

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

In the Matter of)
)
T D) OAH No. 17-1048-MDS
) Agency No.
_____)

**FINAL DECISION ADOPTING PROPOSED DECISION IN PART
AND REVERSING PROPOSED DECISION IN PART**

Mr. D is a Medicaid Waiver recipient who requested that he should receive a total of 85 hours per week in supported-living services as part of his renewed Waiver plan of care. This was an increase of seven hours per week from previous plan of care. The Division of Senior and Disabilities Services (Division) denied the request for an increase on September 13, 2017. Mr. D requested a hearing to challenge that denial of the seven hours. After a hearing was held, the Administrative Law Judge issued a proposed decision which reversed the denial and found that Mr. D should receive those seven hours of supported-living services.

The Division filed a proposal for action objecting to the proposed decision. After review of the Division’s proposal for action, and the entire record in the case, including listening to the entire recording of the evidentiary hearing, the undersigned, by delegation from the Commissioner of Health and Social Services, in accordance with AS 44.64.060, adopts the final conclusion of the proposed decision which provides that Mr. D should receive the seven hours of supported-living services which were denied. However, the underlying reasoning contained in section 2 of the proposed decision is revised.

Section 2 is broadly entitled “The seven hours of supported-living enables Mr. D to reside in a noninstitutional setting.” The implication of this section is that, but for these seven hours, Mr. D would be institutionalized. That conclusion is not borne out by the evidence, nor is it necessary to justify the additional hours. A Waiver recipient is, per se, considered to require either a skilled nursing facility or institutional level of care.¹ A Waiver plan of care contains the services that allow them to reside in the community instead of such an institution:

- b) The department will approve a plan of care if the department determines that

¹ See 7 AAC 130.200; 7 AAC 130.205; 7 AAC 130.215.

(1) the services specified in the plan of care are sufficient to prevent institutionalization and to maintain the recipient in the community.²

The evidence does not show, nor is it required to show, that but for a specific service a recipient will be institutionalized. Instead, the aggregate services are provided to “prevent institutionalization **and** to maintain the recipient in the community.” As an example, the Waiver program allows supported employment services, which help to maintain and integrate a recipient in the community, but which would presumably not keep a recipient out of an institution.³ As noted in the proposed decision, Mr. D’s behavior is impacted for the better by these seven service hours; the improvement in his behavior is an integral part of keeping him out of an institution **and** to maintain him in the community. Accordingly, he has met his burden of proof.

In summary, Mr. D has demonstrated that the seven hours of supported-living services that were denied by the Division should be allowed. Accordingly, the denial of those seven hours is REVERSED.

This is a final decision for appeal purposes. 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 16th day of February, 2018.

By: Signed
Erin Shine
Special Assistant to the Commissioner
Department of Health and Social Services

² 7 AAC 130.217(b) (emphasis supplied).

³ See 7 AAC 130.270.

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T D) OAH No. 17-1048-MDS
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[PARTIALLY REJECTED PROPOSED] DECISION

I. Introduction

T D receives services through the Home and Community Based Waiver program. Senior and Disabilities Services (SDS) reviewed a renewal Plan of Care. Most of the requested services were approved, but SDS denied 7 hours per week of supported-living services. W M-D, Mr. D’s mother and guardian, appealed the denial.

A telephonic hearing was held November 27, 2017, and December 11, 2017. Ms. M-D represented Mr. D. Care coordinator O Z, care provider Y D, and Consumer Direct agency representative K X, testified on Mr. D’s behalf. Hearing representative Terri Gagne presented SDS’s position and program manager Denise Busby testified on its behalf.

SDS’ decision is reversed because the evidence has shown that the approved level of service is likely insufficient to meet Mr. D’s needs.

II. Facts

Mr. D is a 35-year-old man diagnosed with a traumatic brain injury (TBI), epilepsy, borderline intellectual functioning, psychotic disorder, bipolar disorder, dementia, and anxiety.⁴ He also has vision problems, sleep issues, difficulty swallowing, and is incontinent.⁵ He needs assistance with all activities of daily living.⁶ Mr. D has serious balance, endurance, and coordination deficits, and he often uses a wheelchair at home.⁷

Mr. D is also paranoid and suffers from suicidal and homicidal ideation.⁸ He holds persistent beliefs that the “gentlemen” might kill him or his mother, or order him to kill himself.⁹ Mr. D is self-centered, short-tempered, often aggressive, and can be violent towards caregivers.¹⁰

⁴ Ex. 2, p. 4; Ex. E6.

⁵ Ex. 2, p. 4; Ex. E11.

⁶ Ex. 2, p. 20, 28.

⁷ Ex. 1, p. 2; 25.

⁸ Ex 1, p. 3 – 24, Neuro-Psychological Evaluation, Dr. S S, July 1, 2013; M-D testimony.

⁹ Ex. 1; M-D testimony.

¹⁰ Ex. E9 – 10; M-D testimony; D testimony.

He is 6' 2" and weighs 264 pounds.¹¹ Mr. D also displays inappropriate sexual behavior towards women, regardless of age.¹²

Because of his disabilities, Mr. D is unable to live independently.¹³ Mr. D lives with his mother. Ms. M-D and other paid caregivers provide around the clock care.¹⁴ At hearing, Ms. M-D testified that she provides care 11 hours per day, 7 days per week, and is paid for 5 hours per day of that care. The Division used to provide paid care 24 hours per day between the waiver and personal care service programs.¹⁵ In November 2016, Mr. D agreed to a settlement where he receives 18 hours per day of services between the two programs.¹⁶

In August of 2017, SDS received a renewal Plan of Care for August 14, 2017 through August 13, 2018.¹⁷ Mr. D received 20 hours per week of day habilitation services under his previous plan of care. This plan requested 13 hours per week of day habilitation, and 85 per week of supported-living services, for an average of 17 hours per day of services.¹⁸ Mr. D's Plan of Care listed a new goal, to care for his puppies.¹⁹ The objectives identified to help reach the goal included feeding, picking up after, and socializing the puppies, and practicing training techniques.²⁰

The plan went on to state that staff would prompt and assist Mr. D to help him reach this goal. The plan stated that "Data on progress will be recorded by habilitative caregivers once per service type/objective/DOS, supported by weekly case notes, and submitted to the agency weekly for review/aggregation." It also stated that the agency will review the objectives and progress on an ongoing basis and with the participation of the care team at least quarterly.²¹

¹¹ Ex. 2, p. 10.

¹² Ex. 1, p. 21. Caregivers described that Mr. D has difficulty identifying people's ages and makes inappropriate comments to minors.

¹³ Ex. 1.

¹⁴ M-D testimony.

¹⁵ M-D testimony.

¹⁶ See OAH No. 16-1299-MDS; OAH No. 16-1300-MDS, audio recording of mediated settlement agreement, November 22, 2016.

¹⁷ Ex. E.

¹⁸ Ex. E1. Day habilitation services were capped at 12 hours per week (absent an exception) beginning October 1, 2017. Because Mr. D's plan of care went into effect before then, he is receiving 13 hours per week. Anticipating program changes, Mr. D's team reduced the number of requested day habilitation services from 20 to 13 hours per week. The Division agreed that had Mr. D's team not asked for a reduction in day habilitation hours, his plan of care would likely have been approved with 20 hours of day habilitation per week.

¹⁹ Ex. E28. The plan of care lists two puppies. The family purchased a single puppy.

²⁰ Ex. E28.

²¹ Ex. E28.

SDS approved all but seven hours a week of supported-living services.²² SDS denied the one hour of service per day related to training and caring for two puppies.²³ The denial stated that the information provided in the plan of care did not justify the need for “additional” hours; “it appears the puppies would be benefitted rather than T.”²⁴ Mr. D appealed the denial.

Despite the denial, Ms. M-D bought Mr. D a puppy. Mr. D’s team also agreed to provide the seven hours of supported-living services to assist him with caring for and training the dog, despite the Division’s denial.²⁵ Ms. D and Ms. M-D testified credibly that Mr. D benefits from caring and training his new dog. Through his dog training and care, Mr. D is learning increased patience and responsibility. He also displays less suicidal ideation and his caregivers report that he appears to benefit psychologically from his relationship to the animal. The family hopes the animal will grow into a service dog for Mr. D.²⁶

Ms. M-D also testified credibly that caring for Mr. D is very demanding, and that she does not know if she can maintain him in his home with less than 18 hours a day of approved services.

III. Discussion

A. *Applicable Law*

The Home and Community-Based Waiver program will pay for supported-living habilitation services. Habilitation services are 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 noninstitutional setting; and

(B) are provided in a recipient’s private residence . . .^[27]

Supported-living services are approved in units of 15 minutes each.²⁸ There is an expectation that some habilitation service will be provided during each approved unit of

²² Ex. D.

²³ Ex. D; Ex. E28.

²⁴ Ex. D.

²⁵ M-D testimony.

²⁶ M-D testimony; D testimony.

²⁷ 7 AAC 130.319(6).

²⁸ Testimony of Health Program Manager Denise Busby; Exhibit D.

service.²⁹ Services must be of “sufficient amount, duration, and scope to meet the needs of the recipient”³⁰

B. Dog Care Supported-Living Services Meet Regulatory Requirements for Approval

1. Caring for the dog helps Mr. D with adaptive living skills.

SDS correctly asserts that the goals and objectives listed in the Plan of Care did not provide adequate justification for this goal.³¹ Mr. D and his care providers have since worked with his dog, and his team provided reliable testimony of the benefits of this goal. Specifically, dog care provides Mr. D with an opportunity to work on his fine motor skills, compassion, patience, and responsibility. The uncontroverted evidence also shows that Mr. D’s negative behaviors have decreased since he became responsible for the dog’s care. This benefits Mr. D as well as his caregivers. The evidence demonstrates that the dog care supported-living services help Mr. D improve skills related to activities of daily living, self-help, social and adaptive skills necessary to maintain him in his home, as required under 7 AAC 130.319.

2. The seven hours of supported-living enables Mr. D to reside in a noninstitutional setting.

The next question is whether the approved number of hours is sufficient to meet Mr. D’s needs and maintain his living in the community instead of an institution.³² Mr. D requires around the clock care or supervision. SDS no longer authorizes that level of services for Mr. D. Ms. M-D’s and Ms. D’s testimony regarding Mr. D’s care requirement was compelling. Because of his diagnoses and size, he is very difficult to care for. Ms. M-D described that she would not be able to continue to provide care in her home without the seven weekly hours of supported-living Services. Dr. S S, Mr. D’s neuropsychologist, reported that Mr. D would have to be the sole occupant of an assisted living home, due to his behavioral issues.³³

At hearing, the Division opined that nothing in the record indicated a change in Mr. D’s condition that would justify the “extra” hours of supported-living services. Ms. Busby is correct

²⁹ Busby testimony.

³⁰ 7 AAC 130.217(b)(2)(A).

³¹ Mr. D provided updated goals and objectives information to the Division after the denial, to prepare for mediation. Mr. D provided the updated information to OAH for hearing. See Ex. 2, p. 42 – 43; 51. The Division did not consider the new information for hearing.

³² 7 AAC 130.217(b).

³³ Ex. 1. Ms. M-D also testified that she has explored assisted living home-type settings for Mr. D, but has yet to find an appropriate location.

that Mr. D's condition did not change. He still requires a high level of care and will continue to have these care requirements for the rest of his life. Providing the seven hours per week of services for dog care and training will assist Mr. D's goal of remaining in a non-institutional setting.

IV. Conclusion

The issue in this case is whether SDS erred in denying seven hours a week of supported-living services. The evidence established that the services benefit Mr. D with skill building. Further, the record showed that it is more likely than not that Mr. D needs the additional hours of habilitative services to remain in the community. Accordingly, SDS' decision is reversed.

Dated this 1st day of February, 2018.

Signed _____
Bride Seifert
Administrative Law Judge

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]