

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

In the Matter of:)
)
 O T) OAH No. 15-1264-MDS
) Agency Case No.
_____)

DECISION

I. Introduction

The issue in this case is whether O T is entitled to receive individual Supported Employment Services (SES) based on a Plan of Care (POC) amendment request submitted to the Division of Senior and Disabilities Services (Division) on July 20, 2015.¹

The Division denied the SES requested in Mr. T’s proposed POC amendment on two bases. First, the Division asserted that the POC amendment request was late-filed under the Division’s regulations, and did not contain any statement of unusual circumstances justifying the untimely filing.² Second, the Division asserted that a waiver services recipient is only entitled to SES funded through the Medicaid Home and Community-Based Waiver Services program after the recipient has demonstrated that the services requested are not available either through the Division of Vocational Rehabilitation (DVR), or through the public school system.³ The Division asserted that Mr. T’s amendment request failed to show that he had attempted to obtain SES-type services, through either DVR or the public schools, prior to requesting SES through the waiver services program.⁴

This decision concludes that the Division was correct to deny Mr. T’s amendment request. First, the Division was correct to deny the amendment request on procedural grounds because it was filed late, and because no legitimate basis to excuse the late filing was provided either in the amendment request itself, or at hearing. Second, the Division was correct to deny Mr. T’s amendment request on its merits because the request did not satisfy the substantive criteria, contained in the Division’s SES regulation, requiring that recipients seek to obtain SES-related services from other sources prior to requesting them through Medicaid. Accordingly, the

¹ Ex. D.

² Ex. D1.

³ Ex. D2. The services which are similar to SES, which are potentially offered through the public schools, are funded through the Individuals with Disabilities Education Act (20 USC 1400 - 1482), and the Rehabilitation Act (29 USC 730).

⁴ Ex. D2.

Division's denial of Mr. T's POC amendment request of July 20, 2015, which requested individual Supported Employment Services, is affirmed.⁵

II. Facts

A. Mr. T - Background Information

Mr. T is 21 years old.⁶ He has diagnoses of autism spectrum disorder, mood disorder, nighttime enuresis, and restless leg syndrome (RLS).⁷ He is six feet, seven inches tall and weighs about 275 pounds.⁸ He lives with his mother and his brothers, U and L.⁹ He and his family moved to No Name in 2014, and he began attending high school there. He is eligible to receive services through his school district until May 2017.¹⁰

Mr. T has sleep apnea and has a C-PAP mask/machine.¹¹ However, he is resistant to using his C-PAP. Also, he sometimes stays up playing his video games until 3:00 a.m. As a result, he has a very difficult time getting up in the morning, so his high school classes are generally scheduled in the afternoon.

Mr. T is verbal and literate, but he can be difficult to understand when he is very excited or agitated.¹² He has a hard time with non-verbal communication such as body-posturing, eye contact, facial expressions, and gestures.

Mr. T can be easily overwhelmed.¹³ When this occurs he may "shut down" and refuse to talk or interact with others, or he may act-out by yelling and/or swearing. When he has behavioral outbursts, he sometimes causes damage to walls, doors, furniture, and other property. Mr. T's sometimes-destructive behavior is directed only at inanimate objects, and not at people. However, because of his size, he can be very intimidating to service providers.

In addition to his brothers, Mr. T also has two friends that he enjoys engaging with.¹⁴ When indoors he likes watching movies and playing video games and card games. He also likes to go shopping at thrift stores to search for "good deals." When outdoors he enjoys target

⁵ This decision should not be read as indicating that Mr. T will not be eligible for Supported Employment Services if requested in future POC renewals or amendment requests. Rather, this decision simply finds that the information submitted in support of the request for SES *at issue in this case* was inadequate.

⁶ Ex. F6.

⁷ Ex. F13.

⁸ Ex. F12.

⁹ All subsequent factual findings in this paragraph are based on Exs. F7, F8, and F10 unless otherwise stated.

¹⁰ Ex. F12.

¹¹ All subsequent factual findings in this paragraph are based on Exs. F7, F8, and F13 unless otherwise stated.

¹² All factual findings in this paragraph are based on Exs. F12 - F13 unless otherwise stated.

¹³ All subsequent factual findings in this paragraph are based on Exs. F7, F8, and F13 unless otherwise stated.

¹⁴ All subsequent factual findings in this paragraph are based on Exs. F12 - F13 unless otherwise stated.

shooting, fishing, and rabbit hunting. He would like to learn archery so he can take up bow hunting.

As of July 2015, Mr. T had obtained a part-time job performing custodial and lawn-maintenance work for Facility X.¹⁵ As of July 2015 he was working 15 to 20 hours per week for Facility X.

B. Relevant Procedural History

Mr. T has received Medicaid Home and Community-Based Waiver services since 2014 or before.¹⁶ On July 15, 2015 a proposed renewal POC was submitted to the Division, on Mr. T's behalf, for the period from March 5, 2015 through March 4, 2016.¹⁷ The renewal POC document stated in relevant part that he was "currently working on obtaining his driver's license, GED, applying for DVR services, and applying at Job Corps."¹⁸

On August 4, 2015 the Division approved Mr. T's POC renewal application in part and denied it in part.¹⁹ The Division approved 4,160 units of individual Day Habilitation services, 2,496 units of Supported Living services, 2,080 units of Hourly Respite services, and 14 units of Daily Respite services.²⁰ The Division denied 80 units of escort services and 80 units of transportation services.²¹

On July 20, 2015, only five days after Mr. T's proposed renewal POC was submitted to the Division, the proposed POC amendment at issue here was submitted to the Division.²² The proposed POC amendment requested "148 units T2019 One on One Supported Employment" services for the 35-week period from July 7, 2015 through March 4, 2016.²³ The justification for the SES, set forth in the proposed POC amendment, was stated as follows:²⁴

[Mr. T] obtained employment independently working in janitorial services for Facility X and will receive Supported Employment (SE) support from No Name at Facility X. His schedule for work is Monday/Wednesday/Thursday 5:30 - 8:30 p.m., Sunday 1:00 - 5:00 p.m. This is [Mr. T] first real job. He has done some work, such as cutting grass and helping an individual clean their house. SE worked with [Mr. T] over his first two weeks of work to assess his support needs

¹⁵ All subsequent factual findings in this paragraph are based on Exs. F12 - F13 unless otherwise stated.

¹⁶ Ex. F.

¹⁷ Exs. F4 - F26.

¹⁸ Ex. F10.

¹⁹ Exs. F1 - F2.

²⁰ Ex. F1.

²¹ Ex. F1.

²² Exs. E1 - E16.

²³ Ex. E4.

²⁴ Ex. E3. Because this portion of the proposed POC amendment is important to this decision, it is quoted at length. Portions of the quoted material have been reformatted for purposes of brevity.

at this jobsite. [Mr. T] presents as a quick learner but can quickly forget what he was told and will discontinue working to socialize. With assistance and reminders, he has been steadily learning to incorporate what he knows with what is expected at the jobsite. [Mr. T] will ask questions if he is unsure about a task or situation, but needs multiple reminders about tasks He is very thorough while cleaning and has positive habits. [Mr. T] has not grasped that there is a timeframe the cleaning needs to be accomplished within. SE has been giving him shorter timeframes in which to complete his tasks. This has helped him realize how much work he is actually completing. SE will be implementing goals and objectives to assist him with his time management skills, modifying his cleaning to be faster while continuing to keep up with his high quality of work. While cleaning . . . SE noticed that [Mr. T] would skip around tasks and was not completing the tasks as outlined on the checklist. SE will be implementing objectives to assist [Mr. T] with remembering to use and follow his checklist while cleaning He will continue to utilize the checklist until he becomes proficient at the task and no longer needs it to remind him of the task progression. [Mr. T] likes to socialize and tell other individuals about his experiences SE will be working with him on remembering to talk while he works or wait[ing] until a break to socialize This amendment is late because the care coordinator [did not get] goals and objectives for SE until 7/17/15.

The Division construed Mr. T's POC amendment request as seeking between 140 units and 5,180 units of individual SES (between one hour per week and 37 hours per week for a period of 35 weeks).²⁵ On September 2, 2015 the Division notified Mr. T's mother and legal guardian that his proposed POC amendment, seeking Supported Employment services, had been denied.²⁶ The bases for the Division's denial of the SES were stated as follows:²⁷

The amendment submitted on [Mr. T's] behalf has an effective date of 06/22/15 and was received by SDS on 07/20/15, twenty (20) business days after the effective date. The care coordinator included the following statement: "This amendment is late because the care coordinator got goals and objectives for [SES] until 7/17/15." The department determines that this statement does not describe unusual circumstances that prevented timely completion/submission of this amendment and does not approve a later submission date.

. . .

According to [Mr. T's] current POC, "O is currently . . . applying for DVR services and applying at Job Corps." The POC also [states] that [Mr. T] still attends No Name High School and remains eligible to do so until May 2017. Per regulation, "the department will not pay for a service that is available under a program funded under 20 U.S.C. 1400 - 1482 (Individuals with Disabilities Education Act) or 29 U.S.C. 730 (Rehabilitation Act)." No updated information was offered or documentation provided describing [Mr. T's] attempts to access

²⁵ Ex. D1.

²⁶ Exs. D1 - D2.

²⁷ *Id.*

and make full use of these available resources prior to requesting waiver services. Because [Mr. T] remains eligible to receive educational supports until May 2017 and he has not made full use of Vocational Rehabilitation or other available community resources . . . the request for weekly [individual SES] is denied.

On September 21, 2015 Mr. T's mother and legal guardian requested a hearing to contest the Division's denial of the requested SES.²⁸ Mr. T's hearing was held on November 16, 2015. Mr. T did not participate, but was represented by his mother and legal guardian, K S; she participated in the hearing by phone and testified on her son's behalf. Mr. T's care coordinator, G X, also participated by phone and testified on Mr. T's behalf. The Division was represented by Laura Baldwin, who participated by phone. Summer Wheeler, a Health Program Manager employed by the Division, participated by phone and testified on the Division's behalf. The record closed at the end of the hearing.

III. Discussion

A. Applicable Burden of Proof and Standard of Review

Because Mr. T's amendment request seeks additional waiver services, Mr. T bears the burden of proof in this case.²⁹ The standard of review in a Medicaid "Fair Hearing" proceeding, as to both the law and the facts, is *de novo* review.³⁰ The administrative law judge may independently weigh the evidence and reach a different conclusion than did the Division's staff, even if the original decision is factually supported and has a reasonable basis in law.

B. 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.³¹ States may also, at their option, provide certain additional services, one of which is the Home and Community-Based Waiver Services program.³² Congress created the Waiver Services program to allow states to offer long-term care, not otherwise available

²⁸ Ex. C.

²⁹ 42 CFR § 435.930, 7 AAC 49.135.

³⁰ 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).

³¹ 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.

³² 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).

through Medicaid, to serve recipients in their own homes and communities instead of in nursing facilities.³³

Federal regulations require that both mandatory *and* optional Medicaid services “be sufficient in amount, duration, and scope to reasonably achieve [their] purpose.”³⁴ However, states may “place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.”³⁵

2. Relevant State Medicaid Regulations

The procedure for amending a Plan of Care is set forth in 7 AAC 130.217(d), which provides in relevant part as follows:

- (d) A recipient’s care coordinator shall
 - (1) prepare an amendment to the recipient’s plan of care if . . . (B) the recipient needs an increase or decrease in the number of service units approved under (a) - (c) of this section or in a prior amendment to the plan of care;
...
 - (3) submit the plan of care amendment to the department not later than 10 business days after the date of a change in circumstances or a change in the number of service units, unless the care coordinator has submitted to the department written documentation of unusual circumstances that prevent timely completion of a plan of care amendment, and the department has approved a later submission date.

The generally applicable Medicaid regulation, requiring the exhaustion of other sources of services prior to requesting payment through Medicaid, is 7 AAC 160.200. That regulation provides in relevant part as follows:

- (a) The department will pay for a service, prescription drug, or supply only to the extent it is a covered service under AS 47.07.030 and 7 AAC 105 - 7 AAC 160 and *only after the recipient has made full use of any other third-party resources available to pay for that service*, prescription drug, or supply [Emphasis added].
...

³³ 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].

³⁴ 42 CFR 440.230(b).

³⁵ 42 CFR 440.230(d); *see also DeLuca v. Hammons*, 927 F. Supp. 132 (S.D.N.Y.1996).

(e) In this section, “has made full use of” means the recipient has applied for, reasonably cooperated with, and to the extent possible has maintained eligibility for, a third party that will pay for a service . . . otherwise covered under AS 47.07.030 and 7 AAC 105 - 7 AAC 160.

The specific type of waiver services at issue here, “Supported Employment Services,” are governed by 7 AAC 130.270, which provides in relevant part as follows:

(c) The department will not pay for . . . (7) a service that is available under a program funded under 20 U.S.C. 1400 - 1482 (Individuals with Disabilities Education Act) or 29 U.S.C. 730 (Rehabilitation Act).

C. Were the Division’s Reasons for Denying Mr. T’s Amendment Request Supported by its Regulations?

Initially, it is axiomatic that the Division’s bases for denial of Mr. T’s request for Supported Employment services are limited to the reasons expressed in the Division’s denial letter dated September 2, 2015; the Division may not assert additional bases for denial at hearing.³⁶ A fair reading of the Division’s denial/notice letter reveals two asserted bases for denial.³⁷ These are:

1. Mr. T’s amendment request was submitted more than 10 days after its proposed effective date, contrary to the requirements of 7 AAC 130.217(d)(3), and no evidence was provided of any unusual circumstances which prevented the timely submission of the amendment request.
2. Pursuant to 7 AAC 130.270(c)(7), waiver services cannot be used to pay for a service that is available under a program funded under 20 U.S.C. 1400 - 1482 (Individuals with Disabilities Education Act) or 29 U.S.C. 730 (Rehabilitation Act); Mr. T’s amendment request did not show that the services he seeks are unavailable from another agency under one or both of these acts.

The Division’s bases for denial of Mr. T’s amendment request are discussed in turn below.

1. Was the Division Correct to Deny Mr. T’s Amendment Request Based on Untimely Submission?

The Division’s first basis for denial basically asserts that Mr. T’s POC amendment request was filed late. The document states a proposed effective date of June 22, 2015.³⁸ The

³⁶ See 42 CFR 431.241(a) (only matters to be considered at a Medicaid hearing are those pertaining to the agency’s action); compare *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”).

³⁷ Exs. D1 - D2.

³⁸ Ex. E1.

Division's date stamp indicates that the document was submitted on July 20, 2015.³⁹ The 2015 calendar indicates that there were 20 business days (days not including weekends and holidays) from June 22, 2015 through July 20, 2015.

The relevant regulation, 7 AAC 130.217(d)(3), requires that proposed POC amendments be submitted to the Division "not later than 10 business days after the date of a change in circumstances or a change in the number of service units." In this case, the proposed POC amendment was submitted 20 days after its proposed effective date (*i.e.* 20 days after the "date of a change . . . in the number of service units"). Accordingly, Mr. T's proposed amendment request was in fact late-filed.

Regulation 7 AAC 130.217(d)(3) does contain an exception which allows an amendment request to be late-filed when the recipient provides "written documentation of unusual circumstances that prevent timely completion of a plan of care amendment, and the department has approved a later submission date." Mr. T seeks to bring his amendment request within this exception, based on the assertion that his care coordinator was not provided with the "statement of goals and objectives" necessary to complete the amendment request until July 17, 2015.⁴⁰

Ms. X's testimony, that she did not receive the "statement of goals and objectives" necessary to complete the amendment request until July 17, 2015, was certainly credible, and is accepted here as true. However, Ms. X's testimony does not describe any "unusual circumstances" which would have prevented Facility X from providing Ms. X with the "statement of goals and objectives" in time to allow the amendment request to be timely filed.

Finally, the phrasing of 7 AAC 130.217(d)(3) also indicates the intent that the recipient or care coordinator seek an extension of time for filing a POC amendment request *before the amendment request is late*. In this case, Mr. T's request for a filing extension was made after the POC amendment request was already late. Accordingly, the Division was correct to deny Mr. T's POC amendment request for Supported Employment Services based on untimeliness.

2. *Was the Division Correct to Deny Mr. T's Amendment Request Based on a Failure to Demonstrate Prior Exhaustion of Non-Medicaid Resources?*

The Division's second basis for denying Mr. T's POC amendment request asserts that Mr. T failed to show that he had already "made full use of any other third-party resources," and specifically any resources available under 20 U.S.C. 1400 - 1482 (the Individuals with

³⁹ Ex. E1.

⁴⁰ Ex. E3.

Disabilities Education Act) or 29 U.S.C. 730 (the Rehabilitation Act), *prior to* seeking SES through the Medicaid waiver program. It is true that Mr. T's POC renewal states that, as of July 2015, Mr. T was "applying for DVR services and applying at Job Corps."⁴¹ However, this statement does not indicate that SES-related services *are not* available through DVR or the Job Corps. Likewise, there is nothing in Mr. T's POC amendment request or his POC renewal indicating that Mr. T sought SES-related services through the public school system. Finally, at hearing, neither Ms. S nor Ms. X were able to testify unequivocally that they had sought to obtain SES-related services for Mr. T through these other sources, and had found such services to be unavailable.

In summary, the Medicaid program is intended to be the provider of last resort, with all other available resources having been exhausted prior to its use.⁴² Mr. T failed to provide evidence, either in his POC documents or at hearing, that he has sought to obtain SES-type services through sources other than Medicaid, as required by the Division's regulations. Accordingly, the Division was correct to deny Mr. T's request for SES on that basis.

IV. Conclusion

The Division was correct to deny Mr. T's POC amendment request on procedural grounds because it was filed late, and because no legitimate basis to excuse the late filing was provided either in the amendment request itself, or at hearing. The Division was also correct to deny Mr. T's amendment request on its merits because the request did not satisfy the substantive criteria, contained in the Division's SES regulation, requiring that recipients seek to obtain SES-related services from other sources prior to requesting them through Medicaid. Accordingly, the Division's denial of Mr. T's POC amendment request of July 20, 2015, which requested individual Supported Employment Services, is affirmed.⁴³

DATED this 31st day of December, 2015.

Signed

Jay Durych

Administrative Law Judge

⁴¹ Ex. F10.

⁴² *Wesley Health Care Center, Inc. v. DeBuono*, 244 F.3d 280 (2nd Cir. 2001); *Rehabilitation Association of Virginia, Inc. v. Kozlowski*, 42 F.3d 1444 (4th Cir. 1994); *Miller v. Gorski Wladyslaw Estate*, 547 F.3d 273 (5th Cir. 2008); *Caremark, Inc. v. Goetz*, 480 F.3d 779 (6th Cir. 2007); *Ahlborn v. Arkansas Department of Human Services*, 397 F.3d 620 (8th Cir. 2005).

⁴³ Again, this decision should not be read as indicating that Mr. T will not be eligible for Supported Employment Services if requested in future POC renewals or amendment requests. Rather, this decision simply finds that the information submitted in support of the request for SES *at issue in this case* was inadequate.

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 11th day of January, 2016.

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.]