

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

In the Matter of)	
)	
Q C)	OAH Nos. 14-2217, 14-2308-MDS
<hr style="width:40%; margin-left:0;"/>)	Agency Nos.

DECISION

I. Introduction

This matter involves two cases concerning the Medicaid benefits of Ms. Q C.¹ The issue in Case No. 14-2308-MDS is whether Ms. C remains eligible for Medicaid Home and Community-Based Waiver services (waiver services). The issue in Case No. 14-2217-MDS is the amount of Medicaid Personal Care Assistant (PCA) services for which Ms. C is currently eligible. The Division of Senior and Disabilities Services (Division) conducted an assessment on September 30, 2014 and subsequently determined that Ms. C no longer requires a nursing facility level of care (NFLOC), and is therefore no longer eligible to receive waiver services.² Based on the same assessment, the Division also reduced Ms. C's PCA service level from 35.0 hours per week to 5.5 hours per week.³

This decision concludes that Ms. C no longer has a functional limitation or cognitive impairment that would result in the need for nursing home placement, and that she has the ability to function in a home setting without the need for wavier services. Accordingly, the Division's decision terminating Ms. C's waiver services is affirmed.

With regard to Ms. C's PCA services, this decision concludes, based on the evidence in the record, that the Division's determination of the PCA services for which Ms. C is currently eligible was partially correct, but also partially incorrect. Accordingly, the Division's determination regarding Ms. C's PCA services is affirmed in part and reversed in part.

¹ Ms. C filed one set of exhibits *after* the two cases were consolidated; these were marked numerically as Ex. 1 through Ex. 4. The Division filed its exhibits in the two cases prior to consolidation; the Division's exhibits in *each* case were marked as Ex. A through Ex. F. Thus, after the cases were consolidated, there were two Ex. As, two Ex. Bs, etc. Accordingly, to prevent confusion, the pre-consolidation case number is listed after the exhibit identifier.

² Exs. D and E, Case No. 14-2308-MDS.

³ Exs. D and E, Case No. 14-2217-MDS.

II. Facts

A. *Ms. C's Medical Diagnoses and Reports from Medical Providers*

Ms. C is 81 years old.⁴ She lives alone in an apartment on the third floor of a building equipped with an elevator. Her medical diagnoses include asthma, gastroesophageal reflux disease (GERD), gout, hyperlipidemia, malignant essential hypertension, impaired fasting glucose levels, insomnia, intestinal disaccharide mal-absorption, kidney disease (chronic, stage 3 – moderate), neoplasm of connective and soft tissue, neutropenia, multi-site osteoarthritis, overweight, chronic rhinitis, urge incontinence, and vitamin D deficiency.

On June 17, 2014 Ms. C became dizzy.⁵ Her chore worker happened to be present, and checked Ms. C's glucose level. Ms. C's glucose level was very high, and so her chore worker called for paramedics. The paramedics assessed Ms. C and transported her to the hospital, where she was admitted for observation before being discharged back to her home.

The next day, June 18, 2014, Ms. C again felt faint and weak.⁶ At about 11:00 a.m. a friend took Ms. C to a hospital, where she had blood tests. The hospital staff reported that Ms. C's blood pressure was very low, and recommended that she follow-up with her doctor the next day to discuss lowering the daily dosage of her high blood pressure medication. Ms. C was released from the hospital that day at about 4:00 p.m.

F de T, M.D. is Ms. C's primary treating physician.⁷ On or about October 17, 2014 Dr. de T completed a "Level of Care Verification Request" which had been sent to her by the Division.⁸ In response to the question, "[a]t this time, would you admit this patient to a skilled nursing facility?," Dr. de T answered "no." In response to the question, "[a]t this time, doe this patient have intermediate nursing needs?," Dr. de T did not directly answer either yes or no, but stated as follows:

She has bad arthritis, and frozen shoulder; needs help with regular [range of motion] exercises. History of falls [and] confusion about . . . [her] medications. Oversight of medications helpful; also needs help with household tasks at times.

⁴ All factual findings in this paragraph are based on Exs. E1 – E4, Case No. 14-2308-MDS.

⁵ All factual findings in this paragraph are based on Ex. F48 in Case No. 14-2308-MDS unless otherwise stated.

⁶ All factual findings in this paragraph are based on Ex. F52 in Case No. 14-2308-MDS unless otherwise stated.

⁷ Ex. 4, pp. 1 – 2.

⁸ Ex. F32 , Case No. 14-2308-MDS.

In a letter dated November 19, 2014 Dr. de T stated in relevant part as follows:⁹

I am the family medical provider for patient Q C Without assistance, she would require assisted living level of care, due to multiple tasks and daily activities that she is unable to complete without help.

Her major disabling diagnosis is osteoarthritis, involving [her] shoulders, hips, and knees. This makes it difficult or impossible for her to independently prepare meals, wash dishes, do laundry, make her bed, clean her apartment, go shopping, bring supplies into her apartment, etc. She also has a history of falls She is somewhat unsteady on her feet at times, and lacks strength and balance it would be unsafe for her to bathe without someone in the apartment with her. She should be exercising on a regular basis, but has limited herself due to instability. I recommend daily brisk walking or stair climbing with contact assistance from a caregiver. I have also outlined recommended daily range of motion exercises on the Prescribed Task Form, to prevent progressive contractures and movement limitations from [arthritis].

She is on multiple medications for blood pressure, cholesterol, asthma, and gout. Her memory and ability to manage her medications is not as accurate as in years past. On several occasions medications have not been correctly taken, which puts her health in jeopardy. I recommend caregiver reminders to take medications (twice a day), and supervision to make sure they are taken as directed.

She has pre-diabetes, and healthy nutrition is required to prevent this from progressing. She describes some unsafe home cooking activities that create a fire hazard, and food handling practices that have contributed to [diarrhea]. This mandates caregiver assistance with shopping and meal preparation on a daily basis.

In a second letter dated January 14, 2015 Dr. de T stated in relevant part:¹⁰

[Q C] is unable to lift either arm to shoulder level, and has shoulder pain that interferes with sleep and daily activities. She has had one hip replaced, and intermittently has pain in her other hip Her pre-diabetes and hypertension are more likely to worsen if she relies on packaged and easy-to-prepare foods.

It has become more difficult for her to standup from a chair in recent months. She should be exercising on a regular basis, but has limited herself due to imbalance

She has become more forgetful, reporting several episodes of burning food on her stovetop Her medications are provided in a medset, but she has missed or mistaken medications more frequently in the past year. A daily visit from a caregiver to check whether she has taken her medications correctly can help prevent emergency room and physician visits such as she had last summer related to low blood pressure and abnormal kidney function.

⁹ All factual findings in this paragraph are based on Ex. 4, pp. 1 – 2 unless otherwise stated.

¹⁰ All factual findings in this paragraph are based on Ex. 5 unless otherwise stated. The formatting of the original letter has been condensed here for brevity.

I strongly feel she needs a minimum of 2 hours of PCA time daily for safety, and 3 hours a day to accomplish all the above tasks.

B. Relevant Procedural History

Ms. C has received waiver services since 2011 or before,¹¹ and PCA services since 2010 or before.¹² The Division conducted its annual assessment, concerning Ms. C's continuing eligibility for PCA and waiver services, on September 30, 2014.¹³ On October 17, 2014 the Division notified Ms. C that her PCA service level was being decreased from 35.0 hours per week to 5.5 hours per week effective October 27, 2014.¹⁴ On November 13, 2014 the Division notified Ms. C that she was no longer eligible for waiver services, and that her waiver services would end in 30 days.¹⁵ On November 7, 2014 Ms. C requested a hearing to contest the Division's reduction of her PCA services.¹⁶ On December 3, 2014 Ms. C requested a hearing to contest the Division's termination of her waiver services.¹⁷

Ms. C's hearing was held on February 26, 2015. All parties participated by phone. Ms. C was represented by her PCA agency representative, S F, and by her care coordinator, B Z. Ms. C participated in the hearing and testified on her own behalf.

Angela Ybarra represented the Division. Division employees Sam Cornell, R.N. and Olga Ipatova testified for the Division. The record closed at the end of the hearing on February 26, 2015.

III. Discussion

A. Applicable Burden of Proof and Standard of Review

Pursuant to applicable state and federal regulations, the Division bears the burden of proof in this case.¹⁸ The standard of review in a Medicaid "Fair Hearing" proceeding, as to both the law and the facts, is *de novo* review.¹⁹ In this case, evidence was presented at hearing that was not originally available to the Division's reviewers. The administrative law judge may independently weigh the evidence and reach a different conclusion than did the Division, even if the Division's original decision is factually supported and has a reasonable basis in law.

¹¹ Ex. F, Case No. 14-2308-MDS.

¹² Ex. F, Case No. 14-2217-MDS.

¹³ Ex. E (both cases).

¹⁴ Ex. D, Case No. 14-2217-MDS.

¹⁵ Ex. D, Case No. 14-2308-MDS.

¹⁶ Ex. C, Case No. 14-2217-MDS.

¹⁷ Ex. C, Case No. 14-2308-MDS.

¹⁸ 42 CFR § 435.930, 7 AAC 49.135.

¹⁹ See 42 CFR 431.244; *Albert S. v. Dept. of Health and Mental Hygiene*, 891 A.2d 402 (2006); *Maryland Dept. of Health and Mental Hygiene v. C*, 935 A.2d 1128 (Md. App. 2007); *In re Cer*, 969 A.2d 322 (N.H. 2009); *Murphy v. Curtis*, 930 N.E.2d 1228 (Ind. App. 2010).

B. Relevant Medicaid Waiver Services Statutes and Regulations

States participating in the Medicaid program must provide certain mandatory services under the state's medical assistance plan.²⁰ States may also, at their option, provide certain additional services, one of which is the Home and Community-Based Waiver Services program²¹ (“waiver services”).²² Congress created the waiver services program in 1981 to allow states to offer long-term care, not otherwise available through the states' Medicaid programs, to serve eligible individuals in their own homes and communities instead of in nursing facilities.²³ Alaska participates in the waiver services program.²⁴

There are three basic ways in which an applicant or recipient can qualify for waiver services. First, an individual is eligible for waiver services if he or she requires the level of care specified in 7 AAC 130.205. For older adults and adults with disabilities (such as Ms. C), that level of care must be either “intermediate care” as defined by 7 AAC 140.510, or “skilled care” as defined by 7 AAC 140.515.²⁵ Intermediate care, a lower level of care than skilled care, is defined by 7 AAC 140.510 in relevant part as follows:

- (a) The department will pay an intermediate care facility for providing the services described in (b) and (c) of this section if those services are (1) needed to treat a stable condition; (2) ordered by and under the direction of a physician, except as provided in (c) of this section; and (3) provided to a recipient who does not require the level of care provided by a skilled nursing facility.

²⁰ 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.

²¹ The program is called a “waiver” program because certain statutory Medicaid requirements are waived by the Secretary of Health and Human Services. See 42 U.S.C. § 1396n(c). Before a state receives federal funding for the program, the state must sign a waiver agreement with the United States Department of Health and Human Services. *Id.* The agreement waives certain eligibility and income requirements. *Id.*

²² See 42 USC § 1396a(a)(10)(A).

²³ 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].

²⁴ AS 47.07.045, the Alaska statute that authorizes Medicaid Waiver Services, states in relevant part: Home and community-based services. (a) The department may provide home and community-based services under a waiver in accordance with 42 USC 1396 – 1396p (Title XIX Social Security Act), this chapter, and regulations adopted under this chapter, if the department has received approval from the federal government and the department has appropriations allocated for the purpose. To supplement the standards in (b) of this section, the department shall establish in regulation additional standards for eligibility and payment . . .

²⁵ 7 AAC 130.215.

(b) Intermediate nursing services are the observation, assessment, and treatment of a recipient with a long-term illness or disability whose condition is relatively stable and where the emphasis is on maintenance rather than rehabilitation

(c) Intermediate care may include occupational, physical, or speech-language therapy provided by an aide or orderly under the supervision of licensed nursing personnel or a licensed occupational, physical, or speech-language therapist.

The Division is required to incorporate the results of the Consumer Assessment Tool (CAT) in determining whether an applicant requires intermediate or skilled nursing care.²⁶

The second way an individual may qualify for waiver services is by showing that the individual's requirements for physical assistance with his or her activities of daily living (ADLs) are sufficiently high.²⁷ Under the CAT, an individual can qualify for waiver services by demonstrating a need for extensive assistance with at least three designated ADLs, known as "shaded" ADLs, even without demonstrating a need for professional nursing care.²⁸ An individual may also qualify for waiver services by having a certain minimum level of nursing needs, *combined with* a certain minimum level of need for physical assistance with ADLs.²⁹

Before a recipient's waiver services may be terminated, the Division must conduct an annual assessment to "determine whether the recipient continues to meet the [applicable] standards . . ." ³⁰ To remove a recipient from the program, the assessment must find:

that the recipient's condition has materially improved since the previous assessment; for purposes of this paragraph, "materially improved" means that a recipient who has previously qualified for an older Alaskan or adult with a physical disability [waiver], no longer has a functional limitation or cognitive impairment that would result in the need for nursing home placement, and is able to demonstrate the ability to function in a home setting without the need for wavier services.^[31]

Finally, in an order issued within the last year in the class action³² case *Krone et. al. v. State of Alaska, Department of Health and Social Services et. al.*, Case No. 3AN-05-10283CI, an Anchorage Superior Court judge held that, "in order to determine if a recipient is 'materially

²⁶ 7 AAC 130.215.

²⁷ Ex. E32 (both cases).

²⁸ Ex. E32 (both cases).

²⁹ Ex. E32 (both cases).

³⁰ AS 47.07.045(b)(1).

³¹ AS 47.07.045(b)(3).

³² Although a Superior Court decision generally does not constitute binding precedent for the Office of Administrative Hearings (except in the particular case being appealed), a class action like the *Krone* case is binding in all cases involving class members, one of whom is Ms. C.

improved,' for purposes of AS 47.07.045(3)(C), the State must compare the results of the current assessment with those of the most recent assessment that concluded that the recipient was eligible for the Waiver program;" that "[t]he State may not conclude that a recipient is no longer eligible based only on the results of the current assessment;" that "[t]he State may not base its annual determination of whether a recipient is 'materially improved' solely upon the scoring obtained from the CAT;" and that "[t]he State must consider all reasonably available information relevant to that determination."³³

C. The PCA Program - Overview

The Medicaid program provides personal care assistant (PCA) services to eligible persons; "[t]he purpose of personal care services is to provide to a recipient *physical assistance* with activities of daily living (ADL), *physical assistance* with instrumental activities of daily living (IADL), and other services based on the *physical condition* of the recipient"³⁴ [Emphasis added]. Accordingly, "[t]he department will not authorize personal care services for a recipient if the assessment shows that the recipient only needs assistance with supervision, cueing, and setup in order to independently perform an ADL or IADL."³⁵

D. The Consumer Assessment Tool (CAT)

An applicant or recipient's eligibility for PCA services, and (if eligible) the amount of PCA services for which the applicant or recipient qualifies, are determined by the Department's Consumer Assessment Tool (CAT), which is adopted by regulation at 7 AAC 160.900(d)(6).³⁶ Similarly, level of care determinations for those waiver services applicants and recipients who seek services under the "adults with physical disabilities" or "older adults" categories must incorporate the results of the CAT.³⁷ The CAT covers both the recipient's need for nursing services, as well as the recipient's ability to perform his or her activities of daily living (ADLs). The ADLs scored by the CAT are body mobility, transfers (non-mechanical), transfers (mechanical),

³³ *Krone* order dated October 1, 2014 at page 6.

³⁴ 7 AAC 125.010(a) (emphasis added).

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

³⁶ 7 AAC 125.020(b).

³⁷ See 7 AAC 130.230(b)(2)(B),

locomotion (in room, between levels, and to access apartment or living quarters), dressing, eating, toilet use, personal hygiene, and bathing.³⁸

The CAT numerical scoring system for ADLs has two components. The first component is the *self-performance score*. These scores rate how capable a person is of performing a particular ADL.³⁹ The possible scores are **0** (the person is independent and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance); **3** (the person requires extensive assistance); and **4** (the person is totally dependent). There are also codes that are not treated as numerical scores for purposes of calculating a service level: **5** (the person requires cueing); and **8** (the activity did not occur during the past seven days).⁴⁰

The second component of the CAT scoring system for ADLs is the *support score*. These scores rate the degree of assistance that a person requires in order to perform a particular ADL. The relevant scores are **0** (no setup or physical help required); **1** (only setup help required); **2** (one person physical assist required); and **3** (two or more person physical assist required).

The CAT also scores certain activities known as "instrumental activities of daily living" (IADLs).⁴¹ These are light meal preparation, main meal preparation, light housekeeping, routine housekeeping, laundry, and grocery shopping.

The CAT scores IADLs slightly differently than ADLs.⁴² The *self-performance scores for IADLs* are **0** (independent either with or without assistive devices - no help provided); **1** (independent with difficulty; the person performed the task, but did so with difficulty or took a great amount of time to do it); **2** (assistance / done with help - the person was somewhat involved in the activity, but help in the form of supervision, reminders, or physical assistance was provided); and **3** (dependent / done by others - the person is not involved at all with the activity).

The *support scores* for IADLs are also slightly different than the support scores for ADLs.⁴³ The relevant support scores for IADLs are **0** (no support provided); **1** (supervision / cueing

³⁸ The CAT also scores the recipient's ability to perform Instrumental Activities of Daily Living (IADLs). However, although IADL scores are important for determining the recipient's eligibility for Medicaid Personal Care Assistant (PCA) services, the recipient's IADL scores are not considered in determining eligibility for waiver services.

³⁹ According to the federal Medicaid statutes, the term "activities of daily living" includes tasks such as eating, toileting, grooming, dressing, bathing, and transferring. See 42 USC § 1396n(k)(6)(A). In Alaska, pursuant to AS § 47.33.990(1), "activities of daily living" means "walking, eating, dressing, bathing, toileting, and transfer between a bed and a chair."

⁴⁰ See, for example, Ex. E8 (both cases).

⁴¹ Ex. E28 (both cases).

⁴² *Id.*

⁴³ *Id.*

provided); **2** (set-up help); **3** (physical assistance provided); and **4** (total dependence - the person was not involved at all when the activity was performed).

E. Does Ms. C Require Intermediate or Skilled Nursing Care?

As discussed above, there are several ways in which a waiver services applicant or recipient can qualify for (or remain qualified for) waiver services. The first way is to demonstrate a need for either skilled nursing care or intermediate level nursing care.⁴⁴ Because skilled care is a higher level of care than intermediate care, the minimum level of nursing care for which Ms. C must demonstrate a need, in order to remain eligible for waiver services on that basis, is intermediate care.

The intermediate care regulation (7 AAC 140.510) has three subsections (see text of regulation quoted in Section III(B), above). Ms. C clearly satisfies *some* of the criteria stated in the regulation. For example, Ms. C has one or more long-term illnesses or disabilities. Also, her condition is relatively stable, and her treatments emphasize maintenance of her condition rather than rehabilitation. However, one of the mandatory requirements, under 7 AAC 140.510(a), is that the recipient *either* require services ordered by and under the direction of a physician, *or* be receiving occupational, physical, or speech-language therapy provided by an aide or orderly under the supervision of licensed nursing personnel or a licensed occupational, physical, or speech-language therapist.

The Division's registered nurse nurse-assessor, first-level in-house reviewing nurse, and second-level reviewing nurse (employed by the Division's independent contractor Qualis Health), all agreed that Ms. C does not require nursing services as defined by the relevant regulations. My own independent review of the record likewise indicates that Ms. C currently has no nursing needs as defined by the applicable regulations. Finally, Ms. C's own treating physician, Dr. de T, agreed that Ms. C has no skilled nursing needs, and did not state that Ms. C has any intermediate nursing needs. Accordingly, the Division correctly determined that Ms. C does not qualify for waiver services based on a need for skilled or intermediate level nursing care. The next issue is whether Ms. C qualifies for waiver services under the scoring matrix employed by the CAT.

⁴⁴ 7 AAC 140.510, 7 AAC 140.515.

F. Does Ms. C Qualify for Waiver Services Based on the Consumer Assessment Tool's Scoring Matrix?

The Consumer Assessment Tool's scoring summary is located at page 29 of the CAT.⁴⁵ As indicated by that summary, there are several scoring combinations through which one may demonstrate a need for a nursing facility level of care (NFLOC) or otherwise qualify for waiver services. The first way, discussed immediately above, is to require skilled or intermediate level nursing care, as defined by the regulations and the CAT. However, under the CAT, an individual may also qualify for waiver services, even without demonstrating a need for skilled or intermediate level nursing care, if the individual has certain other serious medical problems, and/or if his or her need for assistance with activities of daily living (ADLs) is sufficiently high.⁴⁶ The CAT divides the possible scoring combinations into six different areas, designated "NF1" through "NF6."

1. NF1

There are five different ways to meet NFLOC under NF1. The first way (under NF1(a)) is to require nursing services seven days per week. As discussed above, Ms. C does not receive or require nursing services seven or more days per week.

The second way (under NF1(b)) is to require use of a ventilator or respirator at least three days per week. As discussed above, Ms. C does not use a ventilator or respirator.

The third way meet NFLOC (under NF1(c)) is to require care due to uncontrolled seizures at least once per week.⁴⁷ If the applicant / recipient requires such care, "then the person will be found medically eligible for NF level of care and will be scored a 3 or presumed to have a score of 3 or more."⁴⁸ However, Ms. C does not have uncontrolled seizures.

The fourth way (under NF1(d)) is to receive some form of therapy from a qualified therapist at least five days per week. As discussed in Section II, above, Ms. C does not receive such therapy.

The fifth/last way to meet NFLOC under NF1, under NF1(e), is to score a three (extensive assistance required) or a four (completely dependent) in the self-performance portion of three or more of the five "shaded" ADLs listed at page 18 of the CAT.⁴⁹

⁴⁵ Ex. E32, Case No. 14-2308-MDS.

⁴⁶ Ex. E32, Case No. 14-2308-MDS.

⁴⁷ The exact language at page 29 of the CAT is "In Section A, Item 10 (uncontrolled seizure), did you code this response with a 1, 2, 3, or 4 (care needed at least once /week)?"

⁴⁸ CAT at page 29 (Ex. E32, Case No. 14-2308-MDS).

⁴⁹ Ex. E21, Case No. 14-2308-MDS.

The CAT scores which the Division assigned to Ms. C with regard to the five "shaded" ADLs, based on her 2014 assessment, are: bed mobility: 0/0; transfers: 0/1; locomotion: 0/0; eating: 0/0; and toilet use: 0/1.⁵⁰ At hearing, however, the Division agreed to increase some of Ms. C's ADL scores as follows: transfers: 2/2, frequency 6/7; locomotion (single level): 2/2, frequency 6/7; locomotion (to access medical appointments): 3/2, frequency 1/2; dressing: 2/2, frequency 2/7; and toileting: 2/2, frequency 4/7. The Division also increased all of Ms. C's IADL scores to 3/4, and agreed that Ms. C needs PCA time for two loads of laundry per week. Finally, the Division also agreed that Ms. C requires 21 minutes per week of PCA assistance with medication management. These increased scores will provide Ms. C with significantly more PCA time compared to the scores originally assigned at her 2014 assessment. However, the new scores are not high enough to qualify Ms. C to receive waiver services. Whether Ms. C's scores for the "shaded" ADLs should be higher than the Division's revised scores is addressed below.

a. Body / Bed Mobility

For purposes of waiver services eligibility, body / bed mobility is defined as how a person moves to and from a lying position, turns side to side, and positions his or her body while in bed.⁵¹ In order to receive a self-performance score of three (extensive assistance) with regard to bed / body mobility, a person must require either weight bearing support three or more times per week, or full caregiver performance of the activity part of the time.⁵² In 2011 and 2012 the Division found that Ms. C required limited assistance with body mobility (CAT score 2/2).⁵³ In 2014 Ms. Russell found that Ms. C is now independent as to bed mobility (CAT score 0/0). Ms. C did not dispute this score in her areas of disagreement.⁵⁴ Accordingly, the Division's finding that Ms. C is independent with bed / body mobility is affirmed (CAT score 0/0).

b. Transfers

For purposes of waiver services eligibility, a transfer is defined as how a person moves between surfaces (with the exception of the toilet and bathtub or shower, which are handled as separate ADLs).⁵⁵ In order to receive a self-performance score of three (extensive assistance)

⁵⁰ Ex. E21, Case No. 14-2308-MDS.

⁵¹ Ex. E9, Case No. 14-2308-MDS.

⁵² Ex. E9, Case No. 14-2308-MDS.

⁵³ Ex. F12, Case No. 14-2308-MDS.

⁵⁴ Ex. 1.

⁵⁵ Ex. E9, Case No. 14-2308-MDS.

with regard to transfers, a person must require either weight bearing support three or more times per week, or full caregiver performance of the activity part of the time.⁵⁶

In 2011 and 2012 the Division found that Ms. C required extensive assistance with transfers (CAT score 3/2).⁵⁷ In 2014 Ms. Russell found that Ms. C now requires only set-up assistance with transfers (CAT score 0/1). Ms. Russell reported she was told by Ms. C that she can stand with assistance from her PCA. Ms. Russell reported that she observed Ms. C stand up "with a *boost* from [her] PCA,"⁵⁸ which would indicate weight-bearing assistance, but Ms. Russell then stated that Ms. C "bore her own weight."⁵⁹

I find the two statements by Ms. Russell to be inconsistent. Ms. C asserts that she requires weight-bearing assistance. This is supported by the 2012 assessment, as well as by Ms. Russell's own statement that Ms. C needs a "boost" to get up. Accordingly, the preponderance of the evidence indicates that Ms. C needs extensive assistance with transfers (CAT score 3/2).

c. Locomotion

For purposes of waiver services eligibility, locomotion is defined as how a person moves between locations in his or her room and other areas on the same floor / level.⁶⁰ In order to receive a self-performance score of three (extensive assistance) for locomotion, a person must require either weight bearing support three or more times per week, or full caregiver performance part of the time.⁶¹ In 2011 and 2012 the Division found that Ms. C required extensive assistance with locomotion (CAT score 3/2).⁶² In 2014, Ms. Russell reported she was told by Ms. C that she walks with supervision when someone is with her, but that she can walk independently using her cane, albeit with difficulty, when she is alone. Ms. Russell reported that she observed Ms. C walk within her home using her cane and with standby assistance. Based on this, Ms. Russell assigned Ms. C a CAT score of 0/0 for locomotion. Ms. C, on the other hand, asserts that she requires extensive assistance with locomotion, as she did at the time of her prior assessment.⁶³ At hearing, the Division agreed to increase Ms. C's locomotion scores to 2/2, frequency 6/7 for single-level locomotion, and to 3/2, frequency 1/2 for locomotion to access medical appointments. These self-performance and support scores are appropriate because, although Dr. de T notes that Ms. C is

⁵⁶ Ex. E9, Case No. 14-2308-MDS.

⁵⁷ Ex. F12, Case No. 14-2308-MDS.

⁵⁸ Ex. E9, Case No. 14-2308-MDS (emphasis added).

⁵⁹ Ex. E9, Case No. 14-2308-MDS.

⁶⁰ Ex. E10, Case No. 14-2308-MDS.

⁶¹ Ex. E10, Case No. 14-2308-MDS.

⁶² Ex. F12, Case No. 14-2308-MDS.

⁶³ Ex. 1 p. 3.

unsteady when she walks, and clearly needs standby assistance to help prevent falls, the evidence in the record fails to show that Ms. C still requires weight-bearing assistance with locomotion at least three days per week, or full caregiver performance part of the time. Accordingly, the preponderance of the evidence indicates that Ms. C generally requires limited one-person assistance with locomotion (CAT score 2/2).

d. Eating

For purposes of waiver services eligibility, eating is defined as how a "person eats or drinks regardless of skill."⁶⁴ In order to receive a self-performance score of three (extensive assistance) with regard to eating, a person must require either weight bearing support three or more times per week, or full caregiver performance of the activity part of the time.⁶⁵

Ms. Russell reported that she was told by Ms. C that she can eat, drink, and take her pills without assistance. Ms. Russell therefore scored Ms. C as being able to eat independently (CAT score 0/0). Ms. C did not challenge this finding in her areas of disagreement.⁶⁶ Accordingly, this score is undisputed, and the Division's finding that Ms. C can eat and drink independently is affirmed (CAT score 0/0).

e. Toilet Use

For purposes of waiver services eligibility, toilet use is defined as how a "person uses the toilet room (or commode, bedpan, urinal); transfers on/off toilet, cleanses, changes pads, manages ostomy or catheter, adjusts clothes."⁶⁷ In order to receive a self-performance score of three (extensive assistance) as to toilet use, a person must require either weight bearing support three or more times per week, or full caregiver performance of the activity part of the time.⁶⁸

In 2011 and 2012, the Division found that Ms. C required extensive assistance with toileting (CAT score 3/2).⁶⁹ In 2014, Ms. Russell found that Ms. C requires only set-up assistance with toileting (CAT score 0/1). Ms. Russell based this finding on her observations of Ms. C transferring, and on Ms. C's alleged statement that she can perform post-toileting hygiene herself, but needs assistance with toilet-related transfers.⁷⁰ On the other hand, Ms. C asserts that she still requires extensive assistance with toileting, as she did in 2011 and 2012.⁷¹

⁶⁴ Ex. E12, Case No. 14-2308-MDS.

⁶⁵ Ex. E12, Case No. 14-2308-MDS.

⁶⁶ Ex. E12, Case No. 14-2308-MDS.

⁶⁷ Ex. E12, Case No. 14-2308-MDS.

⁶⁸ Ex. E12, Case No. 14-2308-MDS.

⁶⁹ Ex. F12, Case No. 14-2308-MDS.

⁷⁰ Ex. E12, Case No. 14-2308-MDS.

⁷¹ Ex. 1, pp. 3 - 4.

Dr. de T has stated that Ms. C has "bad arthritis" and a "frozen shoulder" (see Section II(A), above). Further, there is no medical evidence in the record indicating that Ms. C's condition has improved since her 2012 assessment. Accordingly, the preponderance of the evidence indicates that Ms. C still needs extensive assistance with toileting (CAT score 3/2).

f. Summary - Degree of Assistance Required With Shaded ADLs

My independent review indicates that Ms. C requires a greater degree of assistance than was found by the Division with regard to the "shaded" ADLs of transfers, locomotion, and toilet use. However, this review indicates that Ms. C requires *extensive assistance* with only *two* shaded ADLs (transfers and toileting). In order to qualify for waiver services under NF1(e), a person must demonstrate either full dependence, or a need for extensive assistance, *as to at least three* of the shaded ADLs. Because Ms. C does not require extensive assistance with three or more of the "shaded" ADLs, she does not meet NFLOC under NF1(e).

2. NF2

An applicant cannot meet NFLOC under NF2 alone. However, under NF2 an applicant can obtain points towards qualifying for NFLOC which, when added to points obtained under *other* subsections of NF1 - NF6, can qualify the applicant for NFLOC. The first way (under NF2(a)) is to obtain a score of two or three with regard to needing injections and/or IV hookups, feeding tubes, tracheotomy care or nasopharyngeal suctioning, treatments or dressings, oxygen, requiring observation, assessment, and management of unstable conditions, catheter management, and/or care required due to a comatose condition. The record does not show that Ms. C requires any of these services, so she scores no points under NF2(a).

The second way to obtain points (under NF2(b)) is to require speech therapy, respiratory therapy, physical therapy, and/or occupational therapy at least three days per week. However, the record does not show that Ms. C requires any of these therapies at least three days per week, so she receives no points under NF2(b).

The third way to obtain points (under NF2(c)) is to require medications via tube, tracheotomy care, urinary catheter changes or irrigation, venipuncture, or barrier dressings for ulcers, at least three days per week.⁷² Again, the record does not show that Ms. C requires any of these procedures with the necessary frequency, so no points are awarded under NF2(c).

⁷² It is true that Ms. C receives venipuncture by a registered nurse *once per month* (Ex. E-18), but this is not often enough to earn her any points under NF2(c).

The fourth/last way to obtain points (under NF2(d)) is to require chemotherapy, radiation therapy, hemodialysis, and/or peritoneal dialysis, at least three days per week. Ms. C does not receive any of these treatments, so she receives no points under NF2(d).

3. NF3

An applicant cannot meet NFLOC under NF3 alone. However, under NF3 an applicant can obtain points towards qualifying for NFLOC which, when added to points obtained under *other* subsections of NF1 - NF6, can qualify the applicant for NFLOC. The first way (under NF3(a)) is to have short-term memory problems. Dr. de T stated that Ms. C is forgetful and that her memory "is not as accurate as in years past." Ms. Russell found in her assessment that Ms. C has short-term memory problems. Accordingly, Ms. C receives one point under NF3(a).

The second way to obtain points (under NF3(b)) is to be generally unable to recall names and faces, the season of the year, where you are, and the location of your room. Ms. Russell found that Ms. C is able to recall all four of these items, and Ms. C did not challenge this specific finding. Accordingly, Ms. C gets no points under NF3(b).

The third way to obtain points (under NF3(c)) is to be moderately or severely impaired in one's cognitive skills for daily decision-making. Ms. Russell found that Ms. C's cognitive skills for daily decision-making are slightly impaired, which gives her zero points. Based on Dr. de T' reports, I find that Ms. C's cognitive abilities are best characterized as moderately impaired. Ms. C therefore receives one point under NF3(c).⁷³

The last way to obtain points (under NF3(d)) is to require *either* professional nursing care at least three days per week due to cognitive problems, *or both* (1) score at least a 2/2 as to any shaded ADL, *and* (2) score 13 or more on the cognitive portion of the Division's Supplemental Screening Tool (SST). Ms. C did not assert that she requires professional nursing care due to cognitive difficulties, and the record indicates that she does not. Ms. C did score 2/2 or better as to three shaded ADLs. However, Ms. C scored only one on the cognitive portion of the SST, and she did not challenge this finding. Accordingly, Ms. C receives no points under NF3(d).

Under NF3, an applicant must receive a score of one *on all four subsections* in order to receive a single "overall" point at the conclusion of NF3. Here, Ms. C received one point

⁷³ Based on the scoring matrix at page 29 of the CAT, even were Ms. C's cognitive abilities found to be severely impaired, she would still receive only one point under NF3(c).

under NF3(a) and another point under NF3(c), but received no points under NF3(b) or NF3(d). Accordingly, Ms. C receives an overall score of zero on NF3.

4. NF4

An applicant cannot meet NFLOC under NF4 alone. However, under NF4 an applicant can obtain one point towards qualifying for NFLOC which, when added to points obtained under other subsections of NF1 - NF6, can qualify the applicant for NFLOC.

There are two subsections to NF4, and an applicant must qualify under *both* of these subsections in order to receive the one point available under NF4. Under NF4(a), an applicant must either wander, engage in socially inappropriate or disruptive behavior, be verbally abusive, or be physically abusive, at least four days per week, to receive a point. Ms. Russell found that Ms. C does not have any of these behavioral problems, and Ms. C did not challenge those findings. Accordingly, Ms. C receives no points under NF4(a).

Under NF4(b), an applicant must *either* require professional nursing care *at least three days per week* as a result of problem behaviors, *or both* (1) score at least 2/2 as to any "shaded" ADL, *and* (2) score 14 or more on the behavioral portion of the Division's Supplemental Screening Tool (SST). Ms. Russell found that Ms. C does not require or receive professional nursing assessment, observation, or management of behavioral problems three or more days per week. This finding is supported by the record and was not challenged by Ms. C. Ms. C *did* receive scores of 2/2 or better as to three "shaded" ADLs. However, Ms. Russell assigned Ms. C a score of one on the behavioral portion of the SST,⁷⁴ and Ms. C did not challenge this score. Accordingly, Ms. C gets no points under NF4(b).

5. NF5

At NF5, the total scores from NF2, NF3, and NF4 are added together. If an applicant or recipient receives a score of one or more, then the analysis proceeds to NF6. In this case, however, Ms. C's overall score as to NF2, NF3, and NF4 is zero. Accordingly, in this case, the CAT's scoring analysis ends here and does not proceed to NF6 or NF7.

6. Summary - Ms. C No Longer Qualifies for Waiver Services

As discussed above, Ms. C does not require intermediate-level nursing care as defined by 7 AAC 140.510. Further, although she is *close* to qualifying for waiver services based on her CAT scores on the five "shaded" ADLs, she does not quite qualify for waiver services under the CAT's scoring matrix. Accordingly, the preponderance of the evidence indicates that

⁷⁴ Ex. E p. 2.

Ms. C no longer has a functional limitation or cognitive impairment that would result in the need for nursing home placement, and is able to demonstrate the ability to function in a home setting without the need for wavier services.⁷⁵

G. How Much PCA Time is Ms. C Eligible to Receive in This Case?

Initially, it is important to remember that, under the current PCA regulations, the amount of time awarded is set automatically based on the applicant / recipient's self-performance code.⁷⁶ For example, a CAT code of three as to non-mechanical transfers (a transfer that uses hands-on assistance but does not use an assistive device such as a lift) gives a recipient 3.75 minutes of PCA time *regardless of the actual amount of time it takes to perform the transfer*; a CAT code of four as to non-mechanical transfers gives a recipient 5 minutes of PCA time *regardless of the actual amount of time it takes to perform the transfer*.⁷⁷ Under the PCA regulations, neither the Division, nor the administrative law judge, has the discretion to increase the amount of PCA time arrived at through these formulas.

As stated in her areas of disagreement,⁷⁸ Ms. C contests the Division's findings / scoring as to transfers, locomotion, dressing, toilet use, and shampooing hair separately from bathing. These five ADLs are discussed below.

1. Transfers

For the ADL of transfers, PCA time is allowed when a person requires physical assistance to move between one surface and another (including to or from a bed, chair, or wheelchair), and/or when a person requires physical assistance to move from a lying or sitting position to a standing position.⁷⁹ In 2011 and 2012 the Division found that Ms. C required extensive assistance with transfers (CAT score 3/2).⁸⁰ In 2014 Ms. Russell found that Ms. C now requires only set-up assistance with transfers (CAT score 0/1). However, as discussed above in the section concerning transfers in the waiver services context, the preponderance of the evidence indicates that Ms. C currently requires extensive assistance with transfers (CAT score 3/2).

With regard to frequency, neither party presented evidence that Ms. C's required transfer frequency had either increased or decreased. Accordingly, Ms. C's transfer frequency should remain at its 2012 level (CAT score 3/2, frequency 6/7).

⁷⁵ AS 47.07.045(b)(3).

⁷⁶ See Division of Senior and Disability Services' *Personal Care Assistance Service Level Computation* sheet.

⁷⁷ *Id.*

⁷⁸ Ex. 1.

⁷⁹ 7 AAC 125.030(b)(2).

⁸⁰ Ex. F12, Case No. 14-2308-MDS.

2. Locomotion / Walking

For the ADL of locomotion, PCA time is allowed when a person requires assistance with walking (whether with the support of a walker, cane, gait belt, braces, crutches, or manual wheelchair), either between different locations in the recipient's home, outside the home to keep a medical or dental appointment, and/or when walking and simple exercises have been prescribed by a physician.⁸¹ In 2011 and 2012 the Division found that Ms. C required extensive assistance with locomotion (CAT score 3/2).⁸² In 2014, Ms. Russell originally assigned Ms. C a CAT score of 0/0 for locomotion. However, at hearing, the Division agreed to increase Ms. C's locomotion scores to 2/2, frequency 6/7 for single-level locomotion, and to 3/2, frequency 1/2 for locomotion to access medical appointments. As discussed above in the section concerning locomotion in the waiver services context, the preponderance of the evidence indicates that Ms. C currently requires limited assistance with single-level locomotion (CAT score 2/2), and extensive assistance with locomotion to access medical appointments (CAT score 3/2).

With regard to frequency, neither party presented evidence that Ms. C's required locomotion frequency had either increased or decreased. Accordingly, Ms. C's frequency of assistance with locomotion should remain at its 2012 level (CAT score 2/2, frequency 6/7 for in-room locomotion; CAT score 3/2, frequency 1/2 for locomotion to access medical appointments).

3. Dressing and Undressing

For the ADL of dressing, PCA time is allowed for the donning, fastening, unfastening, and removal of the recipient's street clothing, support hose, or prosthesis.⁸³ In 2011 and 2012 the Division found that Ms. C required extensive physical assistance with dressing a total of 14 times per week (CAT score 3/2, frequency 2/7).⁸⁴ In 2014 Ms. Russell found that Ms. C requires limited assistance with dressing eight times per week (CAT score 2/2, frequency 2/4).⁸⁵

The evidence in the record indicates that Ms. C *does* require assistance with dressing. However, Ms. C generally requires assistance with dressing only on those days during which her shoulders are painful.⁸⁶ In order to qualify for extensive assistance with dressing, Ms. C must demonstrate that her PCA either provides weight-bearing assistance, or dresses her completely, at

⁸¹ 7 AAC 125.030(b)(3).

⁸² Ex. F12, Case No. 14-2308-MDS.

⁸³ 7 AAC 125.030(b)(4).

⁸⁴ Exs. F8 and F12, Case No. 14-2308-MDS.

⁸⁵ Ex. E11, Case No. 14-2308-MDS.

⁸⁶ Ex. E11, Case No. 14-2308-MDS.

least three days per week.⁸⁷ Accordingly, the preponderance of the evidence indicates that Ms. C requires only limited assistance with dressing (CAT score 2/2).

With regard to frequency of assistance, Ms. C testified that she requires additional dressings due to incontinence. Her testimony on this issue was credible. However, according to prior Commissioner-level decisions in PCA cases, the need for additional clothing changes due to incontinence is to be addressed through additional frequencies of assistance with toileting rather than dressing. Accordingly, Ms. C's frequency for assistance with dressing should remain at its 2012 level (CAT score 2/2, frequency 2/7).

4. Toilet Use

For the ADL of toilet use, PCA time is limited by regulation to time spent moving to and from the toilet, transfers on and off the toilet, general hygiene care of a colostomy, ileostomy, or external catheter, and inserting and removal of a nonmedicated suppository, digital stimulation, or other routine incontinence care.⁸⁸ The CAT's definition of "toilet use" is somewhat broader, encompassing post-toileting hygiene and clothing adjustments.⁸⁹ In 2011 and 2012 the Division found that Ms. C required extensive assistance with toilet use 35 times per week (CAT score 3/2, frequency 5/7).⁹⁰ In 2014 Ms. Russell found that Ms. C requires only set-up help with toileting 14 times per week (CAT score 0/1).⁹¹ For the reasons stated above regarding toilet use in the waiver services context, the preponderance of the evidence indicates that Ms. C still needs extensive assistance with toileting (CAT score 3/2).

With regard to frequency, Ms. C testified at hearing that she needs additional PCA time due to "re-dressings" which she needs following episodes of incontinence. She indicated that she typically needs to get dressed or re-dressed about four times per day. This assertion is credible based on Ms. C's medical diagnoses. Accordingly, the preponderance of the evidence indicates Ms. C requires 28 assists per week with toilet use (CAT score 3/2, frequency 4/7).

5. Shampooing the Hair Separately From Bathing (Personal Hygiene)

For the ADL of personal hygiene, PCA time is allowed for washing and drying the face and hands, nail care, skin care, mouth and teeth care, brushing and combing the hair, shaving when done

⁸⁷ Ex. E11, Case No. 14-2308-MDS.

⁸⁸ 7 AAC 125.030(b)(6).

⁸⁹ The CAT form defines toilet use as "[h]ow person uses the toilet room (or commode, bedpan, urinal); transfers on/off toilet, *cleanses* . . . manages ostomy or catheter, adjusts clothes" (Ex. E9).

⁹⁰ Exs. F9 and F10, Case No. 14-2308-MDS.

⁹¹ Ex. E12, Case No. 14-2308-MDS.

separately from bathing, and *shampooing the hair when done separately from bathing*.⁹² In 2011 and 2012 the Division found that Ms. C required extensive assistance with personal hygiene seven times per week (CAT score 3/2, frequency 1/7).⁹³ In 2014 Ms. Russell found that Ms. C requires limited assistance with her hygiene three times per week (CAT score 2/2, frequency 1/3).⁹⁴

Ms. C testified that she can "sometimes" perform all her own personal hygiene tasks, but that, when her left shoulder / arm is hurting, her PCA must fully perform the shampooing of her hair. Likewise, Ms. C stated that she needs her PCA to apply lotions to areas of itchy skin that she cannot reach, and to help her clean up after episodes of incontinence.

The Division's prior assessment found that Ms. C required extensive assistance with personal hygiene, meaning that the PCA performed 100% of Ms. C's personal hygiene tasks "part" of the time within the week of the assessment. Ms. C asserts that she still requires extensive assistance with personal hygiene (including shampooing her hair separately from bathing). The Division did not provide specific evidence of the number of times per week that Ms. C requires only limited assistance with personal hygiene, and the number of times per week that Ms. C requires full caregiver performance of hygiene tasks. The Division bears the burden of proof on that issue. Accordingly, the preponderance of the evidence indicates that Ms. C still requires extensive assistance with her personal hygiene tasks, and with shampooing her hair separately from bathing (CAT score 3/2).

With regard to frequency, Ms. C requests that her frequency of assistance with personal hygiene be set at only three days per week. This is the frequency level set by the Division in the 2014 assessment. Accordingly, Ms. C's CAT score and frequency for personal hygiene, and shampooing hair separately from bathing, should be CAT score 3/2, frequency 1/3.

6. Instrumental Activities of Daily Living (IADLs)

Both the waiver services program and the PCA program provide qualifying individuals with assistance performing tasks such as meal preparation, housekeeping, grocery shopping, and laundry. Ms. C has been receiving these services as "chore services" through the waiver program.⁹⁵ With the termination of her waiver services, Ms. C will be entitled to receive these "chore-type" services as "assistance with IADLs" through the PCA program. In recognition of this, the Division stipulated at hearing that Ms. C is fully dependent on others for all her IADLs (CAT score 3/4). The Division

⁹² 7 AAC 125.030(b)(7).

⁹³ Exs. F10 and F12, Case No. 14-2308-MDS.

⁹⁴ Ex. E13, Case No. 14-2308-MDS.

⁹⁵ Ex. E2, Case No. 14-2217-MDS.

also stipulated that Ms. C is eligible for PCA assistance with two loads of laundry per week. Ms. C did not contest these IADL scores and frequencies. The Division will need to implement these stipulations in a new / amended PCA service plan.

7. PCA Assistance with Medication / Medication Management

Pursuant to 7 AAC 125.030(d), PCA assistance is available for:

- (1) assisting the recipient to self-administer routine oral medication, eye drops, and skin ointments; that assistance may include reminding the recipient and placing a medication within the recipient's reach;
- (2) assisting the recipient with the administration of medication

At hearing, the Division stipulated to provide Ms. C with 21 minutes per week of PCA time for medication management. Ms. C did not assert, in her areas of disagreement, that she is entitled to any more time for this activity. The Division will need to implement this stipulation in a new / amended PCA service plan following the issuance of this decision.

IV. Conclusion

Based on the Division's 2014 assessment, the opinion of one of her doctors, and independent review of the record, Ms. C does not currently require either intermediate or skilled nursing care as defined under the relevant regulations and the Consumer Assessment Tool. Further, although Ms. C requires more assistance with her ADLs than was found by the Division, her level of need for assistance with ADLs is not high enough to qualify her for waiver services on that basis. Accordingly, Ms. C's condition has materially improved⁹⁶ since her 2012 assessment, and she is not currently eligible for the waiver services program. The Division's decision terminating Ms. C's waiver services is therefore affirmed.

Finally, the Division's determination of the PCA services for which Ms. C is currently eligible was partially correct, but also partially incorrect. Accordingly, the Division's determination regarding Ms. C's PCA services is affirmed in part and reversed in part.

DATED this 31st day of July, 2015.

Signed

Jay Durych
Administrative Law Judge

⁹⁶ The waiver services program's relevant statutes, regulations, and assessment form have been amended over time, and those amendments can be construed as having tightened the eligibility requirements for waiver services. Accordingly, a finding that a recipient has "materially improved" can be due, in part, to heightened eligibility requirements which may not have been in effect at the time the recipient originally qualified for waiver services.

Adoption

The undersigned, by delegation from 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 11th day of August, 2015.

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.]