

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

In the Matter of:	)	
	)	
U W	)	OAH No. 13-0796-MDS
	)	HCS Case No.
_____	)	Medicaid ID No.

**DECISION**

**I. Introduction**

The issue in this case is whether U W (U) is entitled to an additional ten hours per week of Day Habilitation services. The Division of Senior and Disabilities Services (Division) denied U's proposed Plan of Care (POC) as to these additional services on four separate bases. These are (1) that the PCA services, home schooling, and other waiver services that U is already receiving are of sufficient amount, duration, and scope to prevent his institutionalization; (2) that Day Habilitation services are not the appropriate means to facilitate U's planning for interaction with his peers or his actual interaction with his peers; (3) that activities such as developing an emergency contact list and/or a list of planned activities are things that can be done at home, and therefore do not qualify as Day Habilitation services; and (4) that U's family has not yet made full use of other third-party resources which are available to pay for the requested Day Habilitation services.

This decision concludes that the Division correctly determined that Day Habilitation services are not the appropriate means to facilitate U's planning for interaction with his peers, and that activities such as developing an emergency contact list and/or a list of planned activities do not qualify as Day Habilitation services. However, the Division erred in denying U Day Habilitation services in general because the Day Habilitation services requested appear necessary to prevent institutionalization, and because third party resources are not available to pay for the *specific activities* for which the Ws have sought funding through Day Habilitation services.

Accordingly, the Division's denial of that portion of U's proposed Plan of Care, which requested an additional 10 hours per week of Day Habilitation services, is reversed. However, none of the authorized hours of Day Habilitation services may be used for planning for interaction with peers, developing an emergency contact list, or developing a list of planned activities.

## II. Facts<sup>1</sup>

### A. *U's Medical Condition, Care Needs, and Physical Limitations*

U is a 14 year old boy.<sup>2</sup> He currently lives with his mother, father, sister, and uncle in a single family home.<sup>3</sup> He was struck by a car while riding his bicycle in July 2012.<sup>4</sup> He was thrown 60 feet and suffered a spinal cord injury, as a result of which he lost the use of his legs.<sup>5</sup> U was hospitalized for about four months following the accident, but was able to return home in November 2012.<sup>6</sup>

U's spinal cord injury, in addition to causing paraplegia, has left him incontinent<sup>7</sup> and has led to diagnoses of cervical instability, essential hypertension, autonomic dysreflexia, neurogenic bowel, neurogenic bladder, and mild bilateral spasms of the lower extremities.<sup>8</sup>

U weighed 188 pounds at the time of his assessment.<sup>9</sup> He currently requires hands-on assistance with all activities of daily living.<sup>10</sup> His legs cannot bear weight and he is transferred by Hoyer lift. He must be assisted into his wheelchair, but he can then propel the wheelchair himself. The assistive devices used by U include a walker, wheelchair, hospital-type bed, Hoyer lift, shower chair, and bathroom grab bars. U has been referred to physical therapy and occupational therapy, and his family is in the process of finding providers for those services.<sup>11</sup>

U's injuries have affected him psychologically as well as physically.<sup>12</sup> Since his accident he is reluctant to leave his home, and his social network is limited to his family. He enjoys playing video games, watching television, and visiting shopping malls.

Following his accident U's family moved into a different home.<sup>13</sup> As a result of his accident and the move, U has become isolated. He is not familiar with his new neighborhood. He is afraid of being teased and is not interacting with his peers. Because of his fear and anxiety U does not

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<sup>1</sup> 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.

<sup>2</sup> Ex. E4.

<sup>3</sup> Ex. E6.

<sup>4</sup> Ex. E5.

<sup>5</sup> Ex. E5.

<sup>6</sup> Ex. E6.

<sup>7</sup> Ex. F3.

<sup>8</sup> Ex. F6.

<sup>9</sup> Ex. E4.

<sup>10</sup> Exs. E5, E6, F6 (sources for entire paragraph).

<sup>11</sup> Ex. E7.

<sup>12</sup> Exs. E6, E7, F6 (sources for entire paragraph).

<sup>13</sup> Q M's hearing testimony (source for entire paragraph).

leave the house unless accompanied by a family member. U does not attend classes at his middle school, but he does receive some educational services in his home.<sup>14</sup>

**B. Relevant Procedural History**

U was found eligible for and began receiving Medicaid Home and Community-Based Waiver Services ("waiver services") in February 2013.<sup>15</sup> U also receives Medicaid-funded Personal Care Assistant (PCA) services.<sup>16</sup> On April 8, 2013 U submitted a proposed initial Plan of Care which sought Care Coordination services, Nursing Oversight and Case Management services, Respite services, and 10 hours per week of Day Habilitation services.<sup>17</sup> On May 3, 2013 the Division notified U's parents that his proposed POC had been approved in part and denied in part.<sup>18</sup> The Division approved 246 units of Nursing Oversight and Case Management services, 1,640 units (10 hours per week for 41 weeks) of Hourly Respite services, and 14 units of Daily Respite services.<sup>19</sup> The Division denied U's request for 1,640 units (10 hours per week for 41 weeks) of Day Habilitation services.<sup>20</sup> On May 29, 2013 U's parents requested a hearing to contest the Division's denial of the Day Habilitation services.<sup>21</sup>

U's hearing was held on August 27, 2013. U was represented by his father, Jack W, who participated by phone. U's Care Coordinator, Q M, participated by phone and testified on U's behalf. Gerry Johnson, a Health Program Manager employed by the Division, participated by phone and represented the Division. Maria del Rosario, also a Health Program Manager employed by the Division, attended the hearing in person and testified on behalf of the Division. The record closed at the end of the hearing on August 27, 2013.

**III. Discussion**

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

**1. Relevant Federal Medicaid Statutes, Regulations, and Case Law**

States participating in Medicaid must provide certain mandatory services under a state medical assistance plan.<sup>22</sup> States may also, at their option, provide certain additional services, one

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<sup>14</sup> Exs. E6, E7, and Q M's hearing testimony.

<sup>15</sup> Ex. E1. The specific waiver services program category in which U participates is the category for children with chronic medical conditions (the "CCMC" Waiver Services program).

<sup>16</sup> Ex. E12.

<sup>17</sup> Exs. E1 - E11. This proposed POC was for the period February 4, 2013 through November 18, 2013 (*Id.*).

<sup>18</sup> Ex. D1.

<sup>19</sup> Ex. D1.

<sup>20</sup> Ex. D1.

<sup>21</sup> Ex. C.

<sup>22</sup> 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.

of which is the Home and Community-Based Waiver Services program.<sup>23</sup> 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.<sup>24</sup>

Federal regulations require that both mandatory *and* optional Medicaid services “be sufficient in amount, duration, and scope to reasonably achieve [their] purpose.”<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup> A state may “place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.”<sup>28</sup>

## 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 . . ."<sup>29</sup>

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<sup>23</sup> 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).

<sup>24</sup> See 42 USC 1396n(c)(1); 42 CFR §§ 435.217; 42 CFR §§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. (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].

<sup>25</sup> 42 CFR 440.230(b).

<sup>26</sup> 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).

<sup>27</sup> 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).

<sup>28</sup> 42 CFR 440.230(d); see also *DeLuca v. Hammons*, 927 F. Supp. 132 (S.D.N.Y.1996).

<sup>29</sup> 7 AAC 130.319(3).

The specific type of waiver services at issue here, "Day Habilitation services," is defined by regulation in relevant part as follows:<sup>30</sup>

(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 . . . and (2) do not replace, enhance, or supplement educational services for which the recipient is eligible under 4 AAC 52.

The substantive standards for approval of an initial Plan of Care are specified by 7 AAC 130.230(f),<sup>31</sup> which provides in relevant part as follows:<sup>32</sup>

(f) The department will approve a plan of care if the department determines that each service listed on the plan of care (1) is of sufficient amount, duration, and scope to prevent institutionalization; (2) is supported by documentation required in (c)(4) of this section;<sup>[33]</sup> and (3) cannot be provided under 7 AAC 105 - 7 AAC 160, except as a home and community-based waiver service under 7 AAC 130.200 - 7 AAC 130.319.<sup>34</sup>

Finally, 7 AAC 160.200 requires that waiver services applicants make use of other resources prior to seeking waiver services, and provides in relevant part as follows:

(a) The department will pay for a service, prescription drug, or supply only to the extent it is a covered service under AS 47.07.030 and 7 AAC 105 - 7 AAC 160 and only after the recipient has made full use of any other third-party resources available to pay for that service, prescription drug, or supply. A third-party resource includes . . . (2) private, employer-based, or public health insurance; (3) a prepaid health plan; (4) a program or health plan of the federal government, including (A) Veterans Administration benefits, (B) the TRICARE military health plan . . . and (C) Medicare . . . (6) automobile insurance, including uninsured or underinsured motorist insurance...

.....  
(e) In this section, "has made full use of" means the recipient has applied for, reasonably cooperated with, and to the extent possible has maintained eligibility for,

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<sup>30</sup> 7 AAC 130.260. This regulation was substantially amended effective July 1, 2013 (see Register 206). However, because the Division's determination was made on May 3, 2013 (Ex. D), this case must be decided under the prior version of the regulation.

<sup>31</sup> 7 AAC 130.230 was adopted on February 1, 2010 and was the regulation in effect at the time the Division denied U's request for Day Habilitation services on May 3, 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).

<sup>32</sup> The Division's partial denial letter also cites 7 AAC 130.230(g). However, this case involves an initial Plan of Care, and 7 AAC 130.230(g) applies only to Plan of Care renewals and amendments.

<sup>33</sup> 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 . . ."

<sup>34</sup> The only subsection of 7 AAC 130.230(f) cited by the Division in its partial denial letter was subsection one.

a third party that will pay for a service, prescription drug, or supply otherwise covered under AS 47.07.030 and 7 AAC 105 - 7 AAC 160.

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

The Division, at hearing, asserted several arguments not found in its partial denial letter of May 3, 2013. However, the bases for partial denial of U's proposed POC are limited to those expressed in the Division's May 3, 2013 partial denial notice.<sup>35</sup> A fair reading of the Division's notice dated May 3, 2013 reveals four asserted bases for denial:<sup>36</sup>

1. The PCA services, home schooling, and other waiver services that U is already receiving are of sufficient amount, duration, and scope to prevent his institutionalization (see 7 AAC 130.230(f)).<sup>37</sup>
2. Day Habilitation services are not the appropriate means to facilitate U's planning for interaction with his peers, his actual interaction with his peers (see 7 AAC 130.319(3)).<sup>38</sup>
3. Activities such as developing an emergency contact list and/or a list of planned activities are things that can be done at home, and therefore do not qualify as Day Habilitation services under 7 AAC 130.260(b)(1).<sup>39</sup>
4. U's family has not yet made full use of other third-party resources which are available to pay for the requested Day Habilitation services (see 7 AAC 160.200).<sup>40</sup>

These four alleged bases for denial are addressed below. Because this is U's initial Plan of Care, he bears the burden of proof as to all facts needed to demonstrate his eligibility for the Day Habilitation services requested.<sup>41</sup>

**C. Are Other Waiver and Non-Waiver Services That U is Already Receiving of Sufficient Amount, Duration, and Scope to Prevent his Institutionalization?**

Maria del Rosario is the Division employee who reviewed and acted on U's proposed POC. In her letter denying U's request for Day Habilitation services, she asserted that the PCA services, home schooling, and other waiver services that U is already receiving are of sufficient amount,

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<sup>35</sup> 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 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).

<sup>36</sup> Exs. D1, D2.

<sup>37</sup> Ex. D1, last paragraph, and Ex. D2, carryover paragraph and first full paragraph.

<sup>38</sup> Ex. D2, third full paragraph.

<sup>39</sup> Ex. D2, third full paragraph.

<sup>40</sup> Ex. D2, fourth and fifth / last full paragraphs.

<sup>41</sup> 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).

duration, and scope to prevent his institutionalization. This assertion is based on 7 AAC 130.230(f), which states in relevant part that "[t]he department will approve a plan of care if the department determines that each service listed on the plan of care (1) is of sufficient amount, duration, and scope 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.<sup>42</sup> Rather, the Plan of Care is considered as a whole. Whether the services that U is already receiving are sufficient to prevent him from being institutionalized is a factual issue on which U bears the burden of proof.

Making a determination as to whether existing waiver and non-waiver services are sufficient to prevent future institutionalization is obviously an inexact science. U's Care Coordinator testified that, because of U's isolation following his accident, his social skills are deteriorating, and indicated that continuing deterioration of these skills could ultimately place him in an institution. She also testified that initial POCs like the one at issue here usually start with more basic goals and are used to establish a baseline. She stated that the POCs are later revised over time, through the renewal and amendment processes, as the recipient's condition changes. Her testimony in this regard was credible and deserves significant weight due to her familiarity with U. Further, this testimony was essentially unchallenged by the Division at hearing.

The logic of the Division's partial denial notice appears to be that, since U has not been institutionalized in the past due to lack of the Day Habilitation 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 U had received a lower level of waiver services for a lengthy period of time, the argument might be convincing. However, U has only been a paraplegic for about 14 months, and this is his first / initial POC. The short period of time that U has avoided institutionalization without Day Habilitation services makes the inference that he will continue to do so in the future less reliable.

In summary, while the "institutionalization test" mandated by state and federal Medicaid regulations is necessarily speculative, on balance, the testimony presented on U's behalf on this issue is more persuasive than the argument presented by the Division. Accordingly, the preponderance of the evidence indicates that the requested Day Habilitation services need to be added to U's Plan of Care in order to prevent his institutionalization.

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<sup>42</sup> *Brown v. South Carolina Dept. of Health and Human Services*, 709 S.E.2d 701, 704 (S.C. App. 2011).

***D. Is Interaction with Peers an Appropriate and Needed Day Habilitation Goal?***

One of the goals proposed for U in his POC, to be met through Day Habilitation services, is for U to "increase [his] opportunities for community connections;" this is meant in large part to increase his interaction with others in his peer group.<sup>43</sup> The Division's response is that U does not require Day Habilitation services, and/or that those services are not an appropriate means to plan for interaction with his peers or to interact with his peers. This argument is based on 7 AAC 130.319(3), which states in relevant part that "habilitation services" are "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 . . .".

The uncontested evidence in this case is that, as a result of his accident and move, U has become isolated, is not familiar with his new neighborhood, is afraid of being teased, does not leave the house unless accompanied by a family member, is not interacting with his peers, and does not physically attend classes at his middle school. Accordingly, the evidence clearly shows that planning for and engaging in social interaction with his peers would be very beneficial to U.

The remaining question is whether Day Habilitation is the appropriate avenue through which to provide these needed services. Pursuant to 7 AAC 130.260, Day Habilitation services are to take place *outside* the home. Ms. del Rosario testified that the *planning portion* of the social interaction goal could be performed at home, and this testimony was unrebutted. However, when U's Care Coordinator asked Ms. del Rosario what non-waiver services were available to actually take U out into the community for socialization, Ms. del Rosario could not name any.

In summary, while planning social interaction is necessary for U, it is not properly provided through Day Habilitation because it can be performed at home. However, increasing U's peer interaction itself is clearly a goal which cannot be furthered, at least initially, inside the home. Accordingly, increasing U's interaction with peers is a goal which, by regulation, is appropriately furthered through Day Habilitation services.

***E. Does Developing an Emergency Contact List and/or Developing a List of Planned Activities Qualify as a Day Habilitation Service?***

Another of the goals proposed for U in his POC, to be met through Day Habilitation services, is for U to "increase his safety skills in the community."<sup>44</sup> The POC indicates that this goal will be met in part by developing an emergency contact list which U will carry with him, and

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<sup>43</sup> Exs. E9, E10.

<sup>44</sup> Ex. E10.



by creating "a list of activities which [U] would like to attend in the community."<sup>45</sup> In response, the Division does not contend that developing an emergency contact list, and/or a list of activities which U would like to attend in the community, would be inappropriate activities. Rather, the Division asserts only that these activities cannot properly be funded as Day Habilitation services.

Pursuant to 7 AAC 130.260, Day Habilitation services are to take place *outside* the home. U's Care Coordinator testified at hearing that she envisioned U being shown the actual location of police, fire, and other essential services so he will know what to do and where to go in case of an emergency. However, the proposed POC did not indicate that U would actually go out into the community to find these places. Rather, it indicated only that lists would be prepared. There is no evidence in the record that these lists cannot be developed at home. Accordingly, the Division was correct to deny Day Habilitation funding for these activities.

***F. Has U's Family Made Full Use of Other Third-Party Resources Which May be Available to pay for the Services for Which Day Habilitation is Sought?***

The Division's last basis for denial asserts that U's family has not yet made full use of other third-party resources which are available to pay for the services for which U seeks Day Habilitation funding. This is required by 7 AAC 160.200.<sup>46</sup> In addition to the services described in Sections III(D) and III(E), above, the services for which U seeks Day Habilitation funding can generally be described as socialization, real-world education, and recreation.<sup>47</sup>

When asked at hearing, Ms. del Rosario listed a Hoyer lift, environmental modifications to U's home, physical therapy, occupational therapy, professional counseling, and the Para-Olympics as examples of items or services available through regular Medicaid or elsewhere that U has not yet utilized. Ms. del Rosario testified that "she was open" to approving Day Habilitation services for U, but that he first needed to utilize physical therapy, occupational therapy, and professional counseling. In response, U's Care Coordinator testified that *the services sought in this case as Day Habilitation services* are not available elsewhere as non-waiver services.

The answer to this dispute lies in the precise wording of 7 AAC 160.200(a), which states in relevant part that "[t]he department will pay for a service, prescription drug, or supply only to the

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<sup>45</sup> Ex. E10.

<sup>46</sup> The Division also asserted at hearing that it was barred from providing the requested Day Habilitation services by 7 AAC 130.260(b)(2), which allows Day Habilitation to include only services that "do not replace, enhance, or supplement educational services for which the recipient is eligible under 4 AAC 52." However, the Division did not assert this argument in its partial denial notice. Accordingly, it is barred from doing so now (see footnote 35, above). In any event, Ms. del Rosario testified that she could not determine whether the Day Habilitation services requested "replaced, enhanced, or supplemented" educational services for which U was eligible under 4 AAC 52 because no "individualized education program" (IEP) was submitted in conjunction with U's proposed POC.

<sup>47</sup> Ex. E9.

extent it is a covered service under AS 47.07.030 and 7 AAC 105 - 7 AAC 160 and only after the recipient has made full use of any other third-party resources *available to pay for that service, prescription drug, or supply*" (emphasis added). Thus, under 7 AAC 160.200(a), a waiver applicant or recipient is not required to make full use of every non-Medicaid and every non-waiver service which may be available prior to utilizing *any* waiver funded service. Rather, a waiver applicant or recipient need make full use only of those non-Medicaid and non-waiver services *which provide the specific service for which waiver funding is sought*.

In this case, Ms. del Rosario listed a number of non-waiver services which it is undisputed that the Ws have not yet utilized. However, Ms. M's unrebutted testimony is that none of these as-yet-unutilized non-waiver services provide *the same type of services* which U seeks here as Day Habilitation services. Accordingly, 7 AAC 160.200(a) does not prevent U from receiving the Day Habilitation services he has requested.

#### **IV. Conclusion**

The Division correctly determined that Day Habilitation services are not the appropriate means to facilitate U's planning for interaction with his peers, and that activities such as developing an emergency contact list and/or a list of planned activities do not qualify as Day Habilitation services. However, the Division erred in denying U Day Habilitation services in general because the Day Habilitation services requested appear necessary to prevent institutionalization, and because third party resources are not available to pay for the *specific activities* for which the Ws have sought funding through Day Habilitation services.

Accordingly, the Division's denial of that portion of U's proposed Plan of Care, which requested an additional 10 hours per week of Day Habilitation services, is reversed. However, none of the authorized hours of Day Habilitation services may be used for planning for interaction with peers, developing an emergency contact list, or developing a list of planned activities.

DATED this 20th day of September, 2013.

*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 1<sup>st</sup> day of October, 2013.

By: Signed  
Name: Jay D. Durych  
Title: Administrative Law Judge, DOA/OAH

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