

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

In the Matter of:)
)
 T L) OAH No. 16-1191-MDS
) Agency Case No.

DECISION

I. Introduction

The issue in this case is whether the Division of Senior and Disabilities Services correctly denied T L’s request for an additional eight hours per week of Day Habilitation services. The Division denied the additional Day Habilitation hours requested in the proposed Plan of Care (POC) because it concluded that the 40 hours per week of Day Habilitation services which it had approved were sufficient to accomplish the goals and objectives listed in the POC. Mr. L requested a fair hearing to challenge the Division’s denial.

The Division’s basis for denial is supported by the preponderance of the evidence in the record, and is therefore affirmed.

II. Facts

Mr. L is a 26-year-old man with epilepsy and other pervasive developmental disorders.¹ Mr. L’s overall age equivalent, in terms of adaptive behavior, is 1 year and 2 months.² He also has significant visual impairment.³ Mr. L lives with G and M L, his parents and guardians.⁴ J T is Mr. L’s care coordinator.⁵ Mr. L requires 24-hour care and needs assistance with all his activities of daily living.⁶

Mr. L can ambulate on his own, but often prefers to crawl. This past year, Mr. L developed swelling in his knees that required medical intervention, and gained 11 pounds. His family wants to ensure that Mr. L remains healthy and continues to walk. Mr. L’s physician wrote that twice-weekly visits to the pool for aquatic therapy are medically necessary.⁷ Mr. L does not live near the

¹ Ex. E6.
² *Inventory for Client and Agency Planning (ICAP)*, Sept. 9, 2014.
³ Ex. E9.
⁴ Ex. E10.
⁵ Ex. E3.
⁶ Ex. E10.
⁷ Y T, MD, Letter of medical necessity, October 24, 2016.

appropriate pool for physical therapy.⁸ A trip to the pool, including transportation, dressing, aquatic therapy, and hot tub time takes approximately four hours.⁹

Ms. T submitted Mr. L's proposed POC for the period of October 5, 2016 through October 4, 2017, to the Division on September 7, 2016.¹⁰ This year, Mr. L's family and support team chose to focus on Day Habilitation, with a goal of keeping Mr. L as healthy and engaged in the community as possible.¹¹ They did not request supported living and group habilitation services, which had been approved in the past.¹²

The POC requested 48 hours per week of Day Habilitation services.¹³ The POC lists that Mr. L's Day Habilitation goal is to increase his access to community activities.¹⁴ The goal is further broken down. Mr. L will: 1) develop a healthy lifestyle, 2) be an active member of his community, 3) engage in volunteer opportunities in the community, 4) increase his muscle strength, 5) be safe in his community, and 6) gain independence in his daily routine.¹⁵ The POC lists a variety of activities that Mr. L will participate in to meet his goals, including walking, family therapy, engaging in social activities, and taking classes. The POC also lists that Mr. L will follow Occupational, Physical, and Speech Therapy recommendations.¹⁶

On September 16, 2016, the Division approved Mr. L for 40 hours of Day Habilitation per week or 5.7 hours per day. The Division denied an average of eight Day Habilitation hours per week for 47 weeks.¹⁷ Mr. L is also approved for 56 weekly, or eight daily, hours of Personal Care Assistance time.¹⁸ Overall, this leaves Mr. L with 10.25 hours per day of unsupported time.¹⁹ In years past, Mr. L received up to 18 hours per day in combined supported services.²⁰

⁸ Mr. L lives in No Name City 1, approximately 35 minutes from the No Name City 2 pool. The No Name City 2 pool offers a zero- depth entry, warmer water temperature, and family changing room.

⁹ Ex. E; POC Amendment; T testimony.

¹⁰ Ex. E3.

¹¹ T testimony.

¹² T testimony.

¹³ Ex. E17.

¹⁴ Ex. E17.

¹⁵ Ex. E17-21.

¹⁶ Ex. E20. Speech therapy is not recommended for Mr. L at this time due to his current inability to identify wants and desires. Mr. L was referred for an occupational therapy assessment. *See* Robyn Maciejewski, SLP, No Name City 3 Kids Therapy, Inc. notes, July 2016.

¹⁷ Ex. D1. The Division approved 40 hours per week of Day Habilitation for a 3-week trip to Hawaii and 14 days of respite care, for a total for 52 weeks.

¹⁸ Thea Howard testimony.

¹⁹ There are 168 hours in the week. 24 – 5.7 hours Day Habilitation – 7 hours PCA = 10.25 hours per day unsupported.

²⁰ T testimony; G L testimony.

On October 12, 2016, Mr. L requested a fair hearing on the Day Habilitation denial.²¹ In October 2016, Mr. L submitted an amendment to the POC. The amendment requested an additional eight hours weekly of Day Habilitation services.²² The amendment focused on Mr. L’s need for aquatic therapy.

The Division considered the information submitted in both the POC renewal and the amendment, but did not change its decision.²³ Mr. L’s telephonic hearing was held on November 18, 2016. Ms. T, G L, and M L testified on Mr. L’s behalf. Victoria Cobo presented the Division’s position. Thea Howard, the health program manager who reviewed Mr. L’s POC, testified on the Division’s behalf.

III. Discussion

The issue presented is whether the Division was correct to deny eight hours of weekly Day Habilitation services.

A. *Medicaid Home and Community-Based Waiver Services program - Overview*

1. *Relevant Federal Medicaid Statutes, Regulations, and Case Law*

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.²⁴

Federal regulations require Medicaid services “be sufficient in amount, duration, and scope to reasonably achieve [their] purpose.”²⁵ Courts have developed two general tests to determine whether a service offered only in part, or with other limitations, is nonetheless sufficient in “amount, duration, and scope.” First, a limited service meets the sufficiency requirements of the federal regulations if the service is distributed in a manner bearing a rational relationship to Medicaid’s underlying purpose of providing the service to those in greatest need of it.²⁶ Second, a

²¹ Ex. C.

²² Ex. G.

²³ Howard testimony.

²⁴ 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].

²⁵ 42 CFR 440.230(b).

²⁶ See *White v. Beal*, 555 F.2d 1146 (3rd. Cir.1977) (discussing earlier version of amount, scope, and duration regulations); *Anderson v. Director, Department of Social Services*, 300 N.W.2d 921 (Mich. App. 1980).

limited service is sufficient in amount, duration, and scope if it adequately meets the needs of “most” Medicaid recipients who need the particular service.²⁷ A state may “place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.”²⁸

2. Relevant State Medicaid Regulations

The general type of waiver services at issue here, "habilitation services," are defined by regulation as "services that help recipients acquire, retain, or improve skills related to activities of daily living and self-help, social, and adaptive skills necessary to enable the recipient to reside in a noninstitutional setting that is provided in a recipient's home, a shared-care environment, an assisted living home licensed under AS 47.32 or a foster home licensed under AS 47.32" ²⁹

The specific type of waiver services at issue here, "Day Habilitation services," is defined by regulation in relevant part as follows:

(b) The department will consider habilitation services to be Day Habilitation services if the services

- (1) are provided in a nonresidential setting, separate from the recipient's private residence or another residential setting . . . ;
- (2) include round-trip transportation for the recipient between the site where services are provided and . . . where the recipient resides if the recipient's plan of care reflects that transportation will be provided by the Day Habilitation services provider;
- (3) assist the recipient with acquisition, retention, or improvement of skills in the areas of self-help, socialization, appropriate behavior, and adaptation;
- (4) promote the development of the skills needed for independence, autonomy, and full integration into the community;
- (5) reinforce the skills taught in school, therapy, or other settings ³⁰

The department will pay for Day Habilitation services that are approved under 7 AAC 130.217 as part of the recipient’s POC and receive prior authorization.³¹

The standards for POC approval are specified by 7 AAC 130.217, which provides in relevant part:

(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

²⁷ See *Curtis v. Taylor*, 625 F.2d 645, 653 (5th Cir.1980); *Charleston Memorial Hospital v. Conrad*, 693 F.2d 324, 330 (4th Cir.1982); *King v. Sullivan*, 776 F. Supp. 645, 651 - 653 (D.R.I.1991).

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

²⁹ 7 AAC 130.319(3).

³⁰ 7 AAC 130.260.

³¹ 7 AAC 130.260(a)(3)-(4).

- (A) is of sufficient amount, duration, and scope to meet the needs of the recipient;
- (B) is supported by the documentation required in this section; and
- (C) cannot be provided under 7 AAC 105 - 7 AAC 160, except as a home and community-based waiver service under this chapter

B. The Division’s Denial and Mr. L’s Response

The Division denial letter states that the approved amount of 40 Day Habilitation hours per week is of sufficient scope, amount and duration to accomplish the intent of the POC.³² The Division states that the POC does not provide information showing the need for more than 40 weekly hours of Day Habilitation services.³³ The denial also states that it is unclear how Mr. L would be able to fill more than 40 hours per week of active habilitation.³⁴

At hearing, Ms. Howard testified that she still felt 40 hours per week of Day Habilitation services was appropriate. Ms. Howard explained that Day Habilitation services require actively working on a goal. According to the Division, it was not clear that additional time would improve Mr. L’s progress towards meeting his goals.³⁵

Ms. Howard testified that she considered Mr. L’s water therapy needs, including travel time, and approved an additional four hours per week based on this.³⁶ Mr. L’s current POC allows for some downtime where he does not have to be actively working on goals. Ms. Howard considered Mr. L’s knee swelling issues and recognized the importance of continued water therapy. Ms. Howard also stated that Mr. L’s supporting documentation did not identify how he was allocating and using the already approved hours to meet his Day Habilitation goals, aside from swim therapy.

Ms. T testified that staff works with Mr. L on his goals all the time. For example, Mr. L attempts to remove clothing, and is not aware of safety concerns. Staff continues to work with Mr. L in these areas. Mr. G L testified credibly that the family is trying to keep Mr. L in the least restrictive living environment, while maintaining his mobility and overall health.

C. The Services That Mr. L are Receiving Appear to be of Sufficient Amount, Duration, and Scope to Prevent Institutionalization and Meet his Needs

In the denial letter and during the hearing, the Division asserted that the waiver services that Mr. L is receiving are of sufficient amount, duration, and scope to meet his needs. Mr. L’s care coordinator and family stressed the importance of maintaining Mr. L’s health.³⁷ Mr. L’s parents

³² Ex. D2.

³³ Ex. D2.

³⁴ Ex. D2.

³⁵ Howard testimony, *see* EX. E11-12.

³⁶ The POC requested a 12-hour per week increase in Day Habilitation services.

³⁷ Ex. E7.

and Ms. T did not explain how an additional eight hours per week of Day Habilitation was required to maintain Mr. L's health. Mr. L experienced health issues with his knees, and the family is working with ankle foot orthosis to improve Mr. L's stability. However, no information was provided that linked Mr. L's health issues with a lack of support services. Further, nothing in the record indicates that Mr. L is at risk of institutionalization.

Mr. L's POC goals emphasize engaging in the community and developing new relationships. The proposed goals of increased socialization and fostering relationships fall within the Day Habilitation definition. As for reaching those goals, the Division is correct that the record does not indicate why an additional eight hours is necessary for Mr. L to connect with his community.

The POC identifies approximately eight hours per week for aquatic therapy swimming. Assuming that Mr. L chooses to swim twice weekly, this leaves 32 hours per week, more than four-and-a-half hours per day, for additional supported socialization. Ms. T and Mr. L's parents testified that Mr. L's support hours have decreased over time, moving from 18 to now 13.25 hours per day. His family and care coordinator are understandably concerned with this continued decrease. However, the record and testimony did not identify areas where the support is inadequate or where Mr. L is unable to meet his goals. Overall, the record indicates that Mr. L's hours are adequate to meet his needs.

IV. Conclusion

While there is no doubt that Mr. L would enjoy and benefit from more Day Habilitation hours in the community, the record here does not establish that he will be at risk of institutionalization, unable to maintain himself in the community, or be unable to have his needs met, without additional hours. The Division's decision to deny eight additional weekly hours of Day Habilitation services is therefore upheld.

DATED this 27 day of December, 2016.

Signed

Bride Seifert
Administrative Law Judge

Adoption

The undersigned, by delegation from 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 13th day of January, 2017.

By: Signed
Signature
Bride Seifert
Name
Administrative Law Judge
Title

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