



of schizophrenia, with secondary diagnoses of morbid obesity, lymphedema, hypertension, osteoarthritis, asthma, and reflux esophagitis.<sup>8</sup> In addition, she had visited the emergency room for treatment of a urinary tract infection and cellulitis.<sup>9</sup> Ms. X' mental health condition makes her a difficult and needy person to care for: her ability to make decisions is severely impaired, she is abusive to her care providers, and she does not adequately care for herself.<sup>10</sup> Due to her mental health condition, Ms. X' daughter, Z X, was appointed her legal guardian in 2012.<sup>11</sup>

At the time of the 2013 assessment, Ms. X demonstrated good upper extremity range of motion and hand strength, but was unable to place her hands on her chest and stand up.<sup>12</sup> Ms. X sleeps in an electric hospital bed.<sup>13</sup> With the assistance of the bed, she is able to sit up from a lying position on the bed.<sup>14</sup> She is able, with great difficulty, to move from side-to-side in bed.<sup>15</sup> Ms. X regularly requires weight bearing assistance to transfer from her wheelchair to her bed, and on bad days requires weight bearing assistance to transfer from her bed to her wheelchair.<sup>16</sup> Ms. X does not walk; she relies on an electric wheelchair to move about her residence.<sup>17</sup> Because of space limitations and her mental health condition, she requires limited physical assistance to maneuver the electric wheelchair.<sup>18</sup> Due to her girth and mental health issues, Ms. X is unable to dress herself without assistance.<sup>19</sup> She can eat without assistance.<sup>20</sup> She is unable to fit into commercial diapers, and instead is clothed in loose fitting garments to allow for

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<sup>7</sup> Ex. E, p. 24.

<sup>8</sup> Ex. E., p. 3.

<sup>9</sup> Ex. E, p. 3.

<sup>10</sup> Testimony of Z. X. See Ex. E, pp.7 (“increased agitation & confusion related to mental health diagnosis”), 8 (“Due to mental health issues and large girth, assistance needed to change clothes regularly and adjust to make sure appropriately dressed”), 10 (“Due to mental health issues, physical assistance needed to complete [personal hygiene] tasks otherwise recipient would not do so”), 16 (noting severely impaired ability to make decisions regarding tasks of daily life), 17 (noting frequent verbal abuse and occasional inappropriate social behavior), 18 (noting recipient “create[s] consistent difficulties that are modifiable to manageable levels”), 22 (“Physical & mental health issues impact ability to care for herself”), 26 (noting persistent anger, repetitive complaints, decline in mood status); Ex. F, p. 1 (“She is typically highly resistant to cares, and reportedly requires either extensive verbal or physical encouragement to perform her ADL’s.”).

<sup>11</sup> Ex. G.

<sup>12</sup> Ex. E, p. 4. By contrast, at the time of her 2009 assessment, Ms. X was unable to touch her hands above her head or behind her back. Ex. F, p. 3.

<sup>13</sup> See Ex. E, p. 6.

<sup>14</sup> See Ex. E, pp. 6, 28. See notes 50-52, *infra*.

<sup>15</sup> In 2009, her assessor reported, based on her personal observation, that Ms. X was able to move from side-to-side in the bed “with great difficulty.” Ex. F, p. 3. Ms. Heaston did not observe this activity. There is no evidence that Ms. X’ ability to move in bed has improved since 2009.

<sup>16</sup> See notes 65-70, *infra*.

<sup>17</sup> Ex. E, p. 7. See notes 47, 78, *infra*.

<sup>18</sup> Ex. E, p. 7. See note 79, *infra*.

<sup>19</sup> Ex. E, p. 8.

<sup>20</sup> Ex. E, p. 9.

cleansing when incontinent.<sup>21</sup> She is frequently incontinent with both bowels and urine and requires extensive assistance to use the commode and to cleanse herself when incontinent.<sup>22</sup> She is provided this assistance ten times daily.<sup>23</sup> Because of her mental health issues, Ms. X will not perform personal hygiene tasks without physical assistance.<sup>24</sup> Ms. X, due to her girth, is unable to use a shower or bathtub. She is provided one bed bath daily.<sup>25</sup> Ms. X' need for assistance with the instrumental activities of daily living was assessed in 2013 as unchanged from 2009.<sup>26</sup>

Ms. Heaston used the Consumer Assessment Tool (CAT) to record the results of her assessment. Using the Personal Care Assistance Service Level Computation chart in conjunction with the CAT, the Division calculated Ms. X' need for PCA services as 29.25 hours weekly.<sup>27</sup>

### **III. Discussion**

The Department of Health and Social Services is authorized to provide eligible persons with personal care services in the recipient's home.<sup>28</sup> The Division provides compensation for personal care services in the form of physical assistance, based on an assessment of the recipient's ability to perform specified activities of daily living (ADL) and instrumental activities of daily living (IADL).<sup>29</sup> The assessment is conducted using the Consumer Assessment Tool

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<sup>21</sup> Testimony of Z. X. See Ex. F, p. 5 (client report: "She is incontinent of urine throughout the day and soaks her bedding and clothes consistently...She does not fit into commercial diapers, requiring her PCA to perform significant amounts of laundry and clean up care daily."; assessor observation: "her apartment odor was consistent with the consumer report.").

<sup>22</sup> Ex. E, p. 9.

<sup>23</sup> Ex. E., p. 9.

<sup>24</sup> Ex. E, p. 10. This is consistent with the 2009 assessment. Ex. F, p. 5 ("She is incomplete with her cares if left to do them without assistance.").

<sup>25</sup> Ex. E, p. 11. This is a decrease in function since the 2009 assessment, when she reportedly was able, with extensive assistance, to use a bathtub. Ex. F, p. 5.

<sup>26</sup> See Ex. D, p. 6.

<sup>27</sup> Ex. D, p. 1. The Personal Care Assistance Service Level Computation chart (hereinafter, PCA Service Computation chart), revised as of 3/20/2012, may be viewed online at the webpage noted by the Division at Ex. D, p. 1. It is an official document incorporated by reference into the Division's decision; accordingly, it is considered part of the record for purposes of the hearing. See 7 AAC 125.024(a)(1); 7 AAC 160.900(d)(29).

<sup>28</sup> AS 40.07.030(b).

<sup>29</sup> See 7 AAC 125.010, -.020, .030. 7 AAC 125.030(a) provides that compensation will be paid "for the personal care services identified in this section." 7 AAC 125.030(b) provides that "[p]ersonal care services include the following types of physical assistance[,]" and goes on to list eight specific ADL's with forms of personal service assistance. A regulation that lists items as "included", without specifying that other items are excluded, means "included, but not limited to." See AS 01.10.040(b). 7 AAC 125.030(a) limits compensation items to those "identified" in 7 AAC 125.030. Arguably, this means that only those items expressly listed in 7 AAC 125.030(b) are compensable. Absent a claim by Ms. X that a specific type of activity or assistance that is not expressly mentioned in the regulation is compensable, it is not necessary to consider whether to interpret the regulation to that effect.

(CAT),<sup>30</sup> a form created by the Department of Health and Social Services to evaluate an individual's ability to care for himself or herself.<sup>31</sup>

One section of the CAT covers the individual's physical abilities with respect to eight specified ADL's: body mobility, transfers, locomotion, dressing, eating and drinking, toileting, personal hygiene, and bathing.<sup>32</sup> Individuals are given two scores reflecting their ability to perform these activities, one for their ability to perform the activity (self-performance), and the other for the degree of assistance they require (support). A score of two zeros indicates the individual performs the activity independently (self-performance) with no setup or physical help (support). Increasing inability to perform and need for assistance result in progressively higher scores of one to four.<sup>33</sup> The Division will provide a specified amount of time for PCA assistance with each ADL, depending on the scores provided and the frequency with which the activity occurs, in accordance with the Personal Care Assistance Service Level Computation form devised for that purpose.<sup>34</sup>

Under the regulations currently governing this program, the time allowed for the various ADL's is fixed in specific amounts linked to the recipient's scores on the CAT and the frequency of the activity.<sup>35</sup> Applying the current regulations to the scores and frequencies assigned in the 2009 assessment, the time allowed would have been reduced from the prior level of 44.5 hours to approximately 34.55 hours. Under the scores and frequencies assigned in the 2013 assessment, the time allowed was reduced to 29.25 hours. As set forth in the following sections, Ms. X' actual current need is for approximately 35.25 hours per week.

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<sup>30</sup> 7 AAC 125.020(b); 7 AAC 160.900(d)(6).

<sup>31</sup> See generally, <http://dhss.alaska.gov/dsds/Documents/docs/cat-pcatOnlineFlyer.pdf> (accessed June 19, 2013).

<sup>32</sup> Ex. E, pp. 6-11. See 7 AAC 125.030(b)(1)-(8). The CAT terminology does not precisely track the regulatory language for each ADL. For one example, the ADL of "body mobility" is described in the regulation as positioning or turning in a bed or a chair, while the CAT uses the term "bed mobility" and omits any reference to a chair. Compare, 7 AAC 125.030(b)(1), with Ex. E, p. 6. For another, for the ADL of "toileting", the CAT expressly includes how the recipient "adjusts clothes", and the regulation does not mention that action. See *In Re V.W.*, at \*2, OAH No. 12-0957-MDS (Commissioner of Health and Social Services 2013); compare, 7 AAC 125.030(b)(6) with Ex. E, p. 9.

<sup>33</sup> A score of five indicates verbal assistance is provided; a score of eight indicates the activity did not occur within the past seven days.

<sup>34</sup> 7 AAC 125.024(a)(1); 7 AAC 160.900(d)(29).

<sup>35</sup> This includes Instrumental Activities of Daily Living (IADL's). Accordingly, even though the evidence is to the effect that Z X must provide virtually daily laundering services, the time allowed for that activity is limited to 60 minutes per week, which was provided.

(1) Body Mobility

The ADL of body mobility means moving a recipient to and from a lying position, turning a recipient from side to side, or positioning a recipient in a bed or chair.<sup>36</sup> It includes “positioning or turning in a bed or chair, if the recipient is nonambulatory.”<sup>37</sup> In the 2009 assessment, Ms. X was assessed as needing limited assistance for this activity, with a frequency of four times daily, for a total of 112 minutes per week.<sup>38</sup> In the 2013 assessment, she was assessed as independent in this ADL.<sup>39</sup> The Division notified Ms. X that:

due to new PCA regulations only non ambulatory recipients are allowed to receive time for this activity. Because you are ambulatory, this time has been removed.<sup>[40]</sup>

The assessment and the adverse action letter identify two different and independent reasons for denying assistance for this ADL. The reason identified in the adverse action letter is that the applicable regulation had changed. However, contrary to the Division’s assertion, there has been no material change to the applicable regulation. The regulation in effect at the time of Ms. X’ 2009 assessment provided compensation for “physical assistance with positioning or turning a nonambulatory patient in a bed or chair.”<sup>41</sup> This is in substance no different than the current regulation. Ms. X was provided 112 minutes per week for this activity in 2009 even though she was ambulatory, apparently based on her reported need for physical assistance with sitting upright in bed.<sup>42</sup> Whether the regulation has changed, however, is immaterial. The material issue is whether Ms. X is, or is not, ambulatory.

The term “nonambulatory” has not been defined for purposes of the PCA program. In its primary usage, to be ambulatory is to be able to walk.<sup>43</sup> To walk, by common understanding as

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<sup>36</sup> 7 AAC 125.030(h).

<sup>37</sup> 7 AAC 125.030(b)(1)(A).

<sup>38</sup> Ex. D, p. 2; Ex. F, p. 3.

<sup>39</sup> Ex. E, p. 6.

<sup>40</sup> Ex. D, p. 2.

<sup>41</sup> 7 AAC 43.752(a)(1)(E) (repealed 2/1/2010).

<sup>42</sup> See Ex. F, p. 3. To award time to an ambulatory recipient based on a need for assistance with sitting up and lying down would be consistent with a literal interpretation of 7 AAC 125.030(b)(1)(A), which refers only to “positioning or turning in a bed or chair” and does not expressly preclude providing assistance to an ambulatory person for “moving...to and from a lying position.” Compare 7 AAC 125.030(b)(1)(A) with 7 AAC 125.030(h).

<sup>43</sup> Webster’s Ninth New Collegiate Dictionary (1990), p. 77 (“1: of, relating to, or adapted to walking”; “4 a: able to walk about and not bedridden b : involving an individual who is able to walk about”). See also Taber’s Cyclopedic Medical Dictionary (17<sup>th</sup> ed. 1993) p. 78 (“Able to walk; not confined to bed.”); Dorland’s Illustrated Medical Dictionary (27<sup>th</sup> ed. 1988) p. 57 (“ambulatory” defined as “ambulant”; ambulant defined as “walking or able to walk”).

well as by definition, is to be able to move about on foot.<sup>44</sup> A person who can move about while using an assistive device such as crutches, a walker, cane, gait belt, or braces, would be considered ambulatory under that understanding, given that some portion of their weight is borne by the extremities. A person who cannot bear weight on their lower extremities and can move about only while seated in a manual or electric wheelchair would not, under the common meaning of the term, be considered able to walk.

The Division takes a different approach. Ms. Heaslet testified that for purposes of 7 AAC 125.030(b)(1)(A), the Division considers a person to be ambulatory if the person is able to locomote as described in 7 AAC 125.030(b)(3)(A), which states locomotion includes “walking with the support of a walker, cane, gait belt, braces, crutches, or manual wheelchair.”<sup>45</sup> Under this approach, a person who is unable to bear weight on their legs and can move about from place to place while seated in a manual wheelchair is considered ambulatory. Only a person who requires an electric wheelchair in order to move from place to place is considered nonambulatory.

The Division’s interpretation is consistent with 7 AAC 125.030(b)(3)(A), which includes moving about in a manual wheelchair as a form of “walking” for purposes of the ADL of locomotion.<sup>46</sup> Moreover, it might be reasonable to limit payment for the assistance with ADL of body mobility to persons who are incapable of moving about in a manual wheelchair, inasmuch as the ability to self-propel a manual wheelchair might reasonably be viewed as equivalent to the ability to sit up in bed or to position or turn one’s body in bed or in a chair. But in this case, it is undisputed that Ms. X locomotes by using an electric wheelchair.<sup>47</sup> That Ms. X always uses an electric wheelchair does not prove that she is physically incapable of self-propelling in a manual wheelchair, or of walking on her legs, with or without an assistive device. However, the burden of proof is on the Division, and the Division did not establish that Ms. X can self propel in a manual wheelchair, or that she can walk with an assistive device.<sup>48</sup> Thus, the Division has not shown that Ms. X is ambulatory under the Division’s interpretation of the word “nonambulatory.” Because the substance of the applicable regulation is unchanged and because

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<sup>44</sup> Webster’s Ninth New Collegiate Dictionary (199), p. 1325 (“to move along on foot: advance by steps”). The word is also used in the sense of “to come or go easily or readily[.]” *Id.* Ms. X does not come and go easily or readily.

<sup>45</sup> Testimony of K. Heaslet.

<sup>46</sup> *See also* Webster’s Ninth New Collegiate Dictionary (1990), p. 77 (ambulatory may be used in the sense of “2 : moving from place to place”).

<sup>47</sup> *See* Ex. E, p. 7.

<sup>48</sup> At the 2009 assessment, the assessor observed that Ms. X “could not stand to ambulate.” Ex. F, p. 4.

the Division did not prove that Ms. X is ambulatory, the adverse action letter does not state a valid ground for denying Ms. X time for the ADL of body mobility.

Arguably, the Division's failure identify anything other than an alleged change in the applicable regulation as a ground for reducing the time allowed for the ADL of body mobility precludes the Division from relying in this hearing on any other grounds for that action.<sup>49</sup> But at the hearing the Division also relied on another ground, namely that the assessor had determined that Ms. X needed no assistance this ADL. Ms. X did not object to consideration of that issue at the hearing. Accordingly, it will be addressed.

The assessor's determination was based on Ms. X' report that she could sit up and turn on her own, and on the assessor's observation that she sat up from a lying position on a hospital bed, and she repositioned herself while seated.<sup>50</sup> At her 2009 assessment, Ms. X reported she needed assistance to sit up in bed because her hospital bed "no longer works adequately to assist her in this process."<sup>51</sup> Z X testified that her mother sits up in bed using her electric hospital bed.<sup>52</sup> Based on the 2009 assessment, the ambiguity in both Ms. X' report and the assessor's note, and Z X' testimony, the preponderance of the evidence is that Ms. X does not require physical assistance from an another person to sit up in bed, because she uses an assistive device (her hospital bed) to do so.

The other activities included in the ADL of body mobility are turning a recipient from side to side in a bed, or positioning in a bed or chair.<sup>53</sup> Based on the assessor's observation, and absent any testimony or other evidence to the contrary, it does not appear that Ms. X needs physical assistance to reposition herself in a chair. As for turning from side to side while in bed, the assessor's notes state that Ms. X reported she was able to perform this activity "on her own" as well as that she had "no skin breakdown[,]"<sup>54</sup> and that she had no sign of pressure ulcers,<sup>55</sup> although she has visited the emergency room on multiple occasions for cellulitis.<sup>56</sup> In 2009, the assessor observed her turn side to side in bed without assistance, but "with great difficulty[.]"<sup>57</sup>

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<sup>49</sup> See 7 AAC 49.070 (requiring written notice of "the reasons for the proposed action, including the statute, regulation, or policy upon which that action is based."). See, e.g., In Re E.L., OAH No. 13-0257-CMB at 3 (Commissioner of Health and Social Services 2013).

<sup>50</sup> See Ex. E, p. 6.

<sup>51</sup> Ex. F., p. 3.

<sup>52</sup> Testimony of Z. X.

<sup>53</sup> 7 AAC 125.030(h).

<sup>54</sup> Ex. E, p. 6.

<sup>55</sup> See Ex. E, p. 25.

<sup>56</sup> Ex. E, pp. 3, 22.

<sup>57</sup> Ex. F, p. 3.

Although Z X testified that she provides weight bearing assistance in order to cleanse her mother in bed, she did not testify that her mother is unable to turn from side to side without assistance for purposes of repositioning her body. On balance, the preponderance of the evidence is that Ms. X is able, with great difficulty, to turn from side to side in bed without physical assistance.

(2) Transfers

The ADL of transfer includes “moving between one surface and another, including to and from a bed, chair, or wheelchair” as well as “moving from a lying or sitting position to a standing position.”<sup>58</sup> In the 2009 assessment, Ms. X was assessed as needing extensive assistance for this activity, with a frequency of six times daily, for a total of 168 minutes per week.<sup>59</sup> In 2013 she was assessed as needing limited assistance, with a frequency of two times daily, for a total of 70 minutes per week.<sup>60</sup>

Ms. Heaston noted that Ms. X reported she can “usually transfer on her own pushing off the bed holding onto her electric wheelchair.”<sup>61</sup> She also noted that Ms. X “refused to demonstrate transfer” and that Z X stated that her mother “tries to transfer on her own and will need physical assistance due to pain & weakness.”<sup>62</sup>

Z X testified that due to her mother’s mental health issues, and because she has good days and bad (the majority being bad days), her self-reported behavior and her ability to perform an activity on a particular date do not necessarily reflect her actual ability over a period of time.<sup>63</sup> On good days, Z X stated, her mother can get onto the bed “by herself.”<sup>64</sup> On the day of the assessment, Z X testified, her mother “refused” to demonstrate transfers because she lacked the ability to transfer without assistance.<sup>65</sup> Z X described how she assists her mother in transferring from her bed to her wheelchair as “from start to finish,” stating that she “scoots her legs” from the bed to the floor and lifts her feet into the custom-made footrests.<sup>66</sup> To transfer her mother from the wheelchair to her bed, Z X testified, she lifts her mother’s feet off the wheelchair, then grabs her by the side to assist in getting her buttocks to the bed, and lastly assists in lifting her

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<sup>59</sup> Ex. D, p. 2; Ex. F, pp. 3-4.

<sup>60</sup> Ex. D, p. 2; Ex. E, p. 6.

<sup>61</sup> Ex. E, p. 6.

<sup>62</sup> Ex. E, p. 6.

<sup>63</sup> Testimony of Z. X #1 (0:50-0:51), #2 (0:16).

<sup>64</sup> Testimony of Z. X #2 (0:29).

<sup>65</sup> Testimony of Z. X #1 (0:52)

<sup>66</sup> Testimony of Z. X #2 (0:23-0:25).



legs onto the bed and in moving her body across the bed to the proper location.<sup>67</sup> Sometimes, Z X testified, she calls her daughter, who helps her in using a towel placed under Ms. X to pull her body across the bed.<sup>68</sup>

Ms. Heaston's assessment (absent any observation of an attempt to transfer) that Ms. X needs only limited assistance with transfers is contrary to the prior assessor's personal observation that Ms. X was unable to transfer and "was unable to bear weight."<sup>69</sup> The more recent assessment is also inconsistent with Z X' testimony, in which she described providing a high degree of weight bearing assistance (lifting feet, lifting legs, scooting the entire body) for transfers from the wheelchair onto the bed, as well as more limited weight bearing assistance (scooting legs, lifting feet) for transfers from the bed onto the wheelchair. Z X' testimony was offered in a candid, forthcoming, and disingenuous manner that lent it credibility. Her mother weighs 575 pounds, has arthritis, and in 2009 her assessor noted that the atypical distribution of fatty tissue rendered her prone to falls.<sup>70</sup> On balance the preponderance of the evidence is that Ms. X on most days requires weight bearing assistance for transfers from her wheelchair into bed, and on some days requires weight bearing assistance for transfers from her bed to the wheelchair.

According to the adverse action letter, the frequency of transfers was reduced from six in 2009 to four in 2013 because Ms. X "reported...less frequent needs."<sup>71</sup> However, the assessment does not note any such report.<sup>72</sup> At the hearing Z X testified that she provided assistance for transfers eight times daily.<sup>73</sup>

The Division did not prove that the level and frequency of Ms. X' need for assistance with this activity is less than it was in 2009.

### (3) Locomotion

7 AAC 125.030(b)(3) states that personal care services for locomotion include physical assistance for "walking with the support of a[n assistive device] or manual wheelchair (i) between locations in the recipient's home; or (ii) outside the home to keep a medical or dental appointment." However, locomotion "does not include moving a recipient who is self-sufficient

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<sup>67</sup> Testimony of Z. X #2 (0:26).

<sup>68</sup> Testimony of Z. X #2 (0:26).

<sup>69</sup> Ex. F, p. 4 ("The client was observed attempting to transfer unsuccessfully. She rocked back and forth multiple times and was unable to bear weight with [*sic*] assistance.").

<sup>70</sup> Ex. F, p. 1.

<sup>71</sup> Ex. D, p. 2.

<sup>72</sup> Ex. E, p. 6.

<sup>73</sup> Testimony of Z. X #2 (0:05).

with locomotion once in a wheelchair.”<sup>74</sup> In the 2009 assessment, Ms. X was assessed as needing extensive assistance for this activity, with a frequency of six times daily, for a total of 420 minutes per week.<sup>75</sup> In 2013 she was assessed as needing limited assistance, with a frequency of two times daily, for a total of 70 minutes per week.<sup>76</sup>

The evidence establishes that there has been a change in the level of assistance provided to Ms. X for this activity. In 2009, Ms. X reportedly occasionally walked in the house, but required weight bearing physical assistance to do so.<sup>77</sup> In 2013, by contrast, the evidence is that Ms. X no longer walks at all, and that she relies entirely on her electric wheelchair to move about.<sup>78</sup> Ms. X is not self-sufficient in her electric wheelchair, as her mental health condition and space limitations impact her ability to operate it effectively,<sup>79</sup> but she requires only limited assistance to maneuver her electric wheelchair, rather than extensive assistance (as previously) for walking. However, the evidence does not establish a reduction in the frequency of the need for assistance in this activity. Z X testified that she provides assistance as many as eight times a day for this activity. In light of Ms. X’ physical and mental condition, the limited space in the apartment, and the frequency of assistance to which Z X testified, the Division did not prove that the frequency of Ms. X’ need for assistance with this activity is less than it was in 2009.

(4) Dressing

7 AAC 125.030(b)(4) provides that that ADL of dressing includes “the donning, fastening, unfastening, and removal of the recipient’s street clothing.” In both her 2009 and 2013 assessments, Ms. X was assessed as needing limited assistance, with a frequency of twice per day.<sup>80</sup> Due to a regulation change, the time allowed was reduced from 154 minutes in 2009 to 105 minutes in 2013.<sup>81</sup>

At the hearing, Z X asserted that due to her mother’s incontinence, she needs assistance with dressing more often than twice daily. However, a person who needs assistance with dressing and undressing in connection with incontinence is not entitled to dressing assistance for

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<sup>74</sup> 7 AAC 125.030(h)(2).

<sup>75</sup> Ex. D, p. 2; Ex. F, p. 4.

<sup>76</sup> Ex. D, p. 2; Ex. E, p. 7.

<sup>77</sup> Ex. F, p. 4.

<sup>78</sup> Ex. E, p. 7.

<sup>79</sup> Ex. E, p. 7 (assessor observed “Assistance needed to drive the wheelchair if in small space due to large size of wheelchair, & when increased agitation & confusion related to mental health diagnosis.”). See also Ex. F, p. 4 (2009 assessor noted “multiple areas on the walls with evidence of her EWC [electric wheelchair] running into doorjam[b]s.”).

<sup>80</sup> Ex. D, p. 3; Ex. E, p. 8; Ex. F., p. 4.

<sup>81</sup> Ex. D, p. 3.

that activity; rather, assistance for that activity is considered to be included in the activity of toileting.<sup>82</sup> Accordingly, the Division’s assessment of frequency is sustained.

With respect to the degree of assistance, Z X testified that her mother dresses in loose fitting gowns, in order to ease cleansing her when incontinent. In order to take the gown on and off, according to Z X’ testimony, she provides physical assistance in maneuvering her mother’s limbs. She did not testify that she must provide weight bearing support in order to get the gown on and off, however. Thus, the evidence supports the Division’s determination that only limited assistance is rendered for this activity.

(5) Eating and Drinking

Ms. X was assessed as independent with this activity, and Z X did not dispute that characterization.

(6) Toileting

7 AAC 125.030(b)(6) states that personal care services for toileting include physical assistance for “moving to and from the commode [or] bedpan,” “transfers on and off a...commode,” and “routine incontinence care.” On both her 2009 and 2013 assessments, Ms. X was assessed as needing extensive assistance for this activity, with a frequency of ten times daily.<sup>83</sup> However, due to a regulation change, the time allowed was reduced from 700 minutes in 2009 to 630 minutes in 2013.<sup>84</sup>

The primary assistance that Ms. X requires for toileting is frequent cleansing due to incontinence. She also occasionally uses the commode. The evidence does not show any change in the level or frequency of assistance for this activity.

(7) Personal Hygiene

7 AAC 125.030(b)(7) provides that the ADL of personal hygiene includes washing and drying face and hands, nail, skin, mouth and teeth care, brushing and combing hair, and shampooing hair when done separately from bathing. In both 2009 and 2013 Ms. X was assessed as needing limited assistance with this activity,<sup>85</sup> but the frequency was reduced from twice daily in 2009 to once per day in 2013.<sup>86</sup>

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<sup>82</sup> In Re V.W., at \* 2-3, OAH No. 12-0957-MDS (Commissioner of Health and Social Services 2013).

<sup>83</sup> Ex. D, p. 3; Ex. E, p. 9; Ex. F, p. 5.

<sup>84</sup> Ex. D, p. 3.

<sup>85</sup> Ex. D, p. 3; Ex. E, p. 10; Ex. F, p. 5.

<sup>86</sup> *Id.*

The evidence in this case is undisputed that if her care provider did not perform this activity for her, Ms. X would not do it at all. However, Z X' testimony was to the effect that her mother is physically capable of performing some of parts of these tasks and that with coaxing that she will do so. It was not established that Ms. X needs extensive assistance with these activities. The time allowed for this activity is a fixed amount per day, rather than varying with frequency.<sup>87</sup> However, the time allowed for personal hygiene includes additional time for shampooing when done separately from bathing.<sup>88</sup> Ms. X receives full body sponge baths and does not shampoo in a shower or tub. The personal care assistant provides a shampoo separately from the act of providing a full body sponge bath. Ms. X is entitled to additional time for shampooing, again with limited assistance.

(8) Bathing

This ADL includes a full-body bath.<sup>89</sup> In 2009, Ms. X was still bathing in a tub and was assessed accordingly. In 2013, Ms. X was no longer bathing in a tub or shower, but rather was being provided a full-body bath. As described by Z X, to provide her mother with a full body bath she must fully support her legs and turn her over in the bed, with little or no help from her mother, who has a limited ability to lift her legs (due to arthritis and obesity) and no ability to hold them up while lying down. Ms. X testified that she performs this task by herself only with substantial difficulty, and that the task is much faster and easier to perform with the assistance of her daughter. The record is clear that due to her mental health condition Ms. X will not perform this activity on her own, that she is at best uncooperative and at worst abusive and resistant to assistance, and that her mother is unable to provide meaningful physical assistance. Based on the testimony at the hearing and the assessment, Ms. X relies entirely on her daughter to perform this activity, which means that she is dependent as defined in 7 AAC 125.030(a)(3). She is entitled to the full time allowed for this activity, 30 minutes per day for a total of 210 minutes per week.

#### IV. Conclusion

As a result in changes in the applicable regulations, the amount of time that Ms. X is entitled to would have been substantially reduced, from 44.5 hours per week to approximately 34.5 hours per week, even if there had been no changes at all to the level and frequency of services provided. The Division correctly removed time for body mobility, because Ms. X does

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<sup>87</sup> See Ex. D, p. 7.

<sup>88</sup> *Id.*

<sup>89</sup> 7 AAC 125.030(b)(8).

not require physical assistance for that activity. The Division made no changes to the level or frequency of assistance for the ADL's of dressing and toileting. For the ADL's of transfers and locomotion, the Division did not prove that Ms. X' service level need or frequency has been reduced. For the ADL's of personal hygiene, the preponderance of the evidence is that Ms. X is entitled to additional time for shampooing. For the ADL of bathing, the preponderance of the evidence is that Ms. X is dependent on her care provider and thus entitled to additional time for that activity.

This matter is remanded to the Division to recalculate the service level authorization in accordance with this decision.

DATED December 27, 2013.

*Signed* \_\_\_\_\_  
Andrew M. Hemenway  
Administrative Law Judge

### **Adoption**

The undersigned by delegation from the Commissioner of Health and Social Services, adopts this revised decision as final under the authority of AS 44.64.060(e)(1).

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 15<sup>th</sup> day of January, 2014.

By: *Signed* \_\_\_\_\_  
Signature  
Andrew M. Hemenway \_\_\_\_\_  
Name  
Administrative Law Judge \_\_\_\_\_  
Title

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