

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

In the Matter of)	
)	OAH No. 15-0097-MDS
B C)	Division No.
_____)	

DECISION

I. Introduction

B C is a disabled adult who receives Medicaid Home and Community-based Waiver (Waiver) services. Her 2014 – 2015 Plan of Care (POC) included a request that she receive ten days per year, twelve hours each day, of day habilitation services to participate in out-of-town activities such as Special Olympics, the State Fair, other events and shopping. This was in addition to her normal provision of 32 hours per week of day habilitation services. Her 2013 – 2014 POC had been approved for ten days per year, ten hours each day, of day habilitation services for her to participate in out-of-town activities. The Division of Senior and Disabilities Services (Division) completely denied the request for the ten days per year, ten hours each day, of day habilitation services. Ms. C requested a hearing to challenge the denial.

Ms. C’s hearing was held on March 26, 2015. F C, Ms. C’s mother and legal guardian, represented her and testified on her behalf. Victoria Cobo represented the Division. Glenda Aasland and Corina Castillo-Shepherd testified for the Division.

The evidence shows that Ms. C should continue to receive the ten days per year, ten hours each day, for her out-of-town day habilitation services. However, her request to increase the hours per day to 12 hours, rather than the previous ten hours, is not supported by the evidence. The Division’s denial is therefore reversed in part and affirmed in part.

II. Facts

Ms. C is a disabled adult who lives with her parents in No Name. Ms. C’s 2013 – 2014 POC provided her with ten days per year, ten hours per day, of day habilitation services to participate in out-of-town activities (Special Olympics, State Fair), in addition to 32 hours per week of day habilitation. That POC was submitted to the Division on September 5, 2013. It was

for the time period from August 9, 2013 through August 8, 2014, and was approved by the Division on October 2, 2013.¹

Ms. C submitted a proposed POC for the period running from September 21, 2014 through September 20, 2015. That plan of care contained the same 32 hours per week of day habilitation services. It also contained ten days of day habilitation services to participate in out-of-town activities (Special Olympics, State Fair). However, it asked for 12 hour days rather than the ten hour days previously provided.²

The Division approved Ms. C's request for 32 hours per week of day habilitation services. It, however, entirely denied her request for the ten days per year, 12 hours each day, of day habilitation services to participate in out-of-town activities. The Division's reason for denying the out-of-town day habilitation services was because the POC "did not provide a justification as to why [Ms. C] requires a significantly higher level of support out of her community than when she is in her home community" and cited to regulation 7 AAC 130.231 as supporting the denial.³

III. Discussion

The Medicaid program has a number of coverage categories. One of those coverage categories is the Waiver program.⁴ The Waiver program pays for specified individual services to Waiver recipients, if each of those services is "sufficient to prevent institutionalization and to maintain the recipient in the community."⁵ The Division must approve each specific service as part of the Waiver recipient's POC.⁶

The type of waiver services at issue here, day habilitation services, are provided outside the recipient's residence, assist the recipient with social, self-help, behavior, adaptation, independence, and autonomy skills. They promote community integration, and reinforce skills taught in other settings.⁷ Day habilitation services may be provided outside a recipient's community.⁸

This case involves a mixed burden of proof. Given that Ms. C was previously allowed the out-of-town day habilitation services for ten days per year, ten hours each day, the Division has

¹ Ex. F, pp. 1 – 3, 11 - 12.

² Ex. E, p. 13.

³ Ex. D.

⁴ 7 AAC 100.002(d)(8); 7 AAC 100.502(d).

⁵ 7 AAC 130.217(b)(1).

⁶ 7 AAC 130.217(b).

⁷ 7 AAC 130.260(b).

⁸ 7 AAC 130.231.

the burden of proof to demonstrate that she should no longer receive that amount of day habilitation. Given that Ms. C is seeking to increase the amount of out-of-town day habilitation services, she has the burden of proof to demonstrate that those services should be increased to 12 hour days.⁹

The Division argued that there has been a change in the applicable regulations. It stated that the previous regulations allowed the type of requested day habilitation services and the current regulations do not. The Division's argument is not persuasive. All of the applicable regulations, 7 AAC 130.217, 7 AAC 130.231, and 7 AAC 130.260, were enacted in their current form effective July 1, 2013.¹⁰ They have not changed since July 1, 2013. They were the exact regulations in effect when Ms. C applied and was approved for these services in the fall of 2013. Ms. Castillo-Shepherd testified that time could not be allotted for day habilitation services for travel, because there the travel did not involve working on active goals. However, the 2013 – 2014 POC explicitly provided that travel time was involved.¹¹ Further, the day habilitation regulations do allow transportation under some circumstances,¹² and the Division did not raise travel as an issue in its denial letter.¹³ Given that the regulations have not changed, and the purpose of the requested day habilitation services has not changed, the Division has not met its burden of proof to deny the requested day habilitation services altogether.

Ms. C, on the other hand, had the burden of proof to demonstrate why she required 12 hours per day, ten days per year, for the requested day habilitation services, rather than the ten hours per day, ten days per year, previously provided. She did not provide any evidence that would support the increase. As a result, Ms. C's POC is approved for her to receive, in addition to the 32 hours per week previously approved, ten hours per day, ten days per year, for day habilitation services.

IV. Conclusion

The Division's denial of Ms. C's request for ten days per year of day habilitation services, for her to participate in out-of-town activities, is reversed. However, Ms. C's request to increase

⁹ 7 AAC 49.135.

¹⁰ Register 206.

¹¹ Ex. F, p. 12.

¹² 7 AAC 130.260(b)(2).

¹³ See Ex. D. Also see AS 7 AAC 49.070: "the department will state in the written [denial, termination, or reduction] notice the reasons for the proposed action, including the statute, regulation, or policy upon which that action is based."

the time to 12 hours per day, ten days per year, rather than the ten hours per day, ten days per year, is denied.

DATED this 10th day of June, 2015.

Signed _____

Lawrence A. Pederson

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 24th day of June, 2015.

By: *Signed* _____

Name: Lawrence A. Pederson

Title/Agency: Admin. Law Judge, DOA/OAH

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