

**BEFORE THE STATE OF ALASKA
COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of:)
)
 U T) OAH No. 13-0405-MDS
) HCS Case No.
 _____) Medicaid ID No.

COMMISSIONER'S DECISION

After due deliberation, for the reasons specified below, and in accordance with AS 44.64.060(e)(3) and AS 44.64.060(e)(5), the Commissioner of the State of Alaska Department of Health and Social Services declines to adopt the proposed decision of the Administrative Law Judge (ALJ) as issued, and instead modifies and revises the decision in the case as set forth below.

I. Revised Legal Analysis.

The undersigned, in accordance with AS 44.64.060(e)(5), rejects, modifies or amends the interpretation or application of a statute or regulation in the decision as follows and for these reasons:

A. The version of the Day Habilitation Services regulation (7 AAC 130.260) quoted at pages five and six of the ALJ's proposed decision did not become effective until July 1, 2013. Accordingly, the quotation of the regulation appearing in the proposed decision is deleted, and is replaced with the version of 7 AAC 130.260(b) which was effective from February 1, 2010 through June 30, 2013:

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

1. take place in a nonresidential setting, separate from the home, assisted living home licensed under AS 47.32, or foster home licensed under AS 47.32 in which the recipient resides; for purposes of this paragraph, day habilitation services include transportation of the recipient between the home, assisted living home, or foster home where the recipient resides and the site where the services are provided; and
2. do not replace, enhance, or supplement educational services for which the recipient is eligible under 4 AAC 52.

B. Section III (D) (1) at pages nine and ten of the proposed decision is not strictly necessary to the resolution of this case, and it discusses issues of regulatory interpretation which the Department may wish to address in the first instance in its policy manuals or through adjudication.

Accordingly, Section III (D) (1) of the proposed decision is deleted, and former Sections III (D) (2) and (3) are renumbered as new Sections III (D) (1) and (2), respectively.

II. Proposed Decision Adopted as Modified Above.

All factual findings and legal conclusions contained in the ALJ's proposed decision, not inconsistent with the above, are hereby adopted. This Commissioner's Decision, and the ALJ's proposed decision dated August 19, 2013 (as modified above), together constitute the final decision of the Commissioner in this case.

APPEAL RIGHTS

This decision is the final administrative action in this proceeding. Judicial review of this 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 date of this decision.

DATED this 13th day of September, 2013.

By: Signed
Jared C. Kosin
Executive Director, Office of Rate Review
Department of Health and Social Services

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

In the Matter of)	
)	
U T)	OAH No. 13-0405-MDS
)	HCS Case No.
_____)	Medicaid ID No.

DECISION

I. Introduction

The issue in this case is whether U T is entitled to an additional 13 hours per week of Day Habilitation services. The Division of Senior and Disabilities Services (Division) denied Mr. T's request to amend his current Plan of Care (POC) to add these additional services on the bases that his supporting documentation was insufficient, that the additional time was not reasonably necessary to achieve the purposes of his POC, and that the additional time was not necessary to avoid placing him in an institution.¹ This decision concludes that the Division erred as to each of these determinations. Accordingly, the Division's denial of that portion of Mr. T's proposed Plan of Care amendment, which requested an additional 13 hours per week of Day Habilitation services, is reversed.

II. Facts²

A. Mr. T's Medical Condition, Abilities, and Limitations

Mr. T is 22 years old.³ He has a primary diagnosis of "Related Condition Like That of Mental Retardation," and a secondary diagnosis of "FASD [Fetal Alcohol Spectrum Disorder] and Likely Specific Learning Disabled & Cognitive Disorder NOS."⁴ By the time he was four years old both his parents had died, and as a result of his learning disability and cognitive disorder he was often assaulted, victimized, and exploited as a child.⁵

When Mr. T was in school, prior to receiving waiver services, he was described by some of his teachers as "very challenging" and "an animal that was difficult to reckon with."⁶ During this

¹ Ex. D.

² To avoid duplication, discussion of some facts, specifically relevant to the legal issues raised, has been deferred until the discussion of those issues in Section III, below.

³ Ex. F6.

⁴ Ex. F6. NOS means "not otherwise specified."

⁵ Ex. F8.

⁶ Ex. F8.

period Mr. T would crouch on the floor and take on a different persona, "K the no name." K's personality was aggressive and he would often "lash out without warning."⁷

Hope Community Resources, Inc. (Hope) operates an assisted living facility, located in the No Name, known as the No Name. The No Name houses a farm house, duplex, barn, bunk house, an off-grid energy system, a garden, and animals such as yaks, horses, pigs, goats, turkeys, geese and chickens.⁸

Mr. T moved to the No Name in 2010 when he was 18-19 years old.⁹ He has continued living there to the present.¹⁰ He resides in a duplex located on the No Name property and has a roommate. There are currently a total of six residents at the No Name, most of them suffering from fetal alcohol syndrome. Some also have other physical disabilities.¹¹

Mr. T performs chores at the No Name on a daily basis. These include feeding the farm animals, gardening, repairing fences, mowing the lawn, and shoveling the snow in the winter. Mr. T does not like to slaughter any of the farm animals, but he does perform post-slaughter meat-processing activities. Mr. T's work hours on the farm are from 9:00 a.m. to 5:00 p.m.¹²

Mr. T enjoys the outdoors, likes living at the No Name, and engages in activities including animal husbandry, No Name maintenance, and construction.¹³ Mr. T's favorite activity involves beetles; he calls himself "the no name."¹⁴ He likes to look for them, view them, collect them, write stories about them, and make drawings and paintings of them.¹⁵ He also enjoys bicycling, bowling, movies, playing cards, and talking with other residents. Mr. T can read "a little bit," has a library card, and likes going to the library.¹⁶

Mr. T is interested in learning a subsistence lifestyle.¹⁷ The No Name supplies Mr. T with traditional Native foods, such as fish, seal oil, moose, caribou, and bear.¹⁸

The No Name is eight or nine miles outside the town of No Name. The residents are not allowed to leave the No Name without staff. Mr. T does not have a driver's license and cannot drive

⁷ Ex. F8.

⁸ G hearing testimony (source for whole paragraph).

⁹ Ex. F8.

¹⁰ Ex. F8, B and G hearing testimony.

¹¹ G hearing testimony (source for whole paragraph unless otherwise stated).

¹² G hearing testimony (source for whole paragraph).

¹³ Ex. F8.

¹⁴ Exs. F8 - F9.

¹⁵ Exs. F8 - F9.

¹⁶ G hearing testimony (source for whole paragraph unless otherwise stated).

¹⁷ Ex. F9.

¹⁸ Ex. F9.

cars or all-terrain vehicles. However, he likes to go on bike rides to No Name with staff, and he regularly goes into No Name with staff to go to the library, see movies, and go grocery shopping.¹⁹

Mr. T is small and wiry, and is fairly strong, but has no stamina and tires quickly. He is very active, but needs supervision when wandering around the No Name so as to be aware of bears and moose, be safe around the ponds and lakes areas, and not get lost. While in town he needs cues as to traffic and cars.²⁰

Mr. T needs oversight as to personal care and dressing, and has very limited cooking and cleaning abilities. He has a short attention span, is easily distracted, and often needs to be re-directed. He needs help making decisions and managing himself in unfamiliar situations. The No Name staff breaks things down for him into simple steps.²¹

Mr. T is very generous and non-confrontational, which translates into a tendency to want to please people he deals with and to "follow the crowd."²² This in turn makes him very susceptible to being exploited and talked into doing things he would not otherwise do.

Mr. T's sleep patterns are sometimes irregular.²³ He will "run himself ragged" until exhausted. When tired, he can be defiant. He will sometimes hide in order to sleep, and sometimes when he is tired he will lie down and take a nap wherever he may be at the time.

The record indicates that, since coming to the No Name, Mr. T no longer assumes the identity of "K the no name."²⁴

B. Relevant Procedural History

Mr. T has received Medicaid Home and Community-Based Waiver Services ("waiver services") since 2011 or before.²⁵ On April 12, 2012 Mr. T submitted a proposed renewal Plan of Care which sought a total of 8,064 units of Day Habilitation services (42 hours per week for 48 weeks), and 2,688 units of Supported Living Services (14 hours per week for 48 weeks).²⁶ On June 28, 2012 the Division notified Mr. T that his proposed POC had been approved in part and denied in part.²⁷ The Division approved 2,688 units (14 hours per week) of Supported Living Services, and

¹⁹ G hearing testimony (source for whole paragraph).

²⁰ G hearing testimony (source for whole paragraph).

²¹ G hearing testimony (source for whole paragraph).

²² Exs. F12, F13.

²³ Ex. F12 (source for whole paragraph).

²⁴ Exs. E, F.

²⁵ B hearing testimony. The specific Waiver Services program in which Mr. T participates is the category for persons with intellectual and developmental disabilities (the "IDD" Waiver Services program).

²⁶ Ex. F1. This proposed POC was for the period April 18, 2012 through March 21, 2013 (Ex. F5).

²⁷ Ex. F1.

5,184 units (27 hours per week) of Day Habilitation services. The Division denied the other 2,880 units (15 hours per week) of requested Day Habilitation services.²⁸

On December 3, 2012 Mr. T submitted a proposed amendment to his POC.²⁹ The proposed amendment sought an additional 1300 units (13 hours per week for 25 weeks) of Day Habilitation services (two hours per week less than the Division had denied in June 2012).³⁰ On March 15, 2013 the Division denied the request for additional Day Habilitation services.³¹ On March 21, 2013 Mr. T requested a hearing to contest the Division's determination.³²

Mr. T's hearing was held on June 14, 2013. Mr. T was represented by attorney Mark Regan of the Disability Law Center of Alaska. Mr. T's Care Coordinator, B B, and the manager of No Name, G G, attended the hearing and testified on Mr. T's behalf. The Division was represented by Assistant Attorney General Kimberly Allen and legal intern Alexis Cole. Corina Castillo-Shepard, a Health Program Manager for DSDS, attended the hearing and testified on behalf of the Division. The record was held open after the hearing for post-hearing briefing. Briefing was completed, and the record closed, on July 15, 2013.

III. Discussion

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

1. Relevant Federal Medicaid Statutes and Regulations

States participating in Medicaid must provide certain mandatory services under a state medical assistance plan.³³ States may also, at their option, provide certain additional services, one of which is the Home and Community-Based Waiver Services program.³⁴ 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.³⁵

²⁸ Ex. F1.

²⁹ Ex. E.

³⁰ Exs E7 - E11.

³¹ Ex. D. The Division's reasons for its denial are discussed in Section III, below.

³² Ex. C.

³³ See 42 USC §§ 1396a(a)(10)(A); 1396d(a)(1) -(5), 1396a(a)(17), and 1396a(a)(21); see also 42 CFR 440.210 & 440.220.

³⁴ See 42 USC § 1396a(a)(10)(A). The program is called a "waiver" program because certain statutory Medicaid requirements are waived by the Secretary of Health and Human Services. See 42 USC 1396n(c).

³⁵ See 42 USC 1396n(c)(1); 42 CFR §§ 435.217; 42 C.F.R. §§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.

Federal regulations require that both mandatory *and* optional Medicaid services “be sufficient in amount, duration, and scope to reasonably achieve [their] purpose.”³⁶ 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.³⁷ Second, a limited service is sufficient in amount, duration, and scope if it adequately meets the needs of “most” Medicaid recipients who need the particular service.³⁸ A state may “place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.”³⁹

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"⁴⁰

The *specific* type of waiver services at issue here, "Day Habilitation services," are defined by regulation in relevant part as follows:⁴¹

(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;

(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].

³⁶ 42 CFR 440.230(b).

³⁷ 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).

³⁸ 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).

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

⁴⁰ 7 AAC 130.319(3).

⁴¹ 7 AAC 130.260.

- (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

The information which must be submitted in support of a POC renewal or amendment request, and the substantive standards for their approval, are specified by 7 AAC 130.230(g), which provides in relevant part:⁴²

A recipient's need for home and community-based waiver services must be reviewed annually using the same criteria used to determine initial eligibility under 7 AAC 130.205. A new assessment must be prepared in accordance with (b) of this section, and the recipient's plan of care must be changed accordingly The care coordinator shall submit in writing . . . any change to a recipient's plan of care, shall document the need for changes to the plan of care, and shall relate those changes to findings in the current assessment If the department determines that adequate documentation is not provided, the department may cap service levels at prior year levels The department will approve changes to a plan of care if the department determines that *(1) the amount, scope, and duration of services to be provided will reasonably achieve the purposes of the plan of care, and are sufficient to prevent institutionalization; (2) each service to be provided is supported by documentation as required by (c)(4) of this section;*^[43] and (3) the services to be provided are not otherwise covered under 7 AAC 105 - 7 AAC 160, except as a home and community-based waiver service [Emphasis added].

Each of the issues raised in this case involves whether Mr. T's POC amendment request satisfies the requirements of 7 AAC 130.230(g)(1) and (2), italicized above.

B. The Bases for Denial as Framed by the Division's Notice of Adverse Action

The Division, at hearing and in its post-hearing briefing, asserted several arguments not found in its denial letter. However, the bases for denial of Mr. T's amendment request are limited to those expressed in the Division's March 15, 2013 denial notice.⁴⁴ A fair reading of the Division's notice of adverse action reveals three asserted bases for denial:⁴⁵

⁴² 7 AAC 130.230 was adopted on February 1, 2010 and was the regulation in effect at the time the Division denied Mr. T's request for additional Day Habilitation services on March 15, 2013. Since then, 7 AAC 130.230 has been repealed and replaced by 7 AAC 130.217, which became effective on July 1, 2013 (see Register 206). Because 7 AAC 130.230 was the regulation in effect at the time the Division made its decision, it is the regulation that must be followed in this case. See *Allen v. State*, 945 P.2d 1233, 1237 (Alaska App. 1997).

⁴³ 7 AAC 130.230(c)(4) requires that the proposed POC be supported "with appropriate and contemporaneous documentation that (A) relates to each medical condition that places the recipient into a recipient category listed in 7 AAC 130.205(d)(1); and (B) describes, supports, or justifies the recipient's request and need for home and community-based waiver services"

⁴⁴ See *Algonquin Gas Transmission Company v. FERC*, 948 F.2d 1305, 1312 n. 12 (D.C.Cir.1991) (an administrative determination "must stand or fall on the grounds articulated by the agency" in that determination); *In Cherokee Nation of Oklahoma v. Norton*, 389 F.3d 1074, 1078 (10th Cir. 2004), cert. denied, 546 U.S. 812, 126 S.Ct. 333, 163 L.Ed.2d 46 (2005), (agency action must be upheld, if at all, on the basis articulated by the agency); *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 539, 101 S.Ct. 2478, 69 L.Ed.2d 185 (1981) (an agency's *post hoc* rationalizations are an insufficient basis for agency action); 2 Charles H. Koch, Jr., *Administrative*

1. The proposed "amendment's goals and objectives for Day Habilitation do not justify / describe how 13 additional hours [per week] will be utilized," does not "provide a measurable outcome," and does not explain "why the current . . . service hours cannot be reallocated to accommodate [Mr. T's] new interests."⁴⁶
2. "There is no current documentation [indicating] that your current Level of Care has changed" or explaining "why there is a need for an increase of habilitative services."⁴⁷
3. The services provided under the existing POC, "in addition to paid and other community supports, appears sufficient to prevent institutionalization and accomplish the intent of the plan."⁴⁸

The first two bases for denial are procedural; the third is substantive. Each is addressed below.

C. Mr. T's Amendment Request was Adequately Documented

The Division's first and second bases for denial of Mr. T's POC amendment request assert that the amendment is not supported by sufficient information and documentation. The regulation specifying the documentation which must be submitted in support of a POC amendment request is 7 AAC 130.230(g)(2). That provision incorporates 7 AAC 130.230(c)(4) by reference, which requires that the amendment request be supported "with appropriate and contemporaneous documentation that (A) relates to each medical condition that places the recipient into a recipient category listed in 7 AAC 130.205(d)(1); and (B) describes, supports, or justifies the recipient's request and need for home and community-based waiver services . . .".

Based on the foregoing regulations, the first issue is whether Mr. T's amendment request is supported with appropriate and contemporaneous documentation that relates to the medical conditions that made him eligible for waiver services. Mr. T's POC *amendment request* does not actually contain that information.⁴⁹ However, the regulation only requires that the request be supported by such information, not that it contain the information within its four corners. Mr. T's POC *renewal form*, submitted less than eight months before, contains a detailed description of Mr. T's medical condition and his psycho-social history.⁵⁰ Further, instructions in the Division's POC amendment request form only require the recipient to "fully describe" those services which are

Law & Practice § 8.22 (2nd Edition 1997) (“[t]he number of cases rejecting agency efforts to justify actions after the fact shows the strength of the prohibition against post hoc rationalization”); compare 42 CFR 431.241(a) (only matters to be considered at a Medicaid hearing are those pertaining to the agency's action).

⁴⁵ Exs. D1, D2.

⁴⁶ Ex. D2, first full paragraph.

⁴⁷ Ex. D2, second full paragraph.

⁴⁸ Ex. D2, third full paragraph.

⁴⁹ See Ex. E.

⁵⁰ Exs. F6, F8, F11, and F12.

"new or altered."⁵¹ This indicates that an amendment request must be construed together with the existing POC. In this case, those two documents, read together, provide substantial information concerning the medical conditions that made Mr. T eligible for waiver services.

The only other documentation requirement is that Mr. T's amendment request provide information which "describes, supports, or justifies [his] request and need for home and community-based waiver services" The summary of reasons supporting Mr. T's amendment request are set forth on the second page of his POC amendment form. The summary states in relevant part as follows:⁵²

U would like to explore the arts, media, and his culture during Day Habilitation and an increase in hours will pave a path for him to accomplish this goal. U has varying interests and would like an opportunity to explore them further. For example, U has developed a passion for writing stories about his bugs and would like to expand his photographs into either a book or a movie. U also enjoys drawing pictures of the bugs he collects and would like to further develop this skill. U would also like to expand his culinary skills and would benefit from a cooking / nutrition class.

More detailed and specific bases for Mr. T's request for additional Day Habilitation services are set forth on the seventh page of the POC amendment form.⁵³ The four paragraphs of information and justification set forth there, while too lengthy to include here, are part of the record. Those paragraphs, in conjunction with the amendment summary quoted above, adequately support Mr. T's POC amendment request.

In summary, the information supporting Mr. T's POC amendment request satisfies the documentation requirements of the applicable regulations. The remaining issue is whether Mr. T's POC amendment request satisfies the substantive criteria.

D. Mr. T's Plan of Care Amendment Request Satisfies the Substantive Requirements of 7 AAC 130.230(g)(1)

The substantive criterion at issue, under 7 AAC 130.230(g)(1), is whether "the amount, scope, and duration of services to be provided" by Mr. T's amended POC "will reasonably achieve the purposes of the plan of care, and are sufficient to prevent institutionalization." This breaks down into two separate issues: first, whether the amount, scope, and duration of services will reasonably achieve the purposes of the plan of care; and second, whether the amount, scope, and duration of services are sufficient to prevent institutionalization.

⁵¹ Ex. E7.

⁵² Ex. E3.

⁵³ Ex. E8.

1. *The Tension Between the Competing Requirements of 7 AAC 130.230(g)(1)*

Initially, it should be noted that there is an inherent conflict between the two requirements of 7 AAC 130.230(g)(1). The "sufficient to prevent institutionalization" requirement clearly means that the waiver services to be provided must be in an amount calculated to keep the recipient from being institutionalized; that is one of the primary purposes of the Waiver Services program. The question left unanswered by the regulation is whether "the purposes of the plan of care" may go beyond the minimum requirement of keeping the recipient out of an institution, and if so, how far.⁵⁴

There are a number of reasons to construe 7 AAC 130.230(g)(1) as allowing the purpose of a plan of care" to extend beyond the minimum requirement of keeping a recipient out of an institution. First, if the purpose of a plan of care is interpreted in this way, it would make the requirement to "reasonably achieve the purposes of the plan of care" completely superfluous, because the purpose of the plan would be completely subsumed within the other, expressly stated requirement of keeping a recipient out of an institution. Such an interpretation would violate the principle that regulations, like statutes, must be interpreted so that effect is given to all provisions, so that no part will be inoperative or superfluous, and so that one section will not destroy another.⁵⁵

Second, this interpretation, taken to its logical conclusion, would have extreme consequences. The Division would violate its own regulation if it ever increased the amount of a recipient's waiver services without first showing that the recipient had been institutionalized under the service level authorized by the previous POC.

Construing "the purposes of the plan of care" to go beyond the minimum requirement of keeping the recipient out of an institution avoids the problems discussed above. However, this interpretation presents its own problems. For example, were one of the purposes of a particular plan of care to increase the recipient's artistic abilities, then a trip to the Louvre would clearly further that purpose. Or, were one of the purposes of a plan of care to increase the recipient's cooking skills, then enrollment at Le Cordon Bleu might be appropriate.

It seems clear that the purpose of the Medicaid Waiver Services program would not be furthered by either of these interpretations. The first approach would likely cause many waiver services recipients to be institutionalized, the avoidance of which is a primary purpose of the

⁵⁴ The parties were asked to address this issue in their post-hearing briefing. However, Mr. T did not do so, and the Division flatly refused to do so (*see* the Division's post-hearing brief at p. 2).

⁵⁵ *See City of St. Mary's v. St. Mary's Native Corp.*, 9 P.3d 1002, 1008 (Alaska 2000), *Alascom Inc., v. North Slope Borough Board of Equalization*, 659 P.2d 1175, 1178 n.5 (Alaska 1983), 2A C. Sands, *Statutes and Statutory Construction*, § 46.06 (4th ed.1973), and 2A N. Singer, *Sutherland Statutory Construction and Statutory Interpretation*, § 46:6 at 230 - 231 and 244-247(6th Ed. 2002).

Waiver Services program. The second approach would likely cost more than institutionalizing the recipient, contrary to the Waiver Services program's requirement of cost-neutrality.

The only interpretation which avoids the pitfalls discussed above is to *imply a requirement that the purposes of the plan of care themselves be reasonable* when viewed in light of the intent of the Waiver Services program. This is consistent with the regulation's requirement that the amount, scope, and duration of services "reasonably achieve" the purposes of the plan of care.

The reasonableness of the purpose or goals of a plan of care can readily be assessed by comparing them to the types of services which the Division provides under the Waiver Services program (*i.e.* Day Habilitation services, residential habilitation services, etc.). The purposes of the Day Habilitation services at issue here are described by regulation to include (1) assisting the recipient with acquisition, retention, or improvement of skills in the areas of self-help, socialization, appropriate behavior, and adaptation; (2) promoting the development of the skills needed for independence, autonomy, and full integration into the community; and (3) reinforcing the skills taught in school, therapy, or other settings.⁵⁶

2. *The Services Provided Reasonably Achieve the Purposes of the Plan of Care*

To determine whether the amount, scope, and duration of services will reasonably achieve the purposes of the plan of care, it is first necessary to define the purposes of the plan of care. The purposes of the POC are listed in the POC as "goals." The goals of Mr. T's current POC are (1) to maintain his personal hygiene; (2) to expand his culinary skills; (3) to safely participate in farm activities; (4) to participate in social and community activities; (5) to explore his environment through photography and other media; (6) to live a healthy lifestyle; (7) to improve his independence at keeping and maintaining his home; (8) to participate in farm chores; and (9) to participate in social and recreational activities in his community.⁵⁷ As noted above, the Division could conceivably argue that one or more of the goals of Mr. T's POC are not supported by the Waiver Services program. However, the Division did not object to any of the goals presented in Mr. T's current POC when it renewed that POC in June 2012.⁵⁸ Accordingly, the issue narrows to whether the amount, scope, and duration of services provided by Mr. T's POC, as amended, are

⁵⁶ See 7 AAC 130.260. It is arguable that the artistic endeavors sought by Mr. T in his POC amendment request go beyond the purposes of Day Habilitation as stated in the regulation. However, the Division did not raise this as an issue in the letter denying the amendment request. Accordingly, for purposes of this decision, it must be assumed that the goals stated in Mr. T's renewal POC and POC amendment request are legitimate.

⁵⁷ Exs. F9, F10, F14, F15, F16, F18, F19, and F20.

⁵⁸ Exs. F1, F2. The Division denied some of the additional time requested under the renewal POC, but it did not assert that any of the goals were not legitimate.

reasonably necessary to allow him to achieve one or more of his stated and approved goals.⁵⁹ This is a factual issue on which Mr. T bears the burden of proof.⁶⁰

B B testified at hearing as to Mr. T's need for additional Day Habilitation services. She has been Mr. T's Care Coordinator since Mr. T came to the No Name No Name in 2009 or 2010. Ms. B's testimony as to the reasons Mr. T was requesting additional Day Habilitation services essentially tracked the "Amendment Description" she had written on the POC amendment request form, a substantial portion of which was quoted above.⁶¹ Ms. B testified that additional Day Habilitation time for travelling to No Name and/or No Name to take cooking classes was necessary to achieve the POC goal of expanding Mr. T's culinary skills. Ms. B also testified that additional Day Habilitation time for drawing, painting, photographing, writing stories about, and making short films about Mr. T's favorite subject (beetles) was necessary to achieve the POC goal of exploring his environment through various media. Ms. B estimated at hearing that it would be necessary for Mr. T to travel to No Name once per week, and to No Name once per week, to meet these goals. Finally, Ms. B testified that Mr. T's existing Day Habilitation hours could not be reassigned or rearranged to cover these new goals.

The Division's witness on this issue was Corina Castillo-Shepherd.⁶² She is the person who reviewed and denied Mr. T's POC amendment request. Ms. Castillo-Shepherd has a degree in "recreational therapy." Her work experience has included developing care plans for persons with developmental disabilities. When reviewing a POC, she first reviews the person's Inventory for Client and Agency Planning (ICAP) assessment. Mr. T's ICAP indicates that he operates at a 7-year-old's level.

At hearing, Ms. Castillo-Shepherd did not attempt to counter any of Ms. B's factual assertions. Rather, her primary stated justification for denying Mr. T's amendment request was that the reasons advanced in support of the amendment request are the same as those previously asserted in support of Mr. T's renewal POC. She interpreted this as meaning that the proposed new activities were already covered under the renewal POC. However, this is incorrect. First, the Division denied 15 hours per week of the Day Habilitation time requested by Mr. T in his most recent renewal.⁶³

⁵⁹ Medicaid's sufficiency provision requires that "[e]ach service must be sufficient in amount, duration, and scope to reasonably achieve its purpose." 42 CFR 440.230(b).

⁶⁰ See 2 AAC 64.290(e), 7 AAC 49.135, and *Alaska Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

⁶¹ Ex. E3.

⁶² Castillo-Shepherd's testimony (source for whole paragraph).

⁶³ Exs. F1, F2.

Second, it is possible, as Mr. T now asserts, that the hours previously authorized by the renewal POC are insufficient to satisfy its goals. Finally, this argument was not asserted in the Division's letter of March 15, 2013.

The testimony of each of the two witnesses was credible. Ms. Castillo-Shepherd's testimony demonstrated that she is quite knowledgeable regarding waiver services in general. However, only Ms. B testified to specific facts tending to show whether the additional Day Habilitation time requested is reasonably necessary to achieve the purposes of Mr. T's POC. Accordingly, as to the precise matter at issue, Ms. B's testimony was essentially uncontroverted. The preponderance of the evidence therefore shows that the amount, scope, and duration of the additional Day Habilitation services, requested in Mr. T's proposed POC amendment, are reasonably necessary to achieve the purposes of his plan of care.

3. *The Requested Services Appear Sufficient to Prevent Institutionalization.*

The final issue, under 7 AAC 130.230(g)(1), is whether "the amount, scope, and duration of services to be provided" by Mr. T's amended Plan of Care "are sufficient to prevent institutionalization." In making this determination, it is not necessary for a recipient to show that each individual waiver service, by itself, is necessary to prevent institutionalization.⁶⁴ Rather, the Plan of Care is considered as a whole.

Making a determination as to whether present waiver services will be sufficient to prevent future institutionalization is obviously an inexact science. At hearing, Mr. T's Care Coordinator, B B, and G G, manager of the No Name, each testified as to the need to add additional Day Habilitation time to Mr. T's POC so as to keep him at the No Name and avoid regression which might place him in an institution. These witnesses' testimonies were credible and deserve significant weight due to their familiarity with Mr. T.

Ms. Castillo-Shepherd asserted, on the other hand, that because Mr. T has not been institutionalized in the past due to lack of the additional services requested, it is unlikely that he will be institutionalized in the future due to a lack of these services. This argument is logical on its face, and, if Mr. T had received a lower level of waiver services for a lengthy period of time, the argument might be convincing. However, Mr. T has only been at the No Name for about three years, and his current POC has only been in effect since April 2012. The relatively short period of time that Mr. T has avoided institutionalization at his current level of Day Habilitation services makes the inference that he will continue to do so in the future less reliable.

⁶⁴ *Brown v. South Carolina Dept. of Health and Human Services*, 709 S.E.2d 701, 704 (S.C. App. 2011).

In summary, while the Division's witness presented arguments on this issue, only Ms. B testified to specific facts tending to show whether Mr. T is at risk of institutionalization if his POC amendment request is not granted. Accordingly, Ms. B's testimony on this issue was also essentially uncontroverted.

On balance, the evidence presented by Mr. T on this issue is more persuasive than the arguments presented by the Division. Accordingly, the preponderance of the evidence indicates that Mr. T's renewal plan of care, when augmented by the additional Day Habilitation time requested by his proposed Plan of Care amendment, will be sufficient to prevent his institutionalization.

IV. Conclusion

Mr. T met his burden and proved, by a preponderance of the evidence, that (1) the documentation for his Plan of Care amendment request was sufficient; (2) the amount, scope, and duration of the additional Day Habilitation services requested in his proposed POC amendment are reasonably necessary to achieve the purposes of his Plan of Care; and (3) his renewal Plan of Care, when augmented by the additional Day Habilitation time requested by his proposed Plan of Care amendment, will be sufficient to prevent his institutionalization. Accordingly, the Division erred when it denied that portion of Mr. T's proposed Plan of Care amendment which requested an additional 1300 units (13 hours per week for 25 weeks) of Day Habilitation services.⁶⁵ The Division's determination is therefore reversed.

DATED this 19th day of August, 2013.

Signed

Jay Durych
Administrative Law Judge

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

⁶⁵ This is not to say that a state, in view of its limited resources, the cost of providing community-based care, the range of services provided to other recipients, and the state's obligation to distribute those services equitably, cannot place limitations on waiver services. *See generally Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999). However, the Division did not cite any of these factors as reasons for denial of the POC amendment requested in this case.