

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

In the Matter of:)
)
 V H) OAH No. 12-0559-MDS
) DSDS Case No.
 _____) Medicaid ID No.

DECISION

I. Introduction

The issue in this case is the number of hours of Medicaid Personal Care Assistance (“PCA”) services for which Mr. V H is eligible based on the applicable regulations. The Division of Senior and Disabilities Services (DSDS or Division) originally approved Mr. H for 15 hours per week of PCA services in the areas of dressing, eating, toilet use, personal hygiene, bathing, medication, documentation, and escort services.¹ At hearing, the Division agreed to provide Mr. H with additional PCA time for locomotion,² leaving Mr. H's requests for additional assistance with bathing and toilet use as the only remaining issues. This decision concludes that, based on the definition of toilet use contained in the Division's PCA regulations, Mr. H is not eligible for additional PCA time for toilet use. However, because Mr. H demonstrated that he requires extensive assistance with bathing, he is eligible for additional PCA time in the bathing category.

II. Facts

A. Mr. H's Diagnoses and Medical Records

Mr. H is 20 years old, 66.5 inches tall, and weighs 214 pounds.³ He lives in the home of his father and legal guardian.⁴ He has diagnoses of Angelman's syndrome,⁵ autistic disorder,⁶ mental retardation, seizure disorder, constipation, and occasional urinary incontinence.⁷ As a

¹ Ex. D2.

² Gerry Johnson hearing testimony beginning at 18:00.

³ Ex. 1-1.

⁴ Exs. E1, E2.

⁵ Angelman's syndrome is a genetic disorder that causes developmental disabilities and neurological problems such as difficulty speaking, balancing, walking, and in some cases seizures. See Mayo Clinic website at <http://www.mayoclinic.com/health/angelman-syndrome/DS01048> (date accessed October 26, 2012).

⁶ Autism is one of a group of serious developmental problems called autism spectrum disorders that appear in early childhood, usually before age three. See Mayo Clinic website at <http://www.mayoclinic.com/health/autism/DS00348> (date accessed October 26, 2012). Though symptoms and severity vary, all autism spectrum disorders affect a person's ability to communicate and interact with others. *Id.*

⁷ Exs. 1-1, 1-2.

result of his medical problems Mr. H has daily tantrums.⁸ A physician's report from June 2012⁹ states in relevant part that:

Mr. H is not able to be left unsupervised for long and can quickly become agitated;
When he becomes agitated it is "very difficult" to calm him down;
He will sometimes hit and bite when agitated, which can be dangerous due to his size;
He has limited communication skills, being able to say yes or know, but otherwise using gestures;
He needs to be reminded to take his medications and be supervised in order to ensure correct dosage;
He does not have good balance and needs help when using stairs and when getting in and out of vehicles;
He always requires maximum assistance with bathing, grooming, oral hygiene, and toileting;
He always requires moderate support with dressing;
He always needs minimal support when eating; and
He often needs minimal support to move about.¹⁰

B. Mr. H's Functional Abilities as Determined by the Division

On December 27, 2011 Mr. H was assessed as to eligibility for PCA services by David Teague of DSDS.¹¹ Mr. Teague used the Consumer Assessment Tool or "CAT," a system for scoring disabilities that is described in detail in Part III. The scores mentioned below are CAT scores assigned by Mr. Teague. Mr. Teague found that Mr. H has the following abilities and limitations with regard to his Activities of Daily Living (ADLs):¹²

Bed Mobility: Mr. H can reposition himself in bed as needed (scored 0/0; frequency 0/0).¹³

Transfers: Mr. H can stand, sit, and otherwise move between surfaces as needed, but requires cueing (scored 5/5; frequency 0/0).¹⁴

⁸ Ex. 1-1.

⁹ Exs. 1-3, 1-4.

¹⁰ Exs. 1-3, 1-4.

¹¹ Ex. E.

¹² Exs. E6 - E21; see 7 AAC 125.199(1).

¹³ Ex. E6.

¹⁴ Ex. E6.

Locomotion: Mr. H can walk independently within his home, and when going outside the home for medical appointments, but requires supervision (scored 1/0).¹⁵

Dressing: Mr. H has no mechanical difficulties with dressing, but requires others to provide assistance and supervision to make sure he puts his clothes on correctly (scored 2/2; frequency 2/7).¹⁶

Eating: Mr. H has no major mechanical difficulties with eating, but he needs help with set-up and with cutting-up foods, and must use wide-handled utensils (scored 1/1; frequency 3/7).¹⁷

Toileting: Mr. H requires limited physical assistance with clean-up or hygiene after bowel movements (scored 2/2; frequency 2/7).¹⁸

Personal Hygiene: Mr. H requires limited physical assistance to brush his hair and cueing to wash his hands and face (scored 2/2; frequency 2/7).¹⁹

Bathing: Mr. H requires limited physical assistance with bathing; he needs help shampooing his hair and "completing [the] task" (scored 2/2; frequency 1/7).²⁰

The assessment of December 27, 2011 also indicates that Mr. H requires assistance with his medications;²¹ has moderately impaired cognitive abilities which require cueing and supervision;²² and has behavioral problems.²³ The behavioral problems occur daily and involve resisting care, socially inappropriate or disruptive behavior, being verbally abusive, and being physically abusive.²⁴ Mr. H also has balance problems, has an unsteady gait, and had fallen within the 30 days prior to the assessment.²⁵ He also has insomnia and is sometimes up wandering for most of the night.²⁶

The assessment of December 27, 2011 scored Mr. H as follows with regard to his Instrumental Activities of Daily Living (IADLs):²⁷ Meal Preparation (light) 3/4; Meal

¹⁵ Ex. E7.
¹⁶ Ex. E8.
¹⁷ Ex. E9.
¹⁸ Ex. E9.
¹⁹ Ex. E10.
²⁰ Exs. E11, E20.
²¹ Ex. E12.
²² Ex. E16.
²³ Exs. E17, E18.
²⁴ Ex. E17.
²⁵ Ex. E24.
²⁶ Ex. E18.
²⁷ Ex. E27.

Preparation (main) 3/4; Telephone 8/8; Light Housework 3/4; Managing Finances 3/4; Routine Housework 3/4; Grocery Shopping 3/4; Laundry 3/4.

Mr. H also completed an Inventory for Client and Agency Planning (ICAP), in conjunction with his application for Waiver Services, in March 2012.²⁸ The ICAP indicates that Mr. H has the motor skills of a 2-3 year old; the social and communication skills of a 1 year old; and the personal living, community living, and broad independence skills of a 1-2 year old.²⁹ Mr. H's overall age equivalency score for adaptive behavior was 1 year, 11 months,³⁰ his ICAP service score was 44, and his service level was 4 (extensive personal care and/or constant supervision).³¹ However, at hearing, one of the Division's witnesses testified that Mr. H's ICAP and prior Plan of Care did not reflect that Mr. H needed any assistance with his activities of daily living.³²

C. Mr. H's Functional Limitations as Explained by his Parents

Mr. H's parents and guardians are X H and M D.³³ Ms. D believes that her son's toileting score should be scored 3/2 instead of 2/2 because he lacks the cognitive skills to properly clean himself and because he has difficulty adjusting his clothing.³⁴ They believe his toileting needs are underscored by the fact that his most recent ICAP scores confirm that his broad functional skills are at the two-year-old level and that his specific motor skills are at the three-year-old level.³⁵ Ms. D also asserts that her son's bathing score should be scored 3/2 instead of 2/2 because (a) he lacks the cognitive ability to effectively participate in his bathing routine, and (b) he requires weight-bearing assistance to transfer into and out of the bath tub.³⁶

²⁸ Ex. G. The ICAP is a standardized and nationally utilized written assessment instrument, developed and sold by Riverside Publishing Company, that measures adaptive and maladaptive behavior. See Riverside Publishing Company website at <http://www.riversidepublishing.com/products/icap/details.html> (accessed October 26, 2012).

²⁹ Ex. G3.

³⁰ Ex. G3.

³¹ Ex. G4.

³² Anita Halterman hearing testimony at 27:27 - 28:06. Ms. Halterman testified that Mr. H's overall ICAP is not a fair indication of his need for physical assistance because the overall score also measure social and communication skills and personal living, community living, and broad independence skills (Anita Halterman hearing testimony at 54:40 - 55:40. However, it should be noted that even the portion of the ICAP which addresses motor skills alone indicates that Mr. H only has the motor skills of a 2-3 year old (Exs. G3 - G4).

³³ Ex. E2.

³⁴ Ex. F1.

³⁵ Ex. F1.

³⁶ Ex. F1.

D. Relevant Procedural History

Mr. H, who receives Medicaid Home and Community-Based Waiver Services,³⁷ applied for Personal Care Assistance (“PCA”) services.³⁸ As described above, an assessment was performed at Mr. H’s home on December 27, 2011.³⁹ On March 6, 2012 the Division notified Mr. H that it had found him eligible to receive 15 hours per week of PCA services.⁴⁰ Mr. H subsequently requested a hearing, asserting that the number of hours of PCA services authorized by the Division was insufficient for his needs.⁴¹

Mr. H’s hearing was held on August 7, 2012. Mr. H did not participate in the hearing. Mr. H’s mother and legal guardian, M D, participated in the hearing by phone, represented her son, and testified on his behalf. K W of No Name Personal Care, and M T, also participated in the hearing by phone and testified on Mr. H’s behalf. Gerry Johnson, a Medical Assistance Administrator employed by the Division, participated in the hearing by telephone and represented the Division. Anita Halterman and David Teague, both Health Program Managers employed by the Division, participated in the hearing by telephone and testified on behalf of the Division. The record closed at the end of the hearing.

III. Discussion

A. The PCA Program - Overview

Under the Medicaid program, some categories of medical assistance (such as inpatient and outpatient hospital care) are mandatory for participating states, while other categories of medical assistance, including in-home “personal care services,” are optional.⁴² Alaska has opted to provide these optional personal care services.⁴³ Personal care services “include a range of human assistance provided to persons with disabilities and chronic conditions ... which enables

³⁷ Mr. H receives day habilitation services and in-home support services through the Waiver Services program (Ex. E2).

³⁸ Exs. D3, E. The exact date Mr. H’s application was submitted to the Division is not in the record.

³⁹ Ex. E1.

⁴⁰ Ex. D.

⁴¹ Ex. C.

⁴² See 42 U.S.C. 1396a(a)(10)(A). 42 U.S.C. § 1396d(a)(24) defines “personal care services” as services that are:

furnished to an individual who is not an inpatient or resident of a hospital, nursing facility, intermediate care facility for the mentally retarded, or institution for mental disease that are (A) authorized for the individual by a physician or in accordance with a plan of treatment or (at the option of the State) otherwise authorized for the individual in accordance with a service plan approved by the State, (B) provided by an individual who is qualified to provide such services and who is not a member of the individual’s family, and (C) furnished in a home or other location.

See also 42 C.F.R. § 440.167.

⁴³ A.S. 47.07.030(b).

them to accomplish tasks that they would normally do for themselves if they did not have a disability,” and “most often relate[] to ... eating, bathing, dressing, toileting, transferring, ... maintaining continence, ... personal hygiene, light housework, laundry, meal preparation, transportation, grocery shopping, using the telephone, medication management, and money management.”⁴⁴

Significantly, “[t]he purpose of personal care services is to provide to a recipient *physical assistance* with activities of daily living (ADL), *physical assistance* with instrumental activities of daily living (IADL), and other services based on the *physical condition* of the recipient”⁴⁵ [emphasis added]. Accordingly, “[t]he department will not authorize personal care services for a recipient if the assessment shows that the recipient only needs assistance with supervision, cueing, and setup in order to independently perform an ADL or IADL.”⁴⁶

B. Alaska's PCA Program - Use of the Consumer Assessment Tool (CAT)

The Department conducts an assessment for PCA services using the Consumer Assessment Tool or “CAT.”⁴⁷ The goal of the assessment process is to determine the level of physical assistance that an applicant or recipient requires in order to perform their activities of daily living (ADLs) and instrumental activities of daily living (IADLs).⁴⁸ The CAT seeks to make the assessment process more objective by attempting to standardize the assessment of an applicant or recipient's functional impairment.⁴⁹

The CAT numerical coding system has two components. The first component is the *self-performance code*. These codes rate how capable a person is of performing a particular activity of daily living (ADL). The possible codes are **0** (the person is independent and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance); **3** (the person requires extensive assistance); **4** (the person is totally dependent). There are also

⁴⁴ Centers For Medicare And Medicaid Services, *State Medicaid Manual* § 4480(C), at 4–495 (1999).

⁴⁵ 7 AAC 125.010(a).

⁴⁶ 7 AAC 125.020(e). This regulation defines “cueing” as “daily verbal or physical guidance provided to a recipient that serves as a signal to the recipient that the recipient needs to perform an activity;” “setup” as “arranging items for use or getting items ready for use so that the recipient can independently perform an ADL or IADL;” and “supervision” as “observing and giving direction, as needed, so that the recipient can independently perform an ADL or IADL.” *Id.*

⁴⁷ 7 AAC 125.020(b). The CAT has been adopted into DHSS regulations by reference. *See* 7 AAC 160.900(d)(6).

⁴⁸ *See* 7 AAC 125.010(a).

⁴⁹ Ex. E at pages 5-33.

codes that are not treated as numerical scores for purposes of calculating a service level: **5** (the person requires cueing); and **8** (the activity did not occur during the past seven days).⁵⁰

The second component of the CAT scoring system is the *support code*. These codes rate the degree of assistance that a person requires for a particular activity of daily living (ADL). The possible codes are **0** (no setup or physical help required); **1** (only setup help required); **2** (one person physical assist required); **3** (two or more person physical assist required). Again, there are additional codes that do not add to the service level: **5** (cueing required); and **8** (the activity did not occur during the past seven days).⁵¹

The ADLs coded or scored by the CAT are body mobility, transfers (non-mechanical), transfers (mechanical), locomotion (in room), locomotion (between levels), locomotion (to access apartment or living quarters), dressing, eating, toilet use, personal hygiene, personal hygiene-shampooing, and bathing.⁵² In addition, the CAT codes or scores five other ADL-like activities which are not technically ADLs. These are medication, vital signs/glucose levels, dressings/bandages/oxygen, sterile wound care, and documentation.⁵³

The CAT also codes or scores certain activities known as "instrumental activities of daily living" (IADLs). These are light meal preparation, main meal preparation, light housekeeping, laundry (in-home), laundry (out-of-home), and shopping.⁵⁴ Finally, the CAT codes or scores one other IADL-like activity which is not technically an IADL (oxygen maintenance).⁵⁵

The amount of PCA time for which a person qualifies is generally dependent on how high the person's self-performance codes are. A self-performance code of 4 gets more time than a self-performance code of 3, and a self-performance code of 3 gets more time than a self-performance code of 2. However, the number of minutes awarded for the particular code (2, 3, or 4) varies by activity (for example, a code of 4 qualifies a person for 30 minutes of PCA assistance for bathing, but only 12 minutes of PCA assistance for toileting).⁵⁶ Time is generally not awarded for codes of "5" (cueing only) or "8" (activity did not occur).

⁵⁰ See, for example, Ex. E at page 6; Ex. D at page 2.

⁵¹ See, for example, Ex. E at page 6; Ex. D at page 2.

⁵² See Division of Senior and Disability Services' *Personal Care Assistance Service Level Computation* (accessed online at <http://www.hss.state.ak.us/dsds/pca/documents/PCA%20Service%20Computation.pdf>) (accessed October 26, 2012); see also Ex. D5.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

C. How Much PCA Time is Mr. H Eligible to Receive in This Case?

As mentioned above, Mr. H receives Waiver Services in addition to his PCA services. In particular, he receives three hours per day of supported living services through the Waiver Services program.⁵⁷ The Division originally based its determination as to the extent of Mr. H's eligibility for PCA services, at least in part, on the assertion that the requested PCA services duplicated services already provided under the Waiver Services program.⁵⁸ Ultimately, however, the Division provided no evidence as to the extent of the alleged overlap between Mr. H's existing Waiver Services and the requested PCA services. Accordingly, the Division is considered to have abandoned its "duplication of services" argument.

Mr. W provided a written statement specifying the particular activities as to which he believed Mr. H's CAT was incorrectly scored. These areas were identified as (1) locomotion, (2) toileting, and (3) bathing.⁵⁹ At hearing, the parties reached an agreement as to locomotion. Accordingly, only toilet use and bathing are still at issue.

1. Toilet Use

With regard to toilet use, the relevant portions of the applicable PCA regulation cover only moving to and from the toilet or urinal and transfers on and off the toilet.⁶⁰ The CAT's definition of "toilet use" is somewhat broader, encompassing post-toileting hygiene and clothing adjustments.⁶¹ Based on these definitions, the Division contends that Mr. H requires only limited assistance with toileting. The Division's regulations define "limited assistance" to be when "a recipient, who is highly involved in the activity, receives direct physical help from another individual in the form of guided maneuvering of limbs, including help with weight-bearing when needed."⁶²

At hearing, Mr. Teague testified that Mr. H was "highly involved" in his toilet use.⁶³ He stated that the information that he received from Ms. D was that Mr. H did not need assistance

⁵⁷ Anita Halterman testimony at 26:09.

⁵⁸ Ex. D3, Anita Halterman hearing testimony. The Division's service authorization letter states in relevant part that "[i]n your case the waiver supported living services are already approved to allow many of the services a PCA could provide," and that "[t]he PCA program therefore is not allowing tasks that duplicate approved waiver services" (Ex. D3).

⁵⁹ Ex. F1.

⁶⁰ 7 AAC 125.030(b)(6). For reasons that do not appear in the record, the regulation does not cover assisting the recipient with necessary personal hygiene after using the toilet. The PCA regulation for personal hygiene, 7 AAC 125.030(b)(7), likewise fails to cover such necessary activities.

⁶¹ The CAT form defines toilet use as "[h]ow person uses the toilet room (or commode, bedpan, urinal); transfers on/off toilet, *cleanses* . . . manages ostomy or catheter, *adjusts clothes*" (Ex. E9, emphasis added).

⁶² 7 AAC 125.020(a)(1).

⁶³ David Teague hearing testimony at 32:25 - 32:35.

with urinating and needed only limited assistance after bowel movements.⁶⁴ He also testified that the functional assessment indicated that Mr. H was able to reach around to clean himself after toilet use.⁶⁵

Ms. Halterman testified that the CAT indicated that Mr. H can walk to and from the toilet, and transfer on and off the toilet, without assistance.⁶⁶ She pointed out that Mr. H typically dresses in sweat pants so as to minimize the use of buttons and zippers, and asserted that as a result of this he does not need physical assistance with the dressing / undressing aspect of toilet use, but rather requires only cueing to make sure that he puts his clothes back on correctly.⁶⁷ She also noted that the PCA program generally does not provide time for cueing.

On the other hand, Mr. W, Ms. D, and Ms. T asserted that Mr. H requires extensive assistance with toileting. The Division's regulations define "extensive assistance" to be when "the recipient is able to perform part of the activity, but periodically requires direct physical help from another individual for weight-bearing support or full performance of the activity."⁶⁸

Ms. D is the person who actually assists Mr. H with much of his toilet use. She testified that she generally must help her son pull his pants down to use the toilet,⁶⁹ must coach him throughout the activity, and must "completely and fully" clean him after a bowel movement.⁷⁰ She stated that her son cannot reach far enough to clean himself, and is also cognitively unable to do so.⁷¹

The Division's definitions of "limited assistance" and "extensive assistance" are not immensely dissimilar; they differ only by degree, and the amount by which they differ is not well defined by regulation. They both involve some amount of direct physical assistance, and they can both involve some amount of weight-bearing support. The primary difference between the two levels of assistance appears to be that "extensive assistance" can often involve "full performance of the activity."

Ms. D's testimony indicates that Mr. H requires more-or-less complete assistance with the undressing, cleansing, and re-dressing aspects of toilet use. These are the activities that most people would associate with a lay definition of toilet use. However, the Division's definition of

⁶⁴ David Teague hearing testimony at 33:38 - 34:14.

⁶⁵ Ex. E4, David Teague hearing testimony at 56:06 - 56:32.

⁶⁶ Anita Halterman hearing testimony at 34:20 - 34:30.

⁶⁷ Anita Halterman hearing testimony at 28:46 - 29:12.

⁶⁸ 7 AAC 125.020(a)(2).

⁶⁹ M D hearing testimony at 46:06.

⁷⁰ M D hearing testimony at 46:26.

⁷¹ M D hearing testimony at 46:50 - 46:56.

toileting also includes moving to and from the toilet and transfers on and off the toilet. Mr. H is essentially independent as to those two activities. The regulation is silent as to how much emphasis is to be placed on any of the several discrete aspects of toileting that are at issue in this case.

Applying the parties' testimony to the regulatory definition of toileting, the undersigned concludes that Mr. H requires limited assistance with approximately 50% of the activities which make up toileting, and extensive assistance with the other 50% of toileting activities. In the absence of a burden of proof, the evidence on this issue would result in a tie. However, in this case Mr. H bears the burden of proof because he is seeking a change in the status quo or existing state of affairs by applying for additional benefits.⁷² When the evidence on a factual issue is essentially even, the party with the burden of proof must lose. Accordingly, the Division's finding that Mr. H requires limited assistance with toileting was correct.

2. Bathing

With regard to bathing, the applicable PCA regulation covers "the taking of a full-body bath, shower, or sponge bath and the required transfers in and out of the bathtub or shower," yet does not cover "washing only the back and hair."⁷³ The Division contends that Mr. H requires only limited assistance with bathing, while his parents / guardians assert that he requires extensive assistance.⁷⁴

Mr. Teague testified that Mr. H's functional assessment indicates that he can physically perform all functions involved in bathing, was "highly involved" in his bathing, and "wants to be" independent, but that could "potentially" need assistance getting in and out of the tub,⁷⁵ and needs assistance "completing the task."⁷⁶ Mr. Teague acknowledged that Mr. H requires cueing when bathing, but noted that the PCA program generally does not provide time for cueing.⁷⁷

Ms. D has actually assisted her son with bathing. She testified that she must give her son direct physical assistance with getting his clothes off prior to bathing, support him while getting into and out of the bath tub, wash his hair and his entire body, and get him dressed afterwards.⁷⁸ As discussed above, Mr. H suffers from Angelman's syndrome, which causes difficulty

⁷² *State of Alaska Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

⁷³ 7 AAC 125.030(b)(8). The definition of bathing contained in the CAT is essentially identical (*see* Ex. E11).

⁷⁴ *See* definitions of "limited assistance" and "extensive assistance" set forth in the preceding section.

⁷⁵ David Teague hearing testimony at 34:50 - 35:50.

⁷⁶ David Teague hearing testimony at 39:10 - 39:15.

⁷⁷ David Teague hearing testimony at 36:00 - 36:30.

⁷⁸ M D hearing testimony at 49:50 - 50:55.

balancing and walking. For this reason, Ms. D's testimony that her son requires weight-bearing assistance, and full or almost full performance of bathing-connected activities, is credible and demonstrates a need for extensive assistance with bathing.

In summary, a preponderance of the evidence demonstrates that Mr. H requires extensive physical assistance with bathing. Accordingly, Mr. H should receive a code of 3/2 as to bathing.

IV. Conclusion

The Division was correct to find that Mr. H requires only limited assistance with toileting as defined by the PCA regulations. However, a preponderance of the evidence shows that Mr. H requires extensive assistance with bathing, and is therefore eligible for additional PCA time in that area. Accordingly, the Division must issue a new PCA Service Level Authorization Letter, consistent with this decision, within 30 days of the date that this decision becomes final. Mr. H has the right to request a new hearing should he assert that the new PCA Service Level is inconsistent with this decision.

DATED this 30th day of October, 2012.

Signed _____
Jay Durych
Administrative Law Judge

Adoption

The undersigned, by delegation from of 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 8th day of November, 2012.

By: *Signed* _____
Name: Jay D. Durych
Title: Administrative Law Judge

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