

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

In the Matter of	)	
	)	OAH No. 15-0769-MDS
B L	)	Agency No.
_____	)	

**DECISION**

**I. Introduction**

B L receives services through the Home and Community Based Waiver program. Senior and Disabilities Services (SDS) reviewed a renewal Plan of Care. Most of the requested services were approved, but SDS denied an average of 10 hours per week of Supported Living services. Ms. L, through her legal guardians, appealed that denial.

A hearing was held on August 27, 2015 and September 3, 2015.<sup>1</sup> Ms. L was represented by her mother and legal guardian, N L. SDS was represented by a lay advocate, Victoria Cobo.

SDS' decision is affirmed because Ms. L, through her guardian, has not shown that the approved level of service is insufficient to meet her needs.

**II. Facts**

Ms. L is a 39-year-old woman diagnosed with septet optic dysplasia with hypopituitarism, mental retardation, and advanced osteoporosis.<sup>2</sup> She is legally blind.<sup>3</sup> Ms. L has been living in her own apartment with supported living services for about ten years.<sup>4</sup> For most of that time her Plan of Care authorized approximately 18 hours of services each day.<sup>5</sup>

In February of 2014, SDS received a renewal Plan of Care for March 22, 2014 through March 21, 2015.<sup>6</sup> This plan requested a continuation of the 18 hours of daily service that were previously authorized.<sup>7</sup> SDS approved all but an average of 14 hours a week of Supported Living services.<sup>8</sup>

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<sup>1</sup> The hearing was held before Administrative Law Judge Bride A. Seifert. The matter was reassigned to ALJ Jeffrey A. Friedman who has reviewed the entire record and listened to the audio recordings of the hearing.

<sup>2</sup> N L testimony (referred to hereafter as "L testimony"); Exhibit E, page 7.

<sup>3</sup> L testimony; Exhibit E, page 4.

<sup>4</sup> Exhibit E, page 7.

<sup>5</sup> L testimony.

<sup>6</sup> Exhibit F.

<sup>7</sup> Exhibit F, page 2.

<sup>8</sup> Exhibit F, page 1.

The denial of the 14 hours of services was appealed, but the family was unable to follow through with the hearing because of a series of unexpected emergencies that occurred that year.<sup>9</sup>

Another renewal Plan of Care was submitted covering March 22, 2015 through March 21, 2016.<sup>10</sup> This Plan of Care proposed returning Ms. L to 18 hours a day of habilitation services.<sup>11</sup> SDS approved Supported Living Services and Day Habilitation services that, together, provided approximately 16 hours per day of habilitative services.<sup>12</sup> SDS denied an additional 10 hours per week of Supported Living services.<sup>13</sup> This allowed Ms. L was slightly more habilitation services for the 2015/16 plan than she received in the prior year, but still less than had been approved for the 2013/14 Plan of Care.

N L has observed a number of changes since her services were reduced. She has had more medical problems, and more behavioral issues, and gained weight.<sup>14</sup> Staff had to be given a set of behavioral interaction guidelines to assist them in their interactions with Ms. L.<sup>15</sup> Ms. L's behavioral issues were serious enough to cause one of her long-term caregivers to stop working for Ms. L.<sup>16</sup>

Another recent change is that the service provider has changed the manner in which it provides staff for Ms. L. She used to have three primary staff members who worked shifts, with different staff members on weekends. Her primary staff had been with her for a long time, and Ms. L was used to them.<sup>17</sup> The agency has now gone to using a live-in staff person. This staff member is not allowed to work more than 15 hours a day.<sup>18</sup> Ms. L frequently wakes at night, and when she does, her live-in staff member must assist her.<sup>19</sup> That takes up working time that is then not available for assisting Ms. L during the day.<sup>20</sup>

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<sup>9</sup> L testimony.

<sup>10</sup> Exhibit E.

<sup>11</sup> Exhibit D, page 2.

<sup>12</sup> Exhibit D, page 2.

<sup>13</sup> Exhibit D, page 1.

<sup>14</sup> L testimony; letter from Dr. U.

<sup>15</sup> L testimony; Interaction Guidelines.

<sup>16</sup> L testimony; Exhibit E, page 7.

<sup>17</sup> L testimony.

<sup>18</sup> L testimony.

<sup>19</sup> L testimony; Care Calendar.

<sup>20</sup> One of her new goals, remaining safe at night, can only be worked on at night. Goal, Exhibit E, page 18.

### III. Discussion

#### A. *Applicable Law*

The Home and Community-Based Waiver program will pay for Supported Living habilitation services. Habilitation services are services that

(A) help a recipient to acquire, retain, or improve skills related to activities of daily living as described in 7 AAC 125.030(b) and the self-help, social, and adaptive skills necessary to enable the recipient to reside in a noninstitutional setting; and

(B) are provided in a recipient's private residence . . .<sup>[21]</sup>

Supported Living services are approved in units of 15 minutes each.<sup>22</sup> There is an expectation that some habilitation service will be provided during each approved unit of service.<sup>23</sup> Services must be of "sufficient amount, duration, and scope to meet the needs of the recipient . . ."<sup>24</sup>

#### B. *Ms. L's Plan of Care*

Ms. L benefits from having someone with her 24 hours a day. However, the Waiver program does not pay for supervision or companion services. Instead, the program pays for specific Supported Living services that help Ms. L acquire, retain, or improve her self-help, social, and adaptive skills for living in a non-institutional setting.<sup>25</sup> The question in this case is whether the approved number of hours is sufficient to meet Ms. L's needs and maintain her in the community instead of an institution.<sup>26</sup>

Both the 2014/15 Plan of Care and the 2015/16 Plan of Care contain sections describing progress towards acquiring, maintaining, and improving skills. The 2014/15 Plan looks at progress made during 2013/14 when Ms. L had an average of 18 hours a day of habilitative services. The 2015/16 Plan of Care looks at her progress after there had been a reduction in habilitative services. The description of Ms. L's progress during 2013/14 is not as detailed as the

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<sup>21</sup> 7 AAC 130.319(6).

<sup>22</sup> Testimony of Health Program Manager Glenda Aasland; Exhibit D.

<sup>23</sup> Aasland testimony.

<sup>24</sup> 7 AAC 130.217(b)(1).

<sup>25</sup> 7 AAC 130.319(6). *See also* 7 AAC 130.260 (day habilitation services). All services requested in the Plan of Care were approved except for 10 hours of Supported Living. This decision makes no finding as to whether other services that were not requested might be available. Instead, this decision focuses on whether Ms. L has shown a need for the additional 10 hours of Supported Living. If other services are identified that would assist Ms. L, she can request an amendment to the Plan of Care. 7 AAC 130.217(d)(1)(B).

<sup>26</sup> 7 AAC 130.217(b).

description of her progress during 2014/15.<sup>27</sup> However, to the extent they can be compared it appears that Ms. L has continued to make progress towards acquiring, maintaining, and improving skills after the reduction in services.

While she has been making progress towards her goals, there was a change during 2014:

B's overall progress on goals changed drastically in May. Once she was informed that her staff pattern would change from having five amazing staff members to only two, her progress began to decline.<sup>[28]</sup>

This change should have been expected:

B does well when she has regular staff that is consistent, who follows the schedule and rules of the home. . . . Changes in routine, in staff, or even venues when the routine remains the same can upset B.<sup>[29]</sup>

To the extent there has been change in Ms. L's behavior, medical issues, or progress towards her goals during 2014/15 change was more likely due to the change in staffing patterns than the reduction of the number of hours of Supported Living services. In addition, the evidence in the record does not establish that the change to a live-in staff model was because of the reduction in Supported Living services or that this staffing change would be reversed if additional Supported Living services were allowed.

N L has not shown that more Supported Living services are necessary in order to meet Ms. L's needs and maintain her in the community.<sup>30</sup>

#### **IV. Conclusion**

The only issue in this case is whether SDS erred in denying ten hours a week of Supported Living services. The evidence does not establish that Ms. L currently needs those additional hours of habilitative services to meet her needs. Accordingly, SDS' decision is affirmed.

Dated this 28<sup>th</sup> day of September, 2015.

*Signed*  
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Jeffrey A. Friedman  
Administrative Law Judge

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<sup>27</sup> Compare Exhibit F, page 11 to Exhibit E pages 8 and 9.

<sup>28</sup> Exhibit E, page 7.

<sup>29</sup> Exhibit F, page 12.

<sup>30</sup> Ms. L has the burden of proof because she is requesting additional services. However, even if this Plan of Care was viewed as a reduction from the 2013/14 year, SDS would have met its burden of proof. SDS has shown that Ms. L does not need habilitative service every 15 minutes for 18 hours of each day.

## Adoption

The undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 14<sup>th</sup> day of October, 2015.

By: Signed  
Name: Andrew M. Lebo  
Title: Administrative Law Judge

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