

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

In the Matter of:)
)
 E J) OAH No. 15-1499-MDS
) Agency Case No.

DECISION

I. Introduction

The issue in this case is whether E J is entitled to more units of supported living services (SLS) than were most recently approved for him by the Division of Senior and Disabilities Services (DSDS or Division).¹ Mr. J requested 3,473 units of supported living services for the period from October 7, 2015 through November 30, 2015, and 19,510 units of supported living services for the period from December 1, 2015 through October 6, 2016.² The Division approved all of the SLS requested for the period from October 7, 2015 through November 30, 2015, but denied 4,737 units out of the total of 19,510 units requested for the period from December 1, 2015 through October 6, 2016.³ The Division denied the 4,737 units of SLS at issue based on the assertion that the waiver services and PCA services which the Division has approved for Mr. J already total more than 18 hours per day; Mr. J must sleep at least six hours per day; the SLS denied by the Division would thus necessarily cover time that Mr. J is asleep; and habilitation services (of which SLS is one type), as those services are defined by regulation, cannot be provided to a recipient who is sleeping.⁴

This decision concludes that, under 7 AAC 130.319(6), supported living services must be skill-building services, and therefore cannot be utilized to provide night-time stand-by services for a waiver recipient. Mr. J's approved waiver and PCA services already cover his waking hours, so the SLS denied by the Division would necessarily have been rendered while Mr. J is asleep. Accordingly, the Division was correct to deny 4,737 units of the total of 19,510 units requested for the period from December 1, 2015 through October 6, 2016. The Division's decision is therefore affirmed.

¹ Ex. D; Ex. F; Ex. 6.

² Ex. D; Ex. E25.

³ Exs. D1, F. The Division also denied 1,760 units of hourly respite services (Ex. D1), but the parties advised the administrative law judge at hearing that the respite services were no longer at issue.

⁴ Exs. D2, D3.

II. Facts

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

Mr. J is 22 years old.⁵ He was born eight weeks premature and was anoxic at birth.⁶ When he was eight months old he was diagnosed with spastic cerebral palsy, a seizure disorder, and developmental delays. When he was two years old he began using a wheelchair for mobility. At age three he underwent multiple surgical procedures to treat his hip contractures, and spent an entire year in a full body cast. When he was nine he had another hip surgery followed by a prolonged recovery period. When he was 19 he had a steel rod implanted along his spine to help counteract his spinal curvature.⁷ Later the same year he broke one of his legs and had a steel rod implanted to re-set the break.⁸

Mr. J is five feet, five inches tall but weighs only 90 pounds.⁹ He has optic nerve hypoplasia, which limits his visual field and reduces his visual acuity to between 20/70 and 20/200.¹⁰ He has thin and sensitive skin, muscle atrophy, and one of his doctors has remarked that he has the bones of an 80-year-old man.¹¹ He has painful muscle contractures, and over time these have caused his lower torso and legs to pull to the left.¹² He also has grand mal seizures, especially when he is sick or overly tired, and he sometimes has seizures during the night.¹³ He averages about one seizure every three to four months.¹⁴ One of his seizures lasted for three hours and required a trip to a hospital emergency room (ER).¹⁵

Mr. J receives the majority of his nutrition via mouth, but has choking problems and therefore receives supplemental nutrition and hydration via G-tube.¹⁶ He has urinary incontinence, but is able to sit on a special toilet seat for his bowel movements. He has limited gross motor skills and poor fine motor skills. He sleeps in a special bed. He uses a Hoyer lift to transfer from one surface to another. He has a power wheelchair for locomotion, but it is currently in need of repairs, so he must be pushed in his manual wheelchair. He uses a shower chair when he bathes. He is completely dependent on caregivers for body positioning, transfers, and locomotion.

⁵ Ex. E6.

⁶ All factual findings in the remainder of this paragraph are based on Ex. E20 unless otherwise stated.

⁷ Ex. E9.

⁸ Ex. E9.

⁹ Ex. E6.

¹⁰ Ex. E48.

¹¹ Exs. E7 - E9.

¹² Ex. E7.

¹³ Ex. E7.

¹⁴ Ex. E45.

¹⁵ X J's hearing testimony.

¹⁶ All factual findings in this paragraph are based on Exs. E8 and E45 - E46 unless otherwise stated.

Mr. J's ability to communicate is limited.¹⁷ He has good receptive language skills, and generally understands what others are saying. However, he is basically non-verbal, and communicates primarily using nods, head shakes, and about 20 different signs or gestures.

Mr. J lived and was cared for at his parents' (and subsequently his mother's) home through 2011, when he became 18 years old.¹⁸ In January 2012, he moved into a group home (Bright Horizon Homes or BHH). However, after moving to BHH, Mr. J began getting sick more frequently than usual, and required a trip to the ER for dehydration. Accordingly, in January 2013, he moved back into his mother's home.

During 2013, Mr. J's parents finished building a second home about half a mile away from their first home.¹⁹ Ms. J had hoped to operate one of the two homes as an assisted living home (ALH) and live there with her son (in his capacity as her son rather than as a paying ALH client).²⁰ However, Ms. J testified that the arrangement she envisioned could not be implemented under current waiver services and/or PCA regulations.²¹ Accordingly, Mr. J's parents live in their original home, and Mr. J lives in the new home, which was built specifically to accommodate his needs.²² Although the specifics of this housing arrangement are somewhat confusing, there is no dispute that, for the next three years, Mr. J lived in his own residence with 24-hour-per-day paid staffing.²³

B. Relevant Procedural History

Mr. J has received Medicaid Home and Community-Based Waiver services (waiver services) since 2010 or before.²⁴ Prior to October 2015, Mr. J received his waiver services through the waiver for children with complex medical conditions (the CMCC waiver).²⁵ However, because he is now an adult, his current (2015 - 2016) plan of care (POC) was submitted under the waiver for adults with physical and developmental disabilities (the APDD waiver).²⁶

Under his 2011 - 2012 POC, Mr. J received up to 18 hours per day of supported living services.²⁷ Mr. J's 2012 - 2013 POC is not in the record. Under his 2013 - 2014 POC, Mr. J was authorized to receive up to 18 hours per day of SLS, up to 4.3 hours per day of day habilitation

¹⁷ All factual findings in this paragraph are based on Exs. E18 - E19 and X J's hearing testimony unless otherwise stated.

¹⁸ All factual findings in this paragraph are based on Ex. 5 pp. 10 - 11 unless otherwise stated.

¹⁹ All factual findings in this paragraph are based on Ex. 3 pp. 11 - 12 unless otherwise stated.

²⁰ X J's hearing testimony.

²¹ X J's hearing testimony.

²² Ex. 3 pp. 11 - 12; Ex. 6 p. 1; X J's hearing testimony.

²³ Ex. 3 pp. 11 - 12; Ex. 1 p. 9.

²⁴ Ex. 5 p. 9.

²⁵ Ex. 5 p. 3; Ex. 4 p. 3; Ex. 3 p. 3; Ex. E pp. 2, 3.

²⁶ Ex. E.

²⁷ Ex. 4 p. 6; Ex. 5 p. 17.

services, plus up to 2.4 hours per day of PCA services.²⁸ Finally, under his 2014 - 2015 POC, Mr. J was authorized to receive up to 18 hours per day of SLS, up to 4.3 hours per day of day habilitation services, and plus up to 2.4 hours per day of PCA services.²⁹

On September 16, 2015, Mr. J's mother and guardian submitted his proposed 2015 - 2016 POC, which is the POC at issue in this case.³⁰ The proposed POC requested up to 18 hours per day of SLS, up to 4.3 hours per day of day habilitation services, plus up to 2.3 hours per day of PCA services.³¹ Thus, Mr. J's proposed 2015 - 2016 POC requested almost exactly the same amount of services as the Division had approved under his last two POCs.

On November 16, 2015, the Division issued a notice approving Mr. J's proposed POC renewal in part and denying it in part.³² On December 21, 2015, the Division issued an amended notice.³³ The Division's amended notice approved 5,468 units of one-on-one day habilitation services for the period from October 7, 2015 through October 6, 2016 (an average of 20 hours per week for school days, and 30 hours per week for non-school days); 3,473 units of SLS for the period from October 7, 2015 through November 30, 2015 (an average of 110.5 hours per week); 5,385 units of SLS for the 105 school days between December 1, 2015 and October 6, 2016 (an average of 89.75 hours per week); 9,388 units of SLS for the 206 non-school days between December 1, 2015 and October 6, 2016; and 320 units of hourly respite services for the period from October 7, 2015 through November 30, 2015.³⁴ The Division's amended notice denied 4,737 units of SLS for the period from December 1, 2015 through October 6, 2016 (an average of 26.75 hours per week); and 1,760 units of hourly respite services for the period from December 1, 2015 through October 6, 2016 (an average of 10 hours per week).³⁵ The basis for denial of the 4,737 units of SLS, as stated in the Division's amended notice of December 21, 2015, was as follows:³⁶

²⁸ Ex. 3 pp. 19 - 27. Thus, under his 2013 - 2014 POC, Mr. J was authorized to receive up to 22.3 hours per day of waiver services, plus another 2.4 hours of PCA services, for a total of over 24 hours of Medicaid services per day.

²⁹ Ex. 1 pp. 19 - 30. Thus, under his 2014 - 2015 POC, Mr. J was again authorized to receive up to 22.3 hours per day of waiver services, plus another 2.4 hours of PCA services, for a total of over 24 hours of Medicaid services per day.

³⁰ Ex. E.

³¹ Exs. E21 - E33.

³² Ex. D. Because the original notice was later superseded by an amended notice, it is not necessary to discuss the original notice in any detail.

³³ Ex. F.

³⁴ Ex. F1.

³⁵ Ex. F2.

³⁶ Exs. F2 - F3. At hearing, Ms. J stated that she was no longer contesting the Division's denial of a portion of the hourly respite services originally requested in the POC. Accordingly, it is not necessary to discuss the Division's denial of those respite services here.

The services requested on the renewal POC and provided by [the PCA program] and school services, on school and non-school days, equal 24 hours per day. By nature, waiver, PCA, and school services are activities that occur during an individual's waking hours.

....

By definition, habilitation services occur while the recipient is awake and able to actively participate in skill-building activities.

....

To better understand the array of services E receives and determine the need for services requested on this POC, SDS requested 24-hour care calendars. The 24-hour care calendars indicate that . . . [t]he services E currently receives between PCA, Supported Living, and Day Habilitation on non-school weeks equal an average [of] 172 hours per week of services, which exceeds the 168 total hours there are in a week.

....

The services requested on the renewal POC, added to the 16.25 hours per week of PCA services, equal 24 hours per day. Supported Living requires active participation from the recipient, and PCA involves ADLs and IADLs which, by their nature, occur while one is awake. It is understood that an individual would require a minimum of 6 hours of sleep per night. By definition, Supported Living cannot occur while one is sleeping. Because E's combined waiver and PCA services currently exceed 18 hours per day and do not account for time he is sleeping [and] therefore unable to participate in habilitative activities, SDS has approved his habilitative waiver services to equal an average maximum of 18 hours per day combined with PCA.

On November 30, 2015, Mr. J's mother / legal guardian, X J, requested a hearing to contest the Division's determination.³⁷

Mr. J's hearing was held on January 8, 2016. Mr. J attended and observed the proceedings. He was represented by his mother / guardian X J, who represented her son and testified on his behalf. Mr. J's care coordinator, O T, and his health manager, U K, also attended the hearing and spoke or testified on Mr. J's behalf. Victoria Cobo attended the hearing and represented the Division. Vita Castellana and Annette Callies attended the hearing and testified for the Division. The record closed at the end of the hearing.

III. Discussion

A. Medicaid Home and Community-Based Waiver Services Program - Overview

1. Relevant Federal Medicaid Statutes and Regulations

³⁷ Ex. C.

States participating in Medicaid must provide certain mandatory services under a state medical assistance plan.³⁸ States may also, at their option, provide certain additional services, one of which is the Home and Community-Based Waiver Services program.³⁹ 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.⁴⁰

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.⁴¹

2. Relevant State Medicaid Regulations

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 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 specific type of waiver services at issue in this case, "supported-living habilitation services," are defined by regulation 7 AAC 130.265 in relevant part as follows:⁴²

(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.

³⁸ 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.

³⁹ 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).

⁴⁰ 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].

⁴¹ 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").

⁴² 7 AAC 130.265.

(e) The department will pay for supported-living habilitation services under (d) of this section subject to the following limitations:

(1) the department will not pay for more than 18 hours per day of supported-living habilitation services from all providers combined, unless the department determines that the recipient is unable to benefit from (A) other home and community-based waiver services; or (B) services provided by family members or community supports;

(2) the department will approve other direct care services for a recipient under (d) of this section, if the recipient's care coordinator confirms in writing and the department is satisfied that those services do not supplant or duplicate services provided by family members or community supports; for purposes of this paragraph, "direct care services" include (A) personal care services under 7 AAC 125.010 - 7 AAC 125.199; (B) chore services under 7 AAC 130.245; (C) transportation services under 7 AAC 130.290; and (D) meal services under 7 AAC 130.295;

Finally, 7 AAC 130.319(6) defines "habilitation services" as 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 non-institutional setting; and

(B) are provided in a recipient's private residence, an assisted living home licensed under AS 47.32, or a foster home licensed under AS 47.32;

B. The Applicable Burden of Proof and Standard of Review

The Division is seeking to reduce Mr. J's existing waiver services level, which he has been receiving since approximately 2013. The Division therefore has the burden of proving, by a preponderance of the evidence, either that Mr. J's need for waiver services has decreased, or that the amount of services previously authorized was in excess of the level authorized by law.⁴³

The standard of review in a Medicaid "Fair Hearing" proceeding, as to both the law and the facts, is *de novo* review.⁴⁴ Under this standard, 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. Also, in this case, evidence was presented at hearing that was not originally available to the Division.

⁴³ See 42 CFR 435.930, 2 AAC 64.290(e), 7 AAC 49.135, and *Alaska Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

⁴⁴ 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).

C. *Is Mr. J Entitled to the Supported Living Services at Issue?*

It became clear at hearing that there is no material disagreement between the parties as to the facts relevant to this case. Both Mr. J's representative and the Division's witnesses both acknowledged that, in prior POCs, the Division had approved amounts of supported living services which were the same or similar to the amount of SLS requested in Mr. J's current POC.⁴⁵ There was likewise no dispute that the Division had previously approved POCs which, when combined with Mr. J's PCA services, authorized more than 24 hours of care per day.⁴⁶ There was also no dispute that, although Mr. J's sleep cycle varies somewhat between weekdays and weekends, he is generally put to bed at about 10:30 p.m. and awakened at about 6:20 a.m.⁴⁷ Finally, there was no real dispute that, because of his night-time seizures, muscle cramps, incontinence, risk of pressure sores, and need for night-time medications, Mr. J requires night-time monitoring and periodic repositioning and intervention. In other words, there is no real dispute that Mr. J requires *some form of care* 24 hours per day. Instead, the issue in dispute in this case is whether supported living services can be authorized for a recipient of waiver services for hours during which the recipient is asleep.⁴⁸ This is a purely legal issue.

At hearing, Mr. J's representative raised the threshold issue of whether the fact that the Division approved supported living services for sleeping hours in *prior* POCs prevents the Division from denying sleep-time SLS *now*. In *Denali Citizens Council v. State, Dept. of Natural Resources*, 318 P.3d 380, 387 - 388 (Alaska 2014), the Alaska Supreme Court stated:

It is well-established in administrative law that when an agency departs from a prior policy, it must give “a reasoned explanation ... for disregarding facts and circumstances that underlay or were engendered by the prior policy.” [Footnote omitted.] Although the agency “need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one,” it must “display awareness that it is changing position” and “may not ... depart from a prior policy *sub silentio*.” [Footnote omitted]. Importantly, “the law does not require the explanation to be exhaustive.” [Footnote omitted].

In this case, it is clear that the Division's prior approval of POCs providing supported living services during a recipient's sleep-time was an accident rather than a policy. Vita Castellana testified credibly at hearing that the Division's prior approval of sleep-time SLS in Mr. J's past POCs was simply an error. Administrative agencies are allowed to correct past errors and adopt a

⁴⁵ This had definitely happened since 2014 and may have been happening since 2012 (Ex. 6 p. 1).

⁴⁶ This had definitely happened since 2014 and may have been happening since 2012 (Ex. 6 p. 1).

⁴⁷ Ex. 2 pp. 1 - 8. Thus, Mr. J generally sleeps about eight hours per day.

⁴⁸ Ex. 6 p. 1. The Division argues no; Ms. J argues yes.

course of action that corresponds to controlling statutes and regulations.⁴⁹ Accordingly, the Division's past approval of sleep-time SLS does not, in and of itself, require the Division to continue approving those services.

Turning to the issue of whether sleep-time SLS may be authorized under the Division's current regulations, it is clear that the supported living services at issue here are a type of habilitative service; the regulation authorizing SLS, 7 AAC 130.265, is titled "Residential Habilitation Services." Accordingly, the definition of "habilitation services" under 7 AAC 130.319(6) applies to SLS authorized under 7 AAC 130.265(d-e).

This brings us to the crux of the matter. Alaska Medicaid regulation 7 AAC 130.319(6)(A) requires that "habilitation services," and thus SLS, "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 non-institutional setting." In short, under 7 AAC 130.319(6)(A), SLS may only be authorized for activities involving skill building or skill retention. Simply put, time spent sleeping does not involve skill building or skill retention. Rather, sleep, by definition, involves rest, the *absence of activity*. Accordingly, under 7 AAC 130.319(6)(A), the Division may not properly authorize SLS for periods in which the recipient is asleep. This is the case even where, as here, the recipient requires monitoring and occasional intervention while asleep.

D. Though the Result in This Case May Seem Unfair, the Division Does Not Have the Authority to Disregard Applicable Medicaid Regulations

The Division did not dispute that Mr. J has a significant need for services 24 hours per day, and the record supports such a finding. However, the Division is required to follow state and federal Medicaid regulations as currently written.⁵⁰ Likewise, the Office of Administrative Hearings does not have the authority to create exceptions to those regulations.⁵¹ To provide sleep-time SLS to Mr. J would require changes in law at the state level, and possibly at the federal level as well. Those changes cannot be made through the hearing process.⁵²

⁴⁹ See generally *Staton v. American Mfrs. Mut. Ins. Co.*, 207 S.W.3d 456 (Ark. 2005); *Virginia Dept. of Health v. NRV Real Estate, LLC*, 677 S.E.2d 276 (Virginia 2009); *Minnesota Transitions Charter School v. Commissioner of Minnesota Dept. of Education*, 844 N.W.2d 223 (Minn. 2014).

⁵⁰ "Administrative agencies are bound by their regulations just as the public is bound by them." *Burke v. Houston NANA, L.L.C.*, 222 P.3d 851, 868 – 869 (Alaska 2010).

⁵¹ See 7 AAC 49.170 (limits of the hearing authority).

⁵² Fortunately, as discussed at hearing, there are alternative 24 hour services which may be of assistance to Mr. J. These include waiver-funded assistive living facilities, group homes, and possibly family habilitation services.

IV. Conclusion

Under 7 AAC 130.319(6)(A), supported living services must be skill-building services, and therefore cannot be utilized to provide sleep-time services for a waiver recipient. Mr. J's approved waiver and PCA services already cover his waking hours, so the SLS denied by the Division would necessarily have been rendered while Mr. J is asleep. Accordingly, the Division was correct to deny 4,737 units of the total of 19,510 units of SLS requested for the period from December 1, 2015 through October 6, 2016. The Division's denial of those 4,737 units of SLS, requested in Mr. J's September 2015 Plan of Care renewal, is therefore affirmed.

DATED this 18th day of February, 2016.

Signed _____
Jay Durych
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 29th day of February, 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.]