

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

In the Matter of )  
 )  
E L ) OAH No. 17-1280-MDS  
 ) Agency No.  
\_\_\_\_\_ )

**NOTICE TRANSMITTING FINAL DECISION**

Attached is the administrative law judge's decision in this matter, which became the final agency decision on March 12, 2018 by operation of AS 44.64.060(f).

Judicial review of the decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the decision is mailed or otherwise distributed.

DATED March 14, 2018

By: Signed \_\_\_\_\_  
Law Office Assistant  
Office of Administrative Hearings

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**DECISION**

**I. Introduction**

E L is a severely disabled adult who receives Medicaid Home and Community-based Waiver (Waiver) services. Her 2016 – 2017 Plan of Care (POC) provided her 20 hours per week of day habilitation services. When 2017 - 2018 Plan of Care (POC) renewal included a request that she receive the same level of day habilitation services. The Division approved her POC but reduced the day habilitation services to 624 hours for the plan year, which is 12 hours per week. K L, Ms. L’s mother, requested a hearing to challenge the reduction in her benefits.

Ms. L’s hearing was held on January 10, 2018. K L represented Ms. L and testified on her behalf. D M, Ms. L’s Medicaid Care Coordinator, and B A, her customer support supervisor, also testified on her behalf. Terri Gagne represented the Division. Esther Hayes, a Health Program Manager with the Division, testified for the Division.

The Medicaid regulations were changed effective October 1, 2017 to limit day habilitation services to a maximum of 624 hours per year, which comes to an average of 12 hours per week for 52 weeks (one year). The only exception to that limit is if the reduction in day habilitation services would result in a risk to a recipient’s health and safety and place him or her at risk of institutionalization. The evidence in this case shows that Ms. L’s day habilitation services keep her busy and occupied, and that without those services, she has a degradation in her mental health, which affects her health and safety and places her at risk of institutionalization. Accordingly, the Division’s limitation of Ms. L’s day habilitation services to 624 hours for the plan year, which comes to 12 hours per week, is REVERSED, and she is to receive the 20 hours per week requested in her 2017 – 2018 POC renewal.

**II. Facts**

Ms. L is 44 years old. Her diagnoses are intellectual disability, episodic mood disorder, and anxiety state. She has a “history of destructive behavior.”<sup>1</sup> She has two psychiatric

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<sup>1</sup> Ex. E, pp. 58 – 59.

prescriptions, Prozac – taken once daily for mood stabilization and anxiety, and Quetiapine, which is taken once daily as needed – “[t]aken at first signs of severe Episodes.”<sup>2</sup> Quetiapine, also known as Seroquel, is an antipsychotic used to treat bipolar disorder, schizophrenia, and depression.<sup>3</sup>

Ms. L lives in a family habilitation home. She is a very active person, has supported employment, and is involved in several activities such as Special Olympics, bowling, dance classes, cooking classes, and attends a weekly social therapy group. She also has a social life with several close friends.<sup>4</sup> In her POC for 2016 – 2017, she was approved for an average of 20 hours per week in day habilitation services.<sup>5</sup> When she applied to renew the POC for 2017 – 2018, she requested that she receive the same level of day habilitation services.<sup>6</sup> The POC specifically states that Ms. L “needs social interaction and time out in the community to maintain her emotional and mental health needs” and that “[s]he does best when she is kept busy.” It further notes that she had a psychiatric hospitalization in October 2015.<sup>7</sup>

The Division partially denied Ms. L’s request for day habilitation, providing her with 12 hours per week of day habilitation services, which is 624 hours per year, rather than the 20 hours per week that she requested. The Division’s reasoning was that the regulation had changed to cap the number of day habilitation hours to 624 hours per year, and that Ms. L did not meet the requirements for an exception to that cap, which required her to experience a threat to her health and safety and be at risk of institutionalization if the cap was not exceeded.<sup>8</sup>

Ms. L has had two prior psychiatric hospitalizations. One was in the late 1990s. The other was in 2015. In 2015, she had a psychotic episode. She was taken to the hospital. The hospital sent her home, and she began hearing voices and destroying things. She was then taken back to the hospital, after which she was admitted to API for at least seven days. After her behavior stabilized, she was sent home with medications, which are administered on an as-needed basis.<sup>9</sup>

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<sup>2</sup> Ex. E, p. 7.

<sup>3</sup> <https://www.ncbi.nlm.nih.gov/pubmedhealth/PMHT0011909/?report=details> (date accessed February 5, 2018).

<sup>4</sup> Ex. E, pp. 15 – 16.

<sup>5</sup> Ex. F, p. 4.

<sup>6</sup> Ex. E, pp. 34 – 41.

<sup>7</sup> Ex. E, p. 17.

<sup>8</sup> Ex. D; Ms. Hayes’ testimony.

<sup>9</sup> Ms. K L’s testimony.

Ms. L's mother credibly testified that Ms. L must be kept busy, and that when she is kept busy, her mental health is better. If she is not kept busy, she starts to have trouble. She still displays symptoms of stress at times, and her caregivers try to keep her very busy and occupied at those times.<sup>10</sup>

Ms. M, Ms. L's Care Coordinator, also testified. She has been Ms. L's Care Coordinator since October of 2015. Her testimony was consistent with that of Ms. K L. In addition, Ms. M also testified that day habilitation services provide her with the activities that she needs to keep her stable.<sup>11</sup>

Dr. J, Ms. L's mental health care provider, wrote a letter:

At present she is allowed 20 hours a week of Dayhab. However there has been a proposed cut to 12 hours a week. I am advocating that E's Dayhab remains at 20 hours a week. E does better staying active, and out in community. E uses her Dayhab time to activities in the community to exercise, go to dance class, special O and social activities. (movies, concerts) When E is not active, she has more health issues and also has a history of destructive behavior.<sup>12</sup>

Mr. A is a customer support supervisor with No Name. He has been working with Ms. L for approximately one and one-half years. Ms. L's day habilitation hours were reduced to 12 hours per week at the end of November 2017. He visited Ms. L at home on December 18, 2017 and on January 9, 2018. Both visits were after Ms. L's day habilitation services were decreased. On December 18, 2017, he noticed that she was more anxious to get out of the home, that she was pacing, that she appeared more anxious, that there were changes in her facial expression and body posture, and that she was speaking a lot faster. On January 8, 2017, she displayed the same behaviors if not worse, although that could have been partially attributable to a change in her routine due to one of her workers being out sick.<sup>13</sup>

### **III. Discussion**

The Medicaid program has a number of coverage categories. One of those coverage categories is the Waiver program.<sup>14</sup> The Waiver program pays for specified individual services to Waiver recipients, if each of those services is "sufficient to prevent institutionalization and to

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<sup>10</sup> Ms. K L's testimony.

<sup>11</sup> Ms. M's testimony.

<sup>12</sup> Ex. E, p. 58.

<sup>13</sup> Mr. A's testimony.

<sup>14</sup> 7 AAC 100.002(d)(8); 7 AAC 100.502(d).

maintain the recipient in the community.”<sup>15</sup> The Division must approve each specific service as part of the Waiver recipient’s POC.<sup>16</sup>

The type of Waiver services at issue here, day habilitation services, are provided outside the recipient’s residence. The purpose of these services is to assist the recipient with acquiring, retaining, or improving his or her self-help, socialization, behavior, and adaptive skills. They may also reinforce skills taught in other settings, and promote the skills necessary for independence, autonomy, and community integration.<sup>17</sup> In 2016, the applicable regulations did not limit the number of day habilitation hours available to a recipient, unless the recipient also received group-home habilitation services.<sup>18</sup>

The regulations governing day habilitation services changed effective October 1, 2017 to limit day habilitation services to 624 hours per year (an average of 12 hours per week for an entire year) unless a greater number was necessary to “protect the recipient’s health and safety; **and ...** prevent institutionalization.”<sup>19</sup> The word “and” is highly significant. It means that the need for a larger amount of day habilitation hours must be justified not only by health and safety concerns, but that without the additional day habilitation services, the recipient will face institutionalization.

The undisputed evidence in this case demonstrates that Ms. L has two prior psychiatric institutionalizations. While one was some time ago, in the 1990s, the other occurred relatively recently in October 2015. Ms. K L, Ms. M, and Mr. A are all familiar with Ms. L’s care needs and behavior. They testified about her history, and the fact that day habilitation keeps her occupied and stable. Dr. J, Ms. L’s mental health care provider, concurred Ms. L “does better staying active, and out in community.” Based upon the evidence presented at hearing, it is more likely true than not true that Ms. L’s mental health condition has suffered since her day habilitation hours were reduced to 12 hours per week. Although the Division argued that Ms. L’s other supports meet her needs and prevent institutionalization, the evidence shows that Ms. L is experiencing an increase in her anxiety and exhibiting symptoms of mental health distress despite those other services. Given Ms. L’s relatively recent psychiatric hospitalization, it is therefore more likely true than not true that a reduction of Ms. L’s day habilitation services to the 12-hour weekly cap, which has already affected her mental health, will result in her institutionalization.

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<sup>15</sup> 7 AAC 130.217(b)(1).

<sup>16</sup> 7 AAC 130.217(b).

<sup>17</sup> 7 AAC 130.260(b).

<sup>18</sup> 7 AAC 130.260(c). (Regulation in effect from July 1, 2013 through September 31, 2017).

<sup>19</sup> 7 AAC 130.260(c) (emphasis supplied). (Regulation in effect as of October 1, 2017; Register 223).

Accordingly, Ms. L qualifies for the exception to the weekly cap and her day habilitation services are reinstated to 20 hours per week, for a total of 1040 hours per year, the amount that was requested in her 2017 – 2018 POC renewal.

#### **IV. Conclusion**

The evidence shows that Ms. L will face health and safety issues and risk institutionalization if she does not receive the 20 hours per week of day habilitation she had been approved for as part of her 2016 – 2017 POC and which she requested to be continued when she applied to renew her 2017-2018 POC. Consequently, the Division's reduction of Ms. L's day habilitation services to 624 hours per year is reversed.

DATED this 7<sup>th</sup> day of February, 2018.

*Signed*

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Lawrence A. Pederson  
Administrative Law Judge

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