Division's Exhibit D2 is compared to Mr. V's Exhibit 1 page 1, it is apparent that both parties agree on the amount of services to be provided pursuant to the 2014 - 2015 plan of care.

²³ Ex. D2; Ex. 1 p. 1.

²⁴ Ex. E.

²⁵ Ex. E3.

²⁶ This is equivalent to 42 hours per week of SLS, which is two hours per week less than Mr. V was approved for in the 2013 - 2014 Plan of Care which ended immediately prior to the start of the vacation.

flying together, and staff will support C on the plane and . . . to and from the airport. We are requesting 10 hours of individual day habilitation services for each of the 4 full days at the Disney park²⁷

We will not request hours during 8 hours [per day] of sleep time, although C's staff will remain in his room with him throughout the night, and may be "working" if C cannot sleep, which is a possibility.

On October 29, 2014 the Division approved Mr. V's POC amendment request as to 128 units (eight hours per day for four days) of one-on-one day habilitation services, and 64 units (four hours per day for four days) of supported living services.²⁸ The Division denied that portion of the POC amendment request seeking an additional 32 units (two hours per day for four days) of day habilitation services, and 32 units (two hours per day for four days) of supported living services.²⁹ The bases for partial denial of the requested services, as stated in the Division's letter of October 29, 2014, were as follows:³⁰

Per this request, C will be going to Disneyland with staff from the No Name and [No Name] with his sister and her family. They will spend four days [there] before returning home. In his current POC, C receives the following services: Group Home; 6 hours per week of Supported Employment provided on a one-with-one basis, 3 hours per week of Day Habilitation provided on a one-with-one basis, and 12 hours per week of Day habilitation provided in a group setting. These services in these amounts have been suspended for the length of time that C will be vacationing in Disneyland.

In this [POC amendment request], C [is] requesting 6 hours per day of Supported Living for 4 days and 10 hours per day of Day Habilitation provided on a one-with-one basis for 4 days This amount equals 16 hours per day of active habilitation support, which means that C would be engaged in active habilitative activities virtually every moment that he is awake. C's most recent ICAP (Inventory for Client and Agency Planning) was conducted on September 25, 2012 C received a service score of 67, which places him at a service level of 6, meaning he requires "regular personal care and / or close supervision." Please note that "regular" and "close" do not mean constant. As such, C's service score does not support the request for 16 hours per day of active habilitative supports

Through this [POC] amendment . . . C will receive 4 hours per day of [SLS] for four days and 8 hours per day of [one-with-one day habilitation services] for four days. This level of support will provide C with 12 hours per day of active habilitative support [and] *seems to be in step with 7 AAC 130.231 and [with those] services in*

²⁷ This is equivalent to 70 hours per week of DHS, which is 54 hours per week more than the 16 hours per week Mr. V was approved for in the 2013 - 2014 Plan of Care which ended immediately prior to the vacation.

²⁸ Ex. D1.

²⁹ Ex. D1.

³⁰ Ex. D2.

place when he is in his home Therefore, 2 hours per day of [supported living services] and 2 hours per day of [one-with-one day habilitation services] for four days are denied. [Emphasis added].

On November 12, 2014 Mr. V's sister and legal guardian, J K, requested a hearing to contest the Division's determination.³¹

Mr. V's hearing was held on February 5, 2015. Mr. V did not participate, but was represented by Ms. K, who participated by phone and testified on her brother's behalf. Mr. V's care coordinator, M L, also participated by phone and testified on Mr. V's behalf. The Division was represented by Victoria Cobo, who participated by phone. Glenda Aasland participated by phone and testified for the Division. Corina Castillo-Shepard observed for the Division. The record closed at the end of the hearing.

On May 20, 2015 the administrative law judge (ALJ) issued his proposed decision. The ALJ concluded that the Division was correct to deny the four additional hours per day of waiver services, under 7 AAC 130.231, because those additional services would have put Mr. V's total waiver service level while on vacation above the level he normally receives while living at his group home. The ALJ reached this conclusion based primarily on the mistaken understanding that the Division was still paying for Mr. V's group home services while Mr. V was on vacation.

On May 28, 2015 Ms. K filed a proposal for action (PFA). Ms. K's PFA asserted that:

1. The ALJ erred in his interpretation of 7 AAC 130.265(f), which provides that "[t]he department will consider residential habilitation services to be group-home habilitation services if those services are provided to a recipient 18 years of age or older living full-time in a residence licensed as an assisted living home for two or more residents under AS 47.32 that provides 24-hour care."
2. Under 7 AAC 130.265(f), facilities which provide group-home habilitation services must, by definition, make care available 24 hours per day; group home habilitation services provide more than a place for the recipient to live.
3. Mr. V pays the monthly charges for room and board to the group home. He paid for the entire months of October and November 2014, even though he was on vacation for part of those months.
4. Mr. V receives 24-hour service while in the group home, and requested only 16 hours of waiver services while on vacation, so he actually used less waiver services while on vacation than he did while living at the group home.

³¹ Ex. C1.

On July 6, 2015 the case was remanded to the ALJ for consideration of three issues:³²

1. Was the Division's application of 7 AAC 130.231(b)(2) to the POC amendment correct in light of the fact that the recipient needed increased habilitation services because, in part, his 24-hour group home services would be unavailable while on vacation?
2. Was Mr. V's total waiver service level [while on vacation] above the level he normally receives under his annual POC at home, when he was not receiving any 24-hour group home services while on vacation?
3. Was the waiver program still paying for Mr. V's room at the group home during the four days he was on vacation?

On July 8, 2015 the ALJ requested briefing from the parties on these three issues. On July 22, 2015 the Division submitted a response which can be summarized as follows:³³

1. Group home habilitation services under 7 AAC 130.265(f) differ from supported living habilitation services under 7 AAC 130.265(d) in that the supported living services are provided on a one-to-one basis, while group home habilitation services are not.
2. Group home habilitation services under 7 AAC 130.265(f) provides payment for services rather than for room and board, and Mr. V pays for his own room and board. However, even though no group home habilitation services were provided while Mr. V was on vacation, the group home was still expected to maintain the same staffing.
3. The Division is not required to increase waiver reimbursements when a recipient goes on vacation.
4. The types of services which Mr. V had in effect prior to going on vacation cannot be compared, on an hour-for-hour basis, to the services Mr. V requested while on vacation, because the various services have different purposes and provide different levels of support. Granting all of the services sought by Mr. V in his POC amendment request would have increased the overall daily cost of his waiver services during his vacation.

On August 13, 2015 the ALJ requested that the parties provide a comparison of the cost of Mr. V's waiver services while at his group home, with the cost of Mr. V's waiver services while on vacation. On August 20, 2015 the Division provided the cost comparison.³⁴ The Division's comparison states that the average daily cost of Mr. V's waiver services, while he is living at the

³² The first two issues are quoted verbatim from the remand order; the third issue is paraphrased for brevity.

³³ No response to this briefing request was received from Mr. V.

³⁴ Mr. V did not dispute the Division's cost comparison figures, so those figures are deemed to be correct for purposes of this decision.

group home, is \$428.20, while the average daily cost of the services actually approved by the Division for Mr. V, during his vacation, was \$513.28, about \$85.00 more.³⁵

III. Discussion

A. *Medicaid Home and Community-Based Waiver Services program - Overview*

1. *Relevant Federal Medicaid Statutes and Regulations*

States participating in Medicaid must provide certain mandatory services under a state medical assistance plan.³⁶ States may also, at their option, provide certain additional services, one of which is the Home and Community-Based Waiver Services program.³⁷ Congress created the waiver services program to allow states to offer long-term care, not otherwise available through Medicaid, to serve recipients in their own homes and communities instead of in nursing facilities.³⁸

The waiver services program is not designed to provide recipients with the best possible standard of care; rather the waiver services program is designed to provide recipients with those services, costing no more than institutional care, which are necessary to avoid institutionalization.³⁹

2. *Relevant State Medicaid Regulations*

There are two types of waiver services at issue in this case. The first type, "Day Habilitation services," is defined by 7 AAC 130.260 in relevant part as follows:⁴⁰

³⁵ The Division did not calculate the cost of the waiver services requested by Mr. V in his POC amendment request. However, based on the unit cost figures provided by the Division, the daily cost of the waiver services requested for Mr. V while on vacation would be \$255.84 for supported living services, and \$428.40 for one-on-one day habilitation services, for a total daily cost of \$684.24. This would be an increase of about 37%.

³⁶ 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.

³⁷ See 42 USC § 1396a(a)(10)(A). The program is called a "waiver" program because certain statutory Medicaid requirements are waived by the Secretary of Health and Human Services. See 42 USC 1396n(c).

³⁸ 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].

³⁹ See *Alexander v. Choate*, 469 U.S. 287, 303, 105 S. Ct. 712, 83 L.Ed.2d 661 (1985) (Medicaid only assures that individuals will receive adequate health care, not care tailored to their particular needs); see also *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2664 - 2665, 183 L.Ed.2d 450 (U.S. 2012) (Medicaid only "intended to provide at least a specified minimum level of coverage for all Americans").

⁴⁰ 7 AAC 160.900(a)(36) incorporates the Day Habilitation Services Conditions of Participation dated May 2, 2013 into regulation by reference. Those Conditions of Participation state in relevant part as follows:

Day habilitation services may be provided to assist recipients to acquire, retain, and improve the self-help, socialization, and adaptive skills necessary to live successfully in home and community-based settings. These

(b) The department will consider habilitation services to be Day Habilitation services if the services

(1) are provided in a nonresidential setting, separate from the recipient's private residence or another residential setting . . .

(2) include round-trip transportation for the recipient between the site where services are provided and . . . where the recipient resides if the recipient's plan of care reflects that transportation will be provided by the Day Habilitation services provider;

(3) assist the recipient with acquisition, retention, or improvement of skills in the areas of self-help, socialization, appropriate behavior, and adaptation;

(4) promote the development of the skills needed for independence, autonomy, and full integration into the community;

(5) reinforce the skills taught in school, therapy, or other settings;

The second type of waiver services at issue in this case, "Supported Living Habilitation Services," are defined by 7 AAC 130.265 in relevant part as follows:⁴¹

(d) The department will consider residential habilitation services to be supported-living habilitation services if the services are provided on a one-to-one basis to a recipient 18 years of age or older living full-time in that recipient's private residence.

The information which must be submitted in support of a POC renewal or amendment request, and the substantive standards for their approval, are specified by 7 AAC 130.217, which provides in relevant part as follows:

(b) The department will approve a plan of care if the department determines that (1) the services specified in the plan of care are sufficient to prevent institutionalization and to

services must provide supervision and a secure environment for recipients, may be planned to reinforce skills or lessons taught in other settings, and may include both individual and group activities

While day habilitation services may be offered in a variety of settings in the community and are not limited to fixed-site facilities, the environment in which they are provided must be appropriate for delivery of the services in a manner that will contribute to accomplishing goals specified in the recipient's plan of care. These services must be provided in non-residential settings separate from the recipient's private residence or another residential living arrangement unless the provider is granted a waiver regarding the setting.

⁴¹ 7 AAC 160.900(a)(46) incorporates the Residential Supported-Living Services Conditions of Participation dated March 21, 2014 into regulation by reference. Those Conditions of Participation state in relevant part as follows: Residential supported-living services may be provided for recipients who need assistance with the activities of daily living, but whose need for institutional level of care can be met though the support provided in the 24-hour residential supported-living setting. These services are provided in residential settings staffed 24 hours a day by on-site personnel who must be available to meet both scheduled and unpredictable recipient needs. The residential settings must provide a home-like environment where supervision, safety, and security are available for recipients, and social and recreational activities are provided in addition to the services necessary to prevent institutionalization.

maintain the recipient in the community; (2) each service listed on the plan of care (A) is of sufficient amount, duration, and scope to meet the needs of the recipient . . .

The provision of waiver services during a recipient's temporary absence from his or her community is governed by 7 AAC 130.231, which provides in relevant part as follows:

(a) The department will pay for home and community-based waiver services rendered to a recipient during a recipient's temporary absence from the recipient's community when the recipient travels to another location within the state or to an out-of-state destination, if the services

(1) are provided by a . . . waiver services provider that is certified . . .;

(2) are limited to the following: (A) day habilitation services under 7 AAC 130.260; (B) supported-living habilitation services under 7 AAC 130.265(e) ; (C) in-home support habilitation services under 7 AAC 130.265(i) ; (D) hourly respite care services under 7 AAC 130.280; (E) adult day services under 7 AAC 130.250;

(b) A request for services for a recipient under this section must show that

(1) the services are necessary to maintain the recipient's current level of functioning or to prevent placing the recipient at risk of institutionalization;

(2) the services provided during the recipient's temporary absence are the same as those provided when the recipient is in the recipient's community, and are at the level approved in the recipient's plan of care;

Based on the Division's partial denial letter, the issue in this case is whether Mr. V's POC amendment request satisfies the requirements of 7 AAC 130.231(b), quoted above.

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

The bases for denial of Mr. V's POC amendment request are limited to those expressed in the Division's notice dated October 29, 2014.⁴² The basis for the Division's denial of the services at issue in this case is summarized at the end of the notice: "[t]his [approved] level of support . . . seems to be in step with 7 AAC 130.231 and in alignment with services in place when he is in his

⁴² See *Algonquin Gas Transmission Company v. FERC*, 948 F.2d 1305, 1312 n. 12 (D.C.Cir.1991) (an administrative determination "must stand or fall on the grounds articulated by the agency" in that determination); *In Cherokee Nation of Oklahoma v. Norton*, 389 F.3d 1074, 1078 (10th Cir. 2004), *cert. denied*, 546 U.S. 812, 126 S.Ct. 333, 163 L.Ed.2d 46 (2005), (agency action must be upheld, if at all, on the basis articulated by the agency); *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 539, 101 S.Ct. 2478, 69 L.Ed.2d 185 (1981) (an agency's *post hoc* rationalizations are an insufficient basis for agency action); 2 Charles H. Koch, Jr., *Administrative Law & Practice* § 8.22 (2nd Edition 1997) ("[t]he number of cases rejecting agency efforts to justify actions after the fact shows the strength of the prohibition against *post hoc* rationalization"); compare 42 CFR 431.241(a) (only matters to be considered at a Medicaid hearing are those pertaining to the agency's action).

home and community."⁴³ Thus, the Division asserts that the services denied would have been excessive under 7 AAC 130.231 because they would have put Mr. V's total waiver service level above the level he normally receives, under his annual POC, while at home.

C. *Is Mr. V Entitled to the Services Requested?*

Mr. V's eligibility for the waiver services denied by the Division in this case is controlled by 7 AAC 130.231(b). That provision, which governs waiver services provided during a recipient's temporary absence from his or her community, requires in part that the recipient show that "the services provided during the recipient's temporary absence *are the same as those provided when the recipient is in the recipient's community, and are at the level approved in the recipient's plan of care*" (emphasis added).

In this case, during his 2013 - 2014 POC, Mr. V was authorized to receive group home habilitative services, 16 hours or 64 units per week (2.3 hours or 9.1 units per day) of one-with-one day habilitation services, 44 hours or 176 units per week (6.3 hours or 25.1 units per day) of group day habilitation - supported living services, and six hours or 24 units per week (0.9 hours or 3.4 units per day) of supported employment services. Thus, in aggregate terms, Mr. V was entitled to live at the group home,⁴⁴ at a cost of \$316.86 per day or \$2,218.02 per week,⁴⁵ and to receive 66 hours or 264 units per week (9.4 hours or 37.7 units per day) of waiver services.

Under his 2014 - 2015 POC, Mr. V is authorized to receive group home habilitative services, three hours or 12 units per week (.43 hours or 1.7 units per day) of one-with-one day habilitation services, 12 hours or 48 units per week (1.7 hours or 6.9 units per day) of group day habilitation - supported living services, and six hours or 24 units per week (0.9 hours or 3.42 units per day) of supported employment services.⁴⁶ In aggregate terms, Mr. V is thus currently entitled to live at the group home, at a cost of \$316.86 per day or \$2,218.02 per week,⁴⁷ and to receive a total of 21 hours per week (three hours per day) of hourly waiver services. The average daily cost of all services is \$428.20.

In contrast, under Mr. V's POC amendment request, Mr. V requested 10 hours or 40 units per day of one-with-one day habilitation services, and six hours or 24 units per day of group day

⁴³ Ex. D2.

⁴⁴ Note that "group home" is not construed as providing one-on-one services to the recipient 24 hours per day. To receive one-on-one services 24 hours per day, seven days per week, in all environments in which the recipient functions, the recipient must qualify for a so-called "acuity payment" under 7 AAC 130.267.

⁴⁵ See the Division's post-remand filing dated August 20, 2015.

⁴⁶ Ex. D2; Ex. 1 p. 1.

⁴⁷ See the Division's post-remand filing dated August 20, 2015.

habilitation - supported living services. Mr. V would not use his supported employment services, or incur group home charges, during his vacation. The average daily cost of the services requested by Mr. V's POC amendment request is \$513.28.

The ultimate question in this case comes down to whether the phrase "at the level approved in the recipient's plan of care," as used in 7 AAC 130.231(b), measures a recipient's service "level" based on a comparison of *the number of hours of services* being provided, with all types of services considered equal, or (instead) by the *cost of the services* being provided. If the number of hours, regardless of the mix of services, is determinative, then Mr. V should prevail, since he had 24 hours per day of group home, plus an average of three hours per day of other services, while living at home compared to the 16 hours per day of services her requested while on vacation. On the other hand, if service "level" is determined by cost, then the Division should prevail, since the \$684.24-per-day cost of the services requested by Mr. V for his vacation far exceeds the \$428.20-per-day cost of Mr. V's services while on vacation.

In cases in which the types of services provided during a recipient's temporary absence are the same as the types of services provided when the recipient is in his community, an hour-to-hour comparison is appropriate. It is an "apples to apples" comparison. However, where (as here) a recipient seeks a different "mix" of services during a temporary absence than the recipient has while in his community, a cost comparison is more appropriate.

The problem posed by a straight "hours-to-hours" comparison of services is apparent in the present case. Here, if each one-day unit of group home is considered to constitute 24 hours of services by itself, and hourly waiver services are considered in addition, then *any recipient living in a group home would be receiving more than 24 hours of waiver services each day*. By this logic, Mr. V is receiving about 27 hours of services per day under his current POC. This is nonsensical, and demonstrates that equating 24 hour group home care, with hourly waiver services, is an "apples to oranges" comparison.

In summary, this case involves a comparison of the service level provided in Mr. V's POC, which consists of group home plus three types of hourly waiver services, with the service level requested by Mr. V while on vacation, which consists of two types of hourly waiver services. Because the mix of services under the POC is different than the mix of services requested under the POC amendment, an hour-to-hour comparison does not provide an accurate comparison of service levels under 7 AAC 130.231(b). Accordingly, a cost approach should be used in such cases. Here, the cost of the services requested by Mr. V in his POC amendment is significantly higher than the

cost of the services provided to Mr. V under his existing POC. Under 7 AAC 130.231(b)(2), the service level approved for a recipient during a temporary absence cannot exceed the service level provided when the recipient is in his recipient's community. Here, approval of Mr. V's POC amendment request in its entirety, would, in real terms, have caused his service level while on vacation to substantially exceed his service level while in the community. Accordingly, the Division was correct to deny two of the requested ten hours per day of one-with-one day habilitation services, and two of the requested six hours per day of supported living services.

IV. Conclusion

The aggregate amount of waiver services which the Division approved for Mr. V during his vacation exceeded the minimum amount that the Division was required to approve under 7 AAC 130.231(b). Accordingly, the Division did not err in denying the four additional hours per day of waiver services sought by Mr. V in this case. The Division's denial of those four additional hours of waiver services, requested in Mr. V's proposed Plan of Care amendment, is therefore affirmed.

DATED this 24th day of September, 2015.

By: Signed
Name: Jared C. Kosin, J.D., M.B.A.
Title: Executive Director
Agency: Office of Rate Review, DHSS

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