

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

In the Matter of)	
)	OAH No. 15-0089-MDS
K D)	Agency No.
_____)	

Non-Adoption

The undersigned, in accordance with AS 44.64.060(e)(5), rejects, modifies or amends the interpretation or application of a statute or regulation in the decision as follows and for these reasons:

The proposed decision presents the issue in this case as whether SDS is legally allowed to pay for two people to assist Ms. D when she is receiving supported living services and day habilitation services. After reviewing the case, I find that the actual issue is better stated as whether two units of service can be billed by the same provider when the recipient only receives services that are equal to one unit of time.

The Plan of Care authorizes services by units of time. For supported living services and day habilitation services, the unit of time is 15 minutes. Each unit of service is then billed by the provider who is reimbursed for that unit of time based on the established rate for that service and the services / time received by the recipient. SDS cannot reimburse a provider for a specific service more than once during each 15 minute interval. This does not preclude a provider from using two or more employees to provide the service, but Medicaid will only reimburse one unit of service for supported living services or day habilitation services every 15 minutes the recipient receives the service, regardless of how the service is provided.

The proposed decision's interpretation would permit a single provider who sends two employees to assist in providing 15 minutes of day habilitation services to a recipient to be paid as if it were providing 30 minutes of day habilitation services to that recipient, despite the recipient only receiving 15 minutes of day habilitation services. The same would hold true for supported living services. Medicaid regulations do not allow that and SDS' Proposal for Action is correct that it would result in an overpayment under 7 AAC 105.260. A provider of these services can only be reimbursed per unit of service time, regardless of the number of staff it

deploys over that unit of service time. Accordingly, SDS' November 27, 2014 decision is affirmed as it relates to supported living services and day habilitation services.

DATED this 17th day of September, 2015.

By: Signed
Jared C. Kosin
Executive Director, Office of Rate Review
Department of Health and Social Services

APPEAL RIGHTS

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.

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

services, Ms. D uses parallel bars at home while performing walking exercises.⁷ The plan of care sought time for two people to assist Ms. D while she performed both types of therapy.⁸ According to Q D, Ms. D needs one person on each side of her for support when she does her pool exercises. She does not have the core strength to turn herself over in the water, and when she can't roll, she gets upset or scared. This creates a risk to herself and her aide if there is only one person helping. She also needs two people to assist her getting out of the pool.

When Ms. D performs her walking exercises at home, she has one person following immediately behind her with a wheelchair to catch her if she falls back, and a second person walking in front to catch her if she falls forward.⁹

In denying time for the second person to assist her, SDS said "The waiver does not provide for two staff during the same time period, as this is a duplication of services."¹⁰

III. Discussion

A. Issue Presented

The sole question at issue here is whether SDS is legally allowed to pay for two people to assist Ms. D when performing her physical therapy exercises at home and in the pool. While there was some dispute during the hearing regarding the need for two person assistance, only limited testimony was presented on that issue. The parties each indicated that the issue here was the proper interpretation of the regulations, and Ms. Shafer stated that the denial decision was based on those regulations, and not on a factual finding that the second person was not needed.¹¹

B. Applicable Regulations

A plan of care is developed for individuals who are eligible for Waiver services. The plan of care will be approved if SDS determines that "the services specified in the plan of care are sufficient to prevent institutionalization and to maintain the recipient in the community."¹² Each service provided must be "of sufficient amount, duration, and scope to meet the needs of the recipient."¹³

⁷ These services fall within Supported Living services instead of Day Habilitation services because they are provided in Ms. D's home.

⁸ Exhibit C & Hearing Recording.

⁹ Q D testimony.

¹⁰ Exhibit D2.

¹¹ SDS may examine whether there is a need for two people when reviewing future plans of care. If SDS decides there is no need, Ms. D has the right to appeal that decision.

¹² 7 AAC 130.217(b)(1).

¹³ 7 AAC 130.217(b)(2)(A).

Habilitation services are services provided at the recipient's home that "help a recipient to acquire, retain, or improve skills related to activities of daily living as described in 7 AAC 125.030(b)."¹⁴ Day habilitation services include services provided away from the recipient's residence to "promote the development of the skills needed for independence, autonomy, and full integration into the community."¹⁵

C. No Regulation Prohibits Paying For Two Providers When Two Are Needed

The parties agree that the parallel bar and pool exercises are appropriate services to meet the needs of Ms. D. If those services can only safely be provided by two people, then providing the services with only one person would not be of sufficient amount, duration, and scope to meet her needs. Nothing in the regulations cited by SDS specifically prohibits the use of two people at once to provide habilitation services.

SDS points to the recoupment regulations, and notes that if a provider is paid twice for the same service, that is considered an overpayment.¹⁶ Here, the provider would not be paid twice for the same service. The provider would be paid once for the service provided by the first assistant, and paid once for the service provided by the second assistant.

SDS also points to language in the plan of care. That clause says: "Providing agency certifies that the services of its home support habilitation or supported living habilitation are provided on a one to one basis."¹⁷ This language, which does not apply to the day habilitation services, would prevent a provider from having one person provide services to two or more recipients' simultaneously. In other words, the provider does not get paid several times for multiple recipients when the service is only provided once. This certification is not read to preclude simultaneous services from two people for one recipient. The service is being provided by two people, so there is no windfall or overpayment to the provider.

While it might be rare that two people are needed, Ms. D has made a *prima facie* showing that she does in fact need two assistants to help her with her exercise program. Nothing in the regulations relied on by SDS to deny her claim prohibit two assistants at the same time. Having two assistants is not a duplication of services because both are needed for Ms. D to safely participate in her exercise program.

¹⁴ 7 AAC 130.319(6). Locomotion, or walking, is an activity of daily living. 7 AAC 125.030(b)(3).

¹⁵ 7 AAC 130.260(b)(4).

¹⁶ 7 AAC 105.260(a)(10)

¹⁷ Exhibit F10.

IV. Conclusion

The regulations relied on by SDS do not prevent paying for two people to assist Ms. D with her exercise program. SDS's decision to deny that portion of her plan of care was based solely on SDS's interpretation of the regulations, and that interpretation is reversed. Because no other reason was relied on to deny this portion of the plan of care, the requested habilitation services should have been approved.

Dated this 11th day of August, 2015.

Signed _____
Jeffrey A. Friedman
Administrative Law Judge

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