

## Non-Adoption Options

B. The undersigned, by delegation from the Commissioner of Health and Social Services and in accordance with AS 44.64.060(e)(3), revises the enforcement action, determination of best interest, order, award, remedy, sanction, penalty, or other disposition of the case as follows and adopts the proposed decision as revised:

- i. This decision is upheld based solely on the unique factual and procedural history of this case.

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 13th day of January, 2016.

By: Signed  
Douglas Jones  
Medicaid Program Integrity Manager  
Department of Health and Social Services

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

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

In the Matter of: )  
 )  
 K T ) OAH No. 16-0790/0791-MDS  
 ) Agency No.  
\_\_\_\_\_)

**DECISION**

**I. Introduction**

K T receives Medicaid Home and Community-Based Waiver (Waiver) services. She was approved to receive 10 hours of chore services as part of her Waiver plan of care for six months of her 2015 – 2016 plan of care year, with no chore services thereafter. The reason she was allowed chore services for only the six months of her plan of care year was because her husband, with whom she lives, had a physician’s note stating that he would “be unable to do any lifting > 10 pounds or participate in housecleaning for 6 months.” Ms. T did not file an appeal to challenge the limited period of chore services.

In June 2016, Ms. T filed a request to amend her 2015 – 2016 Waiver plan of care to add the 10 weekly hours of chore services back into the remaining portion of that plan year. She also filed a renewal Waiver plan of care, for the 2016 – 2017 plan of care year, again asking for 10 weekly hours of chore services. The Division partially granted both requests, providing Ms. T with five weekly hours of chore services. A review of the evidence demonstrates that Mr. T is no more able to help assist with chore services than when Ms. T was first approved to receive 10 weekly hours of chore services in 2015. Given that Mr. T’s condition, which justified Ms. T’s initial 10 weekly hours of chore services, has not improved, and given that there has been no regulatory change since that first approval, Ms. T has met her burden of proof and established her eligibility to again receive that amount of chore services. Accordingly, the Division’s partial denials of her requests for 10 weekly hours of chore services, for both her Waiver plan of care amendment and her Waiver Plan of Care renewal, is reversed.

**II. Facts**

Ms. T resides with her husband in a single-level home. Ms. T has functional impairments which qualify her to receive both Medicaid Waiver and PCA services. Mr. T is identified in Ms. T’s Waiver plan of care as her primary unpaid caregiver, who receives respite because it is not

safe for Ms. T to be left alone.<sup>1</sup> Ms. T receives assistance with household tasks through the Medicaid Waiver program. Those tasks consist of items such as cooking, cleaning, shopping, and laundry.

Mr. T also experiences functional impairments. He had an operation which limits his mobility, including lifting, bending, and repetitive motions. On October 29, 2015, his doctor wrote a note that “[t]his patient will be unable to do any lifting > 10 pounds or participate in housecleaning for 6 months.”<sup>2</sup> That doctor’s note was submitted to the Division as part of a November 3, 2015 request to add 10 hours per week of chore services to Ms. T’s Medicaid Waiver plan of care for the period from November 2, 2015 through the end of the plan year, which was July 26, 2016. Based upon that doctor’s note, the Division granted Ms. T’s request, but only for a six month period from November 2, 2015 through April 29, 2016. The Division’s November 13, 2015 approval letter cites to the regulation 7 AAC 130.245(c) in support of its decision. The regulation cited in that letter is the version which went into effect on July 1, 2015.<sup>3</sup>

Ms. T did not appeal the limited approval of her chore service request. Instead, on June 14, 2016, she submitted a request to amend her 2015 – 2016 Medicaid Waiver plan to add the 10 weekly hours of chore services back into the plan from April 30, 2016 to the end of the plan of care year on July 26, 2016.<sup>4</sup> One day earlier, on June 13, 2016, she applied to renew her Medicaid Waiver plan of care, for the period from July 27, 2016 through July 26, 2017, again requesting 10 weekly hours of chores services.<sup>5</sup> The basis for both requests was that Mr. T was not able to assist with chores around the home.<sup>6</sup> Ms. T included a doctor’s note, dated June 7, 2016, as part of both requests. That note reads:

G R. T has been under my care since 02/11/2016 and needs to abide by my below listed restrictions of daily living:  
Lifting anything greater than ten pounds (10 lbs)  
Household (sic) chores/cleaning with repetitive movements or bending.<sup>7</sup>

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<sup>1</sup> OAH Case No. 16-0791-MDS, Ex. F, p. 15.

<sup>2</sup> Ex. A to the Division’s November 7, 2016 Post-Hearing Brief, p. 9.

<sup>3</sup> Ex. A to the Division’s November 7, 2016 Post-Hearing Brief, pp. 1 – 2.

<sup>4</sup> OAH Case No. 16-0790-MDS, Ex. E.

<sup>5</sup> OAH Case No. 16-0790-MDS, Ex. E.

<sup>6</sup> OAH Case No. 16-0790-MDS, Ex. E, p. 4; OAH Case No. 16-0791-MDS, Ex. E, p. 37.

<sup>7</sup> OAH Case No. 16-0790-MDS, Ex. E, p. 5; OAH Case No. 16-0791-MDS, Ex. E, p. 55.

Ms. T's chore service requests were partially approved for both the amendment for the remainder of the 2015 – 2016 plan year and for the entirety of the 2016 – 2017 plan year. The Division allowed five hours of chore services per week, rather than the ten hours requested. The Division's final denial letters provide that the applicable regulation, enacted July 1, 2015, requires limiting or denying chore services when there is a responsible adult family member in the home, whereas the earlier version of the regulation allowed chores services, without reduction, if a recipient's spouse was medically incapable of performing chores. Those letters then concluded that because Mr. T was Ms. T's primary unpaid caregiver and he is her backup PCA, he had to be at least partially capable of performing chore services, and that because Ms. T was delivered some of her meals, she required only five weekly hours of chore services rather than the maximum allowable 10 weekly hours.<sup>8</sup>

Ms. T testified about her chore care needs. She has a number of allergies that require the house to be cleaned frequently. She stated the carpeted areas have to be vacuumed twice per week, and that the uncarpeted areas needed to be "swiffered" either two or three times per week. The garbage, in all rooms, has to be dumped daily. She is incontinent and laundry needs to be done a minimum of twice weekly, depending upon whether she has an accident. She receives two meals delivered daily, and cannot cook the other daily meal. Mr. T testified that he was unable to clean the home or dump the trash. He tries to help with laundry by placing dirty clothes directly into the washer, and by stripping the bed, but is not always physically able to strip the bed. He further stated that he was able to help some with shopping, but had weight limitations and could not bend. Mr. and Ms. T's testimony was credible because it was corroborated by the doctor's notes regarding Mr. T's inability to bend, engage in repetitive motions, and the ten-pound weight limitation.

Ms. Rodes is the Division employee who prepared the Division's partial denial notices. She testified that the Division's general policy is to limit the available chore services to one-half if the recipient lives with his or her spouse or caregiver, although there is room for variation given individual circumstances.<sup>9</sup> She did not speak to Mr. or Ms. T or Ms. T's PCA about Ms. T's care needs in making her decision.

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<sup>8</sup> The Division issued several approval letters. The final letters were issued on September 19, 2016 for the 2016 – 2017 plan of care year (OAH Case No. 16-0791-MDS, Ex. F, pp. 1 - 3), and on September 30, 2016 for the amendment request for the 2015 – 2016 plan of care year (OAH Case No. 16-0790-MDS, Ex. G).

<sup>9</sup> Ms. Rodes' testimony at 1:02 – 1:04:31.

### III. Discussion

The Medicaid program has a number of coverage categories. One of those coverage categories is the Waiver program.<sup>10</sup> 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.”<sup>11</sup> The Division must approve each specific service as part of the Waiver recipient’s plan of care.<sup>12</sup> Because this case involves a request to add previously discontinued services back into Ms. T’s Waiver plan of care, Ms. T has the burden of proof.<sup>13</sup>

The Alaska Medicaid Waiver regulations, in effect beginning on July 1, 2015, allow for a maximum of ten weekly hours for chore services in a recipient’s home to “maintain a clean, sanitary, and safe environment.”<sup>14</sup> The chore services include routine cleaning, heavy chores, food preparation, shopping, and other necessary services.<sup>15</sup> The regulation further provides that “[t]he department will either deny or limit the time authorized for chores services if (1) an individual that lives in the recipient’s home is responsible for performing the chores . . . and the individual is an adult member of the recipient’s immediate family or a caregiver for the recipient.”<sup>16</sup>

While the Medicaid PCA program has very specific provisions on how to determine the exact allowable amount of chore related PCA services,<sup>17</sup> the Medicaid Waiver chore service regulation merely sets a weekly upper limit of ten hours in chore services with no guidelines regarding how the time is determined, nor does it contain guidelines on whether chore services should be limited or denied due to the presence of a spouse or other adult family member caregiver.

The evidence in this case shows that Mr. T’s abilities to help physically care for his wife are limited. The doctor’s letter regarding his functional limitations, which the Division deemed sufficient to justify providing Ms. T with ten weekly hours of chore services in November 2015, is virtually identical to the letter provided to the Division in June 2016 as part of her requests to

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<sup>10</sup> 7 AAC 100.002(d)(8); 7 AAC 100.502(d).

<sup>11</sup> 7 AAC 130.217(b)(1).

<sup>12</sup> 7 AAC 130.217(b).

<sup>13</sup> 7 AAC 49.135.

<sup>14</sup> 7 AAC 130.245(a)(4).

<sup>15</sup> 7 AAC 130.245(b).

<sup>16</sup> 7 AAC 130.245(c).

<sup>17</sup> See 7 AAC 125.024(a)(1).

reinstate the ten weekly hours of chore services. Accordingly, the Division has no apparent basis upon which to differentiate between the November 2015 request which it granted in total, and the June 2016 requests, which it partially denied.

The argument advanced by the Division regarding a regulation change in its partial denial letters, which implies that Ms. T's earlier receipt of a full ten hours of weekly chore services was allowed by earlier regulation but disallowed by current regulations, is entirely devoid of merit, given that the current regulation went into effect July 1, 2015, four months before the Division considered and granted the November 2015 request. The argument that Mr. T can provide chore services since he is Ms. T's primary unpaid caregiver is not persuasive. The evidence instead shows that Ms. T cannot be left by herself. Mr. T being able to provide oversight and supervision to Ms. T does not invalidate or contradict the doctor's letter regarding his functional limitations. Similarly, the argument that Mr. T is Ms. T's backup PCA, and can therefore assist with chore services, is not persuasive because no evidence was presented showing that he actively provides PCA services or that he is even physically capable of providing more than minimal assistance.

The evidence in this case shows that Mr. T has functional limitations regarding lifting, bending, and repetitive motions. While he can certainly perform some very limited household tasks, Ms. T's chore service needs are undoubtedly higher than normal due to her incontinence and her need for a very clean household. Given that Mr. T's doctor's letter of June 2016, establishing Mr. T's functional limitations, is virtually identical to his earlier doctor's letter which the Division considered sufficient to justify Ms. T's receipt of ten weekly hours of chore services, it is more likely true than not true that Ms. T should receive ten weekly hours of chore services. Given the lack of regulatory guidelines for the calculation of the amount of Waiver chore services, when combined with the facts of this case, a different conclusion would be arbitrary and unjustifiable.<sup>18</sup>

#### **IV. Conclusion**

The Division's partial denial of Ms. T's request for ten weekly hours of chore services as an amendment to her 2015 - 2016 Waiver plan of care and to her 2016 - 2017 Waiver plan of

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<sup>18</sup> While an agency can certainly interpret its own regulations, any adoption of standards or policies that "implements, interprets or makes specific the law enforced or administered by the state agency" is itself a regulation and must be adopted through the Administrative Procedure Act to be valid. *Jerrel v. State, Dept. of Natural Resources*, 999 P.2d 138, 143 (Alaska 2000) (citations omitted).

care renewal is reversed. Ms. T is to receive ten weekly hours of chore services as part of her 2015 – 2016 Waiver plan of care from April 30, 2016 to the end of the plan of care year on July 26, 2016. She is to receive ten weekly hours of chore services as part of her Waiver plan of care for 2016 – 2017.

DATED this 1<sup>st</sup> day of December, 2016.

*Signed*

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Lawrence A. Pederson  
Administrative Law Judge

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