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

In the Matter of	)	
	)	
U C-G	)	OAH No. 16-1486-MDS
	)	Agency No.

DECISION

I. Introduction

U C-G (U) applied for benefits under the Intellectual and Developmental Disabilities (IDD) Medicaid Home and Community-Based Waiver program. The Department of Health and Social Services (Department), Division of Senior and Disabilities Services (Division) determined that U does not have a qualifying condition, as required by 7 AAC 140.600, and is therefore not eligible for the IDD Waiver program. The evidence, however, shows that U has a qualifying condition, specifically: "Other Intellectual Disability Condition." Consequently, the Division's determination is REVERSED.

II. Facts

E G (Ms. G) is U's grandmother and his adoptive parent.[1] U was born on 00/00/2006, and as of the date of this Decision is approximately eleven years and two months old.[2] U was diagnosed with Static Encephalopathy (SE) and Fetal Alcohol Spectrum Disorder at the age of 6.[3] He was exposed to alcohol in utero and possibly other drugs, such as methamphetamine.[4] U's biological mother and father both have a history of alcohol and drug abuse, and U was removed from his mother's care and adopted by Ms. G (and his grandfather) at age 3.[5]

U has experienced a troubled young life. Based on reports in the record, which are undisputed, the following thumbnail of U can be sketched. U has impaired attention and concentration and impaired verbal reasoning. He experiences executive dysfunction, behavioral disinhibition and emotional dyscontrol.[6] He has significant behavioral problems, including aggression, disobedience, and attention deficit and hyperactivity problems.[7] His anger and aggression have manifested in frequent verbal or physical fights with peers when playing socially,

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1 G Testimony.
2 Ex. D, p. 1.
3 Ex. E, p. 4.
4 Ex. E, p. 12.
5 Ex. E, p. 5.
6 Ex. E, p. 4.
7 Ex. E, p. 4.

and this has resulted in him having significant difficulty making and keeping friends.[8] He was involved with Special Olympics, but was removed for picking on other children.[9] Similarly, U has had significant discipline issues at school, including violence and aggression toward other students. As a result, he was removed from one elementary school and placed in a specialized "self-contained" school (No Name School) to work on emotional control and behavioral management.[10]

Ms. G testified U has trouble understanding the simplest of tasks, which must be explained to him multiple ways, with lots of hands-on showing.[11] She testified that U needs constant direction, even with basic activities like showering and toileting.[12] She noted that he is eleven years old and should be able to perform such tasks on his own. Even though he can perform such activities as making his bed, emptying the dishwasher or feeding the dog, he needs constant re-direction to accomplish such tasks.[13] Commenting on the psychological evaluations of U in the record, Ms. G testified that she believes U was over-rated and received more credit than he should have – meaning essentially that he is worse off than appears on paper.[14] The Division's representative expressed concern at the hearing that U may have been scored as higher-functioning than he really is, due to familial bias.[15] She testified further that U's self-direction was so severely impaired that it impacted the rest of him, including his cognitive function and opposition disorder.[16]

The reports by psychological professionals in the record, all of which are undisputed and unimpeached, paint a mixed but troubling picture of U. In some aspects of life U presents no problems, such as mobility.[17] But other, significant aspects of his daily life are far less reassuring. One clinician (X L, Ph.D) observed that U had significant abnormalities in attention and concentration, needed test instructions repeated multiple times and at times appeared unable to maintain concentration sufficient to complete test items.[18] He deemed U's insight, judgment and impulse control impaired.[19] Neuropsychological testing of U produced numerous results in the

8 Ex. E, p. 4.
9 Ex. E, p. 4.
10 Ex. E, p. 4; G Testimony.
11 G Testimony.
12 G Testimony.
13 G Testimony.
14 G Testimony.
15 Del Rosario Testimony.
16 Del Rosario Testimony.
17 Ex. E, pp. 5, 28.
18 Ex. E, p. 5.
19 Ex. E, p. 6.

Low Average, Borderline and Defective range.[20] Many other test results, measuring for example Hyperactivity, Aggression and Attention Problems, were rated as Clinically Significant or in the At-Risk classification.[21] For example, U's score on Attention Problems fell in the Clinically Significant range, and his clinician observed that the Attention Problems "experienced by U are probably interfering with academic performance and functioning in other areas."[22] This same clinician noted that U's capacity for learning was impaired, his language functioning is borderline, and his ability to engage in self-care is impaired.[23]

Another clinician who evaluated U in July 2013 (T N, PhD), made a number of troubling observations regarding U. For example, he noted that:

> U is violent with peers and adults. He does not listen or follow instructions/directions. He has ongoing tantrums that include yelling and throwing things. He and his brother engage in violent fighting. He is infatuated with any type of weapon. He engages in inappropriate sexualized talk and behaviors. He requires close and ongoing adult supervision to ensure his safety.[24]

This clinician further noted that "U is destructive, and can engage in activities that are dangerous if not constantly supervised."[25] He concluded that U's

> [o]verall cognitive ability is in the Extremely Low range on the basis of a standardized intellectual battery with equally developed verbal and abstract reasoning skills both in the Borderline range. The Working Memory Index is in the Extremely Low range and the Processing Speed Index is in the Low Average range. . . .
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> U's neuropsychological protocol as a whole highlights a disorder characterized by severe deficits in executive functions including inhibition and emotional/behavioral regulation and control; deficits in language processing, deficits in visual-spatial processing and skill, memory deficits, and delayed academic achievement in reading and writing.[26]

Ms. G applied for benefits for U under the Intellectual and Developmental Disabilities (IDD) Medicaid Home and Community Based Waiver program.[27] In a decision dated November

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20 *E.g.*, Ex. E, pp. 6-8.
21 Ex. E, pp. 9-11.
22 Ex. E, p. 9.
23 Ex. E, pp. 26-27.
24 Ex. E, p. 29.
25 Ex. E, p. 32.
26 Ex. E, p. 35.
27 The date of U's application is not apparent in the record but is immaterial to this Decision.

16, 2016, the Division determined that U does not have a qualifying diagnosis under 7 AAC 140.600 and is therefore not eligible for the IDD Waiver program.[28] On December 15, 2016, Ms. G timely appealed on behalf of U and requested a fair hearing on the Division's eligibility determination.[29]

III. Discussion

The IDD Waiver program permits families with children who meet certain disability eligibility requirements to qualify for Medicaid even if they are otherwise over the normal income limit for participation in Medicaid. Qualifying children are those who receive at-home medical care similar to that provided at a medical institution.[30] Thus, the question presented is whether U needs what is referred to as an institutional "level of care" equal to that of an intermediate care facility for individuals with intellectual disabilities.[31]

The Department has adopted a regulation to define the institutional level of care (*i.e.*, condition) necessary to qualify for the IDD Waiver program.[32] The regulation describes five possible qualifying conditions; an applicant must have at least one of the five conditions to qualify for the program.[33] Four of these require a diagnosis of (i) an intellectual or developmental disability that meets the diagnostic criteria for codes 317, 318.0, 318.1 or 318.2 of the *Diagnostic and Statistical Manual of Mental Disorders (DSMD),* (ii) cerebral palsy, (iii) seizure disorder or (iv) autism (*DSMD* code 299.00).[34] There is no evidence in the record that U has, and his family does not contend that he has, any of these four conditions.

The fifth condition – referred to by the Division as "Other Intellectual Disability Related Condition" – is more generic than the other four. To qualify under this condition, a child must have a condition that:

- is "one other than mental illness, psychiatric impairment, or a serious emotional or behavioral disturbance";
- is "found to be *closely related to* intellectual or developmental disability because that condition results in impairment of general intellectual functioning and adaptive behavior *similar to* that of individuals with intellectual or developmental disabilities";

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28 Ex. D.
29 Ex. C.
30 42 C.F.R. § 435.225.
31 7 AAC 140.600.
32 7 AAC 140.600.
33 7 AAC 140.600(c)(1)-(5).
34 7 AAC 140.600(c)(1), (3)-(5).

- "require[s] treatment or services *similar to* those required for individuals with intellectual or developmental disabilities"; and
- is "diagnosed by a licensed physician."[35]

In short, the fifth qualifying condition is for children who have significant functional limitations. They are not so severely disabled that they qualify for a diagnosis that would put them in the category of severe intellectual or developmental disability, but their functioning is at a similarly low level.

The Division reviewed the reports on U to determine whether they supported a qualifying diagnosis under 7 AAC 140.600. Most recently, U was evaluated by X L, Ph.D. In a report dated October 7, 2016, Dr. L diagnosed U with Static Encephalopathy (ICD code G93.40); Attention Deficit/Hyperactivity Disorder, combined presentation (ICD code F90.2); Depressive Disorder Due to Another Medical Condition, with mixed features (ICD code F06.34); Oppositional Defiant Disorder (ICD code F91.3); and Disruptive Mood Dysregulation Disorder (ICD code F34.8).[36] The Division then determined that none of the conditions diagnosed in Dr. L's November 11 report represented a qualifying diagnosis under 7 AAC 140.600.[37]

The Division, however, noted that other diagnostic codes in the record may meet the requirements for Other Intellectual Disability Related Condition under 7 AAC 140.600(c)(2).[38] For instance, a Qualifying Diagnostic Certification by S S, dated August 11, 2016, stated that U had Borderline Intellectual Functioning (ICD code R41.83) and Pervasive Developmental Disorder Not Otherwise Specified (NOS) (ICD code F84.9).[39] Although not mentioned by the Division in it decision, in a subsequent report prepared by Dr. L in response to questions by the Division, Dr. L added a diagnosis for U of Borderline Intellectual Functioning (ICD code R41.83) "given [U's] full scale IQ of 76."[40]

In evaluating these diagnoses – Borderline Intellectual Functioning and Pervasive Developmental Disorder NOS – the Division first recited the standard in 7 AAC 140.600(c)(2), requiring a condition "closely related to intellectual or developmental disability" that "results in impairment of general intellectual functioning and adaptive behavior similar to that of individuals

35 7 AAC 140.600(c)(2) (emphasis added).
36 Ex. D, p. 1; Ex. E, p. 12.
37 Ex. D, p. 1.
38 Ex. D, pp. 1-2.
39 Ex. D, pp. 1-2; Ex. E, p. 3.
40 Ex. E, p. 28.

with intellectual or developmental disabilities."[41] From here, however, the Division did not examine whether U had a condition *closely related to* an intellectual or developmental disability that resulted in impairments *similar to* those experienced by individuals with intellectual or developmental disabilities. Instead, the Division relied upon a policy which adopts "the definition of *a person with* a developmental disability as defined by Alaska Statute 47.80.900."[42]

AS 47.80.900 is not a statute that applies to the Medicaid program; instead it applies to persons with disabilities.[43] It defines a "person with a developmental disability" as:

> a person who is experiencing a severe, chronic disability that
> (A) is attributable to a mental or physical impairment or combination of mental and physical impairments;
> (B) is manifested before the person attains age 22;
> (C) is likely to continue indefinitely;
> (D) results in substantial functional limitations in three or more of the following areas of major life activity: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency; and
> (E) reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated[.[44]]

The Department has adopted a policy – not a regulation – to assist it in determining whether an individual experiences a developmental disability as defined in AS 47.80.900(6).[45] In particular, this policy defines the term "substantial functional limitation" for purposes of implementing AS 47.80.900(6)(D) as:

> consistently functioning at or near a level that is two standard deviations delayed, or 25% delayed, or functioning at or below the 2nd percentile, compared to the typical functioning of same age peers.[[46]]

It must be noted that the two standard deviations/25 percent delayed metric etc. is not contained in the statute that the Division relied upon (AS 47.80.900). In short, other factors aside, under the

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41 Ex. D, p. 2.
42 Ex. D, p. 2 (emphasis).
43 The Alaska statutes pertaining to Medicaid coverage are located at AS 47.07.010 *et seq*., "Medical Assistance for Needy Persons." AS 47.80.900 is part of a chapter located at AS 47.80.010 *et seq*., "Persons with Disabilities."
44 AS 47.80.900(6).
45 *See* the Division's Policy & Procedure Manual, No. 8-1.
46 Division's Policy & Procedure Manual, No. 8-1, p. 4.

Division's policy a diagnosis is based on an evaluation that demonstrates cognitive impairment that shows a delay of 25 percent or two standard deviations below the mean in three of the following developmental areas: self-care, communication, learning, mobility and self-direction. The Division's conclusion was that self-direction was the only area where U experienced a substantial functional limitation, and that the "documentation does not provide a qualifying diagnosis that is similar to a condition that results in impairment of general intellectual functioning and adaptive behavior similar to that of individuals with intellectual or developmental disabilities."[47]

There are two material problems with the Division's application of this policy and the "substantial functional limitation" test it contains. First, the standards in the policy cannot be strictly applied to U as standards of general application because they have not been adopted into law as regulations. When an agency wants to strictly enforce a standard of general application, it must formally adopt that standard in a regulation. Merely writing the standard into a policy manual does not make the standard enforceable.[48] Instead, if the Division wants to require applicants for the IDD Waiver program "to meet more definite standards, it should promulgate regulations explicitly articulating its requirements."[49] Second, the Division's focus on U's functional limitations discounts his impaired intellectual functioning. U's IQ, from his most recent neuropsychological evaluation, is 76.[50] If it was one point lower, he would have a qualifying condition of intellectual disability, for which the cutoff IQ score is 75.[51] In addition, U supplied a copy of a Medical Facility B occupational therapy evaluation from March 2016, which showed that U was in the bottom 1 percentile for motor coordination, in the bottom 3 percentile for activities of daily living, and in the bottom 1 percentile for independent activities of daily living.[52]

For purposes of U's application, the fact that he does not meet the criteria of the Division's policy will not be strictly enforced. The determination of whether he has a condition

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47 Ex. D, p. 2; Del Rosario Testimony.

48 *Kenai Pen. Fisherman's Co-op Ass'n v. State*, 628 P.2d 897, 908 (Alaska 1981) (holding comprehensive management policy for fisheries not adopted into regulation not enforceable).

49 *Noey v. Department of Environmental Conservation*, 737 P. 2d 796, 805 (Alaska 1987) (holding that if agency wanted to apply a more definite standard it must promulgate a regulation).

50 Ex. E, p. 26. A neuropsychological evaluation from 2013 provided that his full scale IQ was 68. (Ex. E, p. 33). Interestingly enough, a school psychologist found that his full scale IQ was 84 in January 2015. (No Name School District evaluation summary). It is not clear, however, whether that finding was based upon a full neuropsychological evaluation.

51 7 AAC 140.600(c)(1).

52 Medical Facility B OT Evaluation, pp. 2 - 3.

"closely related to" an intellectual or developmental disability with impairments "similar to" that of a child with an intellectual or developmental disability will be based on all the evidence in this record. To find that U meets this level of disability requires a finding that his disability and level of care are "closely related to" the level of disability, and "similar to" the treatment, experienced by a child who has an IQ of 75 points (70 plus 5 points plus or minus) - the qualifying measure for those children for whom deficits must be similar.[53] Considering all the evidence in the record, U met his burden of demonstrating that he has a condition sufficiently related to intellectual or developmental disability and that his condition results in impairments similar to those experienced by a child with intellectual or developmental disabilities: to wit, his IQ is currently measured at 76, although the test results have fluctuated in the past to as low as 68; his most recent neuropsychological evaluation showed that he was rated as clinically significant or at-risk for hyperactivity, aggression, and attention problems, and that his self-care ability was impaired; and an occupational therapy evaluation from March 2016, showed that U was in the bottom 1 percentile for motor coordination, in the bottom 3 percentile for activities of daily living, and in the bottom 1 percentile for independent activities of daily living. Ms. G's testimony about U's self-care abilities was consistent with these findings of low functionality and provided a snapshot of his day-to-day functionality.

As detailed above, U has been diagnosed by licensed professionals with several serious conditions, including Borderline Intellectual Functioning (ICD code R41.83) and Pervasive Developmental Disorder Not Otherwise Specified (NOS) (ICD code F84.9);[54] Static Encephalopathy (ICD code G93.40); Attention Deficit/Hyperactivity Disorder, combined presentation (ICD code F90.2); Depressive Disorder Due to Another Medical Condition, with mixed features (ICD code F06.34); Oppositional Defiant Disorder (ICD code F91.3); and Disruptive Mood Dysregulation Disorder (ICD code F34.8).[55] He has an IQ of 76, just one point over the standard to qualify under 7 AAC 140.600(c)(1). He is a danger to himself and others, requires constant adult supervision and direction and, as his most recent neuropsychological evaluation and his 2016 occupational therapy evaluation show, his "condition results in impairment of general intellectual functioning and adaptive behavior similar to that of individuals with intellectual or developmental disabilities." The evidence therefore shows that it is more

53 7 AAC 140.600(c)(1).
54 Ex. D, pp. 1-2; Ex. E, pp. 3, 28.
55 Ex. D, p. 1; Ex. E, p. 12.

likely true than not true that U has a condition that satisfies the initial qualifying criteria of the IDD Waiver program as set out in 7 AAC 140.600(c)(2).

Ms. G is cautioned that this Decision does not completely resolve the issue of whether U should be approved for IDD Waiver Medicaid coverage. A qualifying diagnosis is the first step towards IDD Waiver approval. An IDD Waiver applicant must not only have a qualifying condition, his qualifying condition must also:

> constitute a substantial disability to the individual's ability to function in society, as
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> (A) measured by the *Inventory for Client and Agency Planning (ICAP)*, adopted by reference in 7 AAC 160.900; and
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> (B) evidenced by a broad independence domain score equal to or less than the cutoff scores in the department's *Table of ICAP Scores by Age*, adopted by reference in 7 AAC 160.900.[56]

In other words, U must have an ICAP performed and have a qualifying score under the ICAP to fully qualify for IDD Waiver approval. If the Division determines after review of the ICAP that U does not have a qualifying score, U may request a new hearing to challenge that determination.

IV. Conclusion

The Division's determination that U did not have a qualifying diagnosis under 7 AAC 140.600 is REVERSED.

DATED: March 17, 2017. By: *Signed*
Lawrence A. Pederson
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 6th day of April, 2017. By: *Signed*
Name: Douglas Jones
Title: Medicaid Program Integrity Manager

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

[56] 7 AAC 140.600(d)(3).