

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

In the Matter of)
)
N X) OAH No. 17-0935/0941-MDS
) Agency No.
_____)

**FINAL DECISION ADOPTING PROPOSED DECISION IN PART
AND REVERSING PROPOSED DECISION IN PART**

A proposed decision was issued on December 13, 2017 providing that Ms. X should receive 35.07 hours per week of PCS, and 45.18 hours per week of supported living services. Ms. X did not file a proposal for action objecting to the proposed decision. The Division of Senior and Disabilities Services filed a proposal for action which did not object to the provision of PCA hours, but which objected to the provision for supported living services. After review of the Division’s proposal for action, the undersigned, by delegation from the Commissioner of Health and Social Services, in accordance with AS 44.64.060(e)(1) adopts that portion of the proposed decision which provides for 35.07 hours per week of PCS. However, the remainder of the proposed decision, which provides for 45.18 hours per week of supported living services is reversed in its entirety. In accordance with AS 44.64.060(e)(5), the proposed decision relies upon an interpretation of the regulations for supported living services which is rejected. As explained by the Division in its proposal for action, the purpose of supported living services is for skill development and retention, and personal care services are not an acceptable primary use for supported living services. In contrast, the proposed decision holds that personal care services are an acceptable primary use for supported living services. Accordingly, the Division’s original finding that supported living services should be disallowed in full is upheld.

This is a final decision for appeal purposes. 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 26th day of December, 2017.

By: Signed
Erin Shine
Special Assistant to the Commissioner
Department of Health and Social Services

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

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

In the Matter of)
)
N X) OAH No. 17-0935/0941-MDS
_____) Agency No.

DIVISION'S PROPOSAL FOR ACTION

Introduction

This is a combo case involving Ms. X's request for personal care services and supported living services. The Division found Ms. X eligible for 31 hours per week of personal care assistance. The proposed decision overturns the Division's determination in part and finds Ms. X eligible for 35.15 hours of personal care services (PCS). The Division does not contest this portion of the proposed decision.¹

The Division does contest the proposed decision as it relates to the award of supported living services. Supported living services are provided to assist individuals with skill building activities. A provider of supported living services may provide personal care services simultaneously to the skill building activity (such as transferring or walking), but there must be a skill building component to the service at least within each 15 minute increment. Supported living under the waiver program is *not* a way for a recipient to get past the personal care services regulations to receive more personal care services. Because the proposed decision explicitly awards supported living services solely to perform additional personal care services, and because Ms. X does not need skill building services anticipated by the supported living regulations, the Division respectfully asks that the Commissioner or her designee reject

¹ While this case was pending, Ms. X submitted a request for an amendment to her personal care service level authorization to add time for range of motion exercises. Her request was approved, and she is now authorized for 420 minutes per week for range of motion exercises. This means that when the administrative decision is final, Ms. X will receive 42.15 hours of personal care services per week.

the proposed decision pursuant to AS 44.64.060(5) as it relates to interpreting 7 AAC 130.265. The Division requests that the Commissioner adopt an interpretation of 7 AAC 130.265 which requires skill building to be provided as part of supported living, consistent with the language of the Residential Habilitation Services Conditions of Participation, adopted by reference in 7 AAC 130.265. Consistent with this plain language regulatory interpretation, the Division asks that the Commissioner uphold the Division's denial of supported living services in Ms. X's current plan of care.

Relevant Facts

The Division does not dispute the facts as found by the Office of Administrative Hearings (OAH) in its proposed decision and relies upon those facts in its Proposal for Action.

Discussion

The PCS program focuses on an individual's functional limitations that are a result of a physical condition. 7 AAC 125.010-050 (exhibit G1 - 02). It provides hands-on assistance with activities in 7 AAC 125.030. Recipients are authorized for assistance with the tasks they cannot perform alone, and based on the type of assistance needed and how frequently they need it. Time is then calculated based on the services level authorization chart, which specifies the time for the task and limits some frequencies allowed under the program. Any Medicaid recipient who needs physical assistance is eligible for PCS (assuming they meet the other regulatory requirements).

In contrast, supported living is a service only available to recipients of some home and community-based waivers administered by the Division. Supported living is one category of Residential Habilitation services. These services "may be provided to assist recipients to acquire, retain, and improve the self-help, socialization, and adaptive skills necessary to maximize independence and to live in the most integrated setting appropriate to the recipient's wishes and needs." The activities that a service provider may provide "must be planned with the objective of maintaining or improving the recipient's physical, mental, and social abilities rather than rehabilitating or restoring such abilities. These services

must be individually tailored, and may include personal care and protective oversight and supervision, in addition to skills development."

On page 13, the proposed decision highlights the Residential Habilitation Services Conditions of Participation (exhibit FFI-3), and notes the division "completely overlooks the fact that 'personal care and protective oversight and supervision in addition to skills development' are allowable supported living services." The agency did not overlook the Conditions of Participation, but instead looked at the definition in its entirety. The key words in the section the proposed decision highlights are "in addition to skills development." What this clearly implies is that even if Ms. X needs assistance with personal care, protective oversight and supervision, she still must require skill development. The activities go in coordination with skill development not in place of. An example would be if Ms. X is participating in active skill development with her supported living provider and has to use the restroom. That provider would assist her to use the restroom and personal care would therefore be provided to her during her covered supported living service. An example of skill development would be if Ms. X did not have the cognitive capacity to understand what items she needed to plan a meal. In this situation, an individual would work one on one with Ms. X helping her to identify what items are needed for the meal, what she has available in her home and what she needs to purchase at the store. As Ms. X and the service provider work step by step through the process, Ms. X would be guided in learning how to identify, remember and track items needed to complete the meal plan. For an individual that has functional capacity but cognitive deficits, an example of skill development might be learning to not only plan the meal, but to cook it. The learning process for each example is conducted in steps, the amount of steps completed in a designated time is dependent on the individual. However, each step will continue to be trained until the individual is able to learn, retain, and perform the skill on their own with little to no service provider assistance.

In Ms. X's case, her needs are entirely physical. As found by the OAH (page 12), she requests supported living for "repositioning, her need for hydration, her need for small frequent meals and snacks, her need assistance [sic] with fine motor tasks for various activities (letter, crafts, etc.), care

of her house pet, for transportation to appointments, work, volunteer, and social activities."

Repositioning, eating, and food preparation, are all personal care services on Ms. X's service level authorization. Assistance with fine motor skills for other tasks would be a personal care task, but it is not a service covered in Alaska. Care for a house pet is only covered for service animals. And transportation is a separate waiver service. As noted above and throughout the hearing record and exhibits, Ms. X has a high level of mental capacity, she is highly intelligent, she has the ability to learn on her own, she personally pursues activities and information through the use of assistive devices and directives to staff and supports, she does not need the assistance of someone else to help her learn to acquire, retain self-help, socialization or adaptive skills to live in her chosen environment.

Habilitation is defined in AS 47.80.900 (4) as "education or training for persons with disabilities to enable them to function better in society." Per PAR-Psychological Assessment Resource, www.parinc.com, Adaptive skills are defined as practical, everyday skills needed to function and meet the demands of one's environment, including the skills necessary to effectively and independently take care of oneself and to interact with people. Ms. X exceeds these definitions based on her intellect and abilities to self-direct her life and care.

Finally, the proposed decision is incorrect in stating that supported living services "are not limited" to "15-minute increments, with the expectation that each unit will be filled with active habilitative skill building tasks." This comes from regulations promulgated by the Office of Rate Review. Per 7 AAC 145.520 & 7 AAC 160.900, a provider can only bill for a 15 minute increment if the actual habilitative service was provided during that time. In the case of supportive living, each 15 minute unit a provider submits billing payment for must show that habilitative services were actually administered and performed during the unit(s) billed.

Conclusion

In summary, supported living services cannot be solely personal care services. There must be skill building activity taking place. Ms. X only requests supported living to help with physical tasks, and indeed she has demonstrated that she retains excellent cognitive function and is able to participate in employment, advocacy groups, schooling, and volunteering. Based on the clear reading of the regulations, the OAH's conclusion that supported living can be provided solely to assist with hands-on physical activities should be rejected, and the Division's denial of supported living should accordingly be upheld.

DATED this 21th day of December, 2017

Signed _____

Division's Authorized Representative
Terri Gagne, Fair Hearing Representative

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of

The foregoing was served by U.S. mail Postage

prepaid, This 21th day of December, 2017

N X

[address]

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

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

In the Matter of)
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N X) OAH No. 17-0935/0941-MDS
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[PARTIALLY REJECTED PROPOSED] DECISION

I. Introduction

N X is a quadriplegic who resides in her own home. She is completely dependent upon others for her physical care needs. Ms. X receives Medicaid Home and Community-based Waiver Services (Waiver). When she filed to renew her Waiver Plan of Care (POC), she requested a change in her Waiver services. She also applied to receive Medicaid Personal Care Services (PCS). Ms. X was assessed to determine her eligibility for PCS on June 30, 2017. She was notified on August 18, 2017 that PCS were approved, in the amount of 31 hours per week. Shortly thereafter, on September 5, 2017, she was notified that her POC renewal request was denied in part, specifically her request for 56 hours per week of supported living services was denied. Ms. X requested a hearing to challenge the Division’s determinations.

The evidence at hearing demonstrated that Ms. X’s care needs cannot be adequately provided for by the amount of PCS allowed by the Division. Accordingly, her PCS are to be increased to 35.07 hours per week. That increase, however, does not fully address her needs either at home or in the community. She is therefore, in addition to the PCS allowed for herein, to receive 45.18 hours of supported-living services per week.

II. Background Facts and Procedural History¹

The following facts were established by a preponderance of the evidence.

Ms. X is in her early 30s. She developed transverse myelitis at age 21, which rendered her a complete quadriplegic with an inability to use any of her limbs, including her hands and fingers. She can move her neck and head to some degree. Her mental functioning is fully intact, and she is able to speak. Due to her complete quadriplegia, she is completely dependent upon others for all her care needs, including feeding herself, bathing, toileting, etc. She requires frequent repositioning in her wheelchair. She is fed frequently. She has to be given water

¹ There have been several sets of documents filed in this consolidated case. All references to exhibits are in the position statement and accompanying exhibits filed on October 3 and 4, 2017.

frequently. She requires complete assistance with the myriad of minute daily actions that others take for granted. For instance, her 24-hour care calendars, which are contained in the record, are replete with items such as constantly repositioning her in the wheelchair, helping her eat snacks, giving her water, covering and uncovering her with a blanket, moving her heating pad, moving her legs, opening a window for her, helping her use a “happy light,” using her computer, using the phone, and moving furniture which is in her path. Except for when she is sleeping, she requires constant attention. However, even at night time, she is catheterized, repositioned and her blankets adjusted.²

Ms. X has two sons. Although, they do not live with her, she is an active parent and involved with their schooling and activities. She is also active in the community. Ms. X owns her own home. In 2016, she was living in her home and receiving Medicaid services under the Group Home category.³

In 2017, Ms. X sought to renew her Medicaid Waiver Plan of Care. Her renewal requested Group Home services for a period, with a switch to 56 hours per week of supported living services, among other services, in lieu of the Group Home services.⁴ Ms. X also requested PCS.⁵

Ms. X’s need for PCS was assessed during a home visit by Robin Platt, a Division assessor, on June 30, 2017.⁶ Based upon that assessment, which found that Ms. X was completely dependent (coded as a “4”) in all her physical activities, apart from being able to operate her electric wheelchair, the Division sent Ms. X notice on August 18, 2017 that she was eligible for 31 hours of PCS per week, as follows:

Bed Mobility	14x/wk (twice daily)	10 min/day	70 min/wk
Transfers – Mechanical	14x/wk (twice daily)	30 min/day	210 min/wk
Dressing	14x/wk (twice daily)	30 min/day	210 min/wk
Eating – Supervised	21x/wk (three times daily)	45 min/day	315 min/wk
Toileting	21x/wk (three times daily)	36 min/day	252 min/wk
Personal Hygiene	7x/wk (once daily)	20 min/day	140 min/wk

² Ex. B, pp. 42 – 328.

³ Ex. B, pp. 330, 338 – 339.

⁴ Ex. B, p. 23.

⁵ Ex. A.

⁶ The Consumer Assessment Tool is located at Ex. C (hereinafter “CAT”).

Bathing	2x/wk		60 min/wk
Light Meals	14x/wk (twice daily)	30 min/day	210 min/wk
Main Meal	7x/wk (once daily)	25 min/day	175 min/wk
Housework	Per week		90 min/wk
Shopping	Per week		60 min/wk
Laundry	Per week		<u>60 min/wk</u>
	TOTAL MINUTES PER WEEK		1,852 ⁷

The Division denied Ms. X’s request for supported living services in its entirety.⁸

III. Discussion

At hearing, Ms. X requested that any increase in her services, over that initially approved by the Division, should be through supported living services, rather than through PCS. As pointed out by the Division, PCS services are less costly to the Medicaid program than similar Waiver services. For instance, services billed through the PCS program are reimbursed at a rate of \$6.10 per 15-minute service unit, whereas supported living services billed through the Waiver program are reimbursed at a rate of \$10.66 per 15-minute service unit.⁹ This means that if the same service can be provided by either PCS or Waiver, PCS will cost Medicaid \$4.56 less per service unit (\$18.24 per hour) than Waiver. Accordingly, this decision will first determine which of Ms. X’s needs can be met through PCS. After that determination is made, her request for supported living services will be addressed.

A. *The PCS Determination Process*

The Medicaid program authorizes PCS for the purpose of providing assistance to a Medicaid recipient who has functional limitations, resulting from his/her physical condition, that “cause the recipient to be unable to perform, independently, or with an assistive device, the activities specified in 7 AAC 125.030.”¹⁰ Those activities are broken down into activities of daily living (ADLs) and instrumental activities of daily living (IADLs). The ADLs are bed

⁷ Ex. D, pp. 6 - 7.

⁸ Ex. E, pp. 1 – 2. The Division also partially denied Ms. X’s request for day habilitation services. Ms. X did not dispute that partial denial.

⁹ *Department of Health and Social Services Chart of Personal Care Attendant and Waiver Service Rates* effective July 1, 2017 (Anchorage rates – the rates for the No Name Area have an increase over the Anchorage rates). This document is available online at <http://dhss.alaska.gov/dsds/Documents/pca/PCA-waiver-service-rates201707.pdf> (date accessed December 5, 2017).

¹⁰ 7 AAC 125.010(b)(1)(A)(iii).

mobility, transfers, locomotion, dressing, eating, toileting, personal hygiene, and bathing.¹¹ The IADLs are light meal preparation, main meal preparation, housework, laundry, and shopping.¹² In addition, PCS are provided for medication assistance, maintaining respiratory equipment, dressing changes, wound care, medical escort, and passive range-of-motion exercises.¹³ PCS are furnished by a Personal Care Assistant, usually abbreviated as “PCA.”

PCS are not provided for activities that can “be performed by the recipient.”¹⁴ Nor are they allowed for “oversight and standby functions.”¹⁵

The Division assesses recipients by using the Consumer Assessment Tool, or “CAT”, as a methodology to score both eligibility for the PCS program and the amount of assistance needed for covered activities and services.¹⁶ The actual list of services, time allotted for each service based upon the severity of need, and the allowable frequencies for each service are set out in the *Personal Care Services: Service Level Computation* instructions, which are adopted by reference into regulation.¹⁷

As a gateway to eligibility for PCS, the CAT evaluates a subset of the ADLs and IADLs. If a person requires some degree of hands-on physical assistance with any one of these ADLs or IADLs, or has a medically documented need for supervision while eating, then the person is eligible for services from a PCA.¹⁸ Once eligibility is established, time for additional ADLs and IADLs, as well as certain other covered services, can be added to the authorization.

The ADLs measured by the CAT are bed mobility, transfers (non-mechanical), transfers (mechanical), locomotion (in room), locomotion (between levels), locomotion (to access apartment or living quarters), dressing, eating, toilet use, personal hygiene, personal hygiene-shampooing, and bathing.¹⁹ The CAT numerical coding system for ADLs has two components. The first component is the *self-performance code*. These codes rate how capable a person is of

¹¹ 7 AAC 125.030(b).

¹² 7 AAC 125.030(c).

¹³ 7 AAC 125.030(d). The regulation contains specific conditions that a recipient must satisfy to receive these specialized services.

¹⁴ 7 AAC 125.040(a)(4).

¹⁵ 7 AAC 125.040(a)(10).

¹⁶ See 7 AAC 125.020(a)(1). The CAT is itself a regulation, adopted in 7 AAC 160.900(d)(6).

¹⁷ 7 AAC 125.024(a); 7 AAC 160.900(d)(29). The *Personal Care Services: Service Level Computation* instructions can be found online at

http://dhss.alaska.gov/dsds/Documents/regulationMaterials/PCS_SLA_Computation_Chart_6-2-2017.pdf

¹⁸ 7 AAC 125.020(c)(1).

¹⁹ CAT, pp. 6 – 11.

performing a particular ADL. The possible codes are: **0** (the person is independent²⁰ and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance²¹); **3** (the person requires extensive assistance²²); **4** (the person is totally dependent²³). There are also codes which are not used in calculating a service level: **5** (the person requires cueing); and **8** (the activity did not occur during the past seven days).²⁴

The second component of the CAT scoring system is the *support code*. These codes rate the degree of assistance that a person requires for a particular ADL. The possible codes are: **0** (no setup or physical help required); **1** (only setup help required); **2** (one-person physical assist required); **3** (two or more person physical assist required). Again, there are additional codes which are not used to arrive at a service level: **5** (cueing required); and **8** (the activity did not occur during the past seven days).²⁵

The IADLs measured by the CAT are light meal preparation, main meal preparation, light housekeeping, laundry (in-home), laundry (out-of-home), and shopping.²⁶ The CAT codes IADLs slightly differently than it does ADLs. The *self-performance codes 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 and the activity is fully performed by another person). There is also a code that is not used to arrive at a service level: **8** (the activity did not occur).²⁷

²⁰ A self-performance code of 0 is classified as “[I]ndependent – No help or oversight – or – Help/oversight provided only 1 or 2 times during the last 7 days.” See CAT, p. 6.

²¹ Limited assistance with an ADL is defined as “[p]erson highly involved in activity; received physical help in guided maneuvering of limbs, or other nonweight-bearing assistance 3+ time – or – Limited assistance (as just described) 1 or 2 times during the last seven days.” See CAT, p. 6.

²² Extensive assistance is defined as “[w]hile person performed part of activity, over last 7-day period, help of following type(s) provided 3 or more times: Weight-bearing support [;] Full staff/caregiver performance during part (but not all) of last 7 days.” See CAT, p. 6.

²³ Total dependence is defined as “[f]ull staff/caregiver performance of activity during ENTIRE 7 days.” See CAT, p. 6.

²⁴ See CAT, p. 6.

²⁵ See CAT, p. 6.

²⁶ See CAT, p. 26.

²⁷ See CAT, p. 26.

The *support codes* for IADLs are also slightly different than the support codes for ADLs. The support codes for IADLs are **0**: (no support provided); **1** (supervision / cueing 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). Again, there is an additional code that is not used to arrive at a service level: **8** (the activity did not occur).²⁸

There are three routes to qualify for PCS. First, a person qualifies by being coded as requiring a limited or greater degree of physical assistance (self-performance code of 2, 3, or 4, and a support code of 2, 3, or 4) in any one of the ADLs of transfers, locomotion, eating, toilet use, dressing or bathing. Similarly, a person qualifies if he or she is coded as requiring some degree of hands-on assistance²⁹ (self-performance code of 1, 2, or 3, and a support code of 3 or 4) with any one of the IADLs of light or main meal preparation, light housework, routine housework, grocery shopping or laundry.³⁰ Finally, unlike the general rule that mere monitoring/supervision/cueing for an ADL or IADL will not confer eligibility for PCS, a medically documented need for supervision while eating confers eligibility.³¹

The codes assigned to a particular ADL or IADL determine how much PCA service time a person receives for each occurrence of a particular activity. For instance, if a person is coded as requiring extensive assistance (code of 3) with bathing, he or she would receive 22.5 minutes of PCA service time every day he or she is bathed.³²

For covered services beyond assistance with ADLs and IADLs, specific rules apply that will be discussed below.

B. PCS Approval

Ms. X disagreed with the amount of PCS the Division approved. Her areas of disagreement were bed mobility, transfers, locomotion, toileting, bathing, hair washing, medication, and maintenance of her respiratory equipment.

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²⁸ See CAT, p. 26.

²⁹ For the purposes of this discussion, “hands-on” assistance does not include supervision/cueing or set-up assistance (support codes of 1 or 2). See CAT, p. 26.

³⁰ See CAT, p. 31.

³¹ 7 AAC 125.020(c)(1)(B).

³² 7 AAC 125.024(a); 7 AAC 160.900(d)(29). The *Personal Care Services: Service Level Computation* instructions can be found online at http://dhss.alaska.gov/dsds/Documents/regulationMaterials/PCS_SLA_Computation_Chart_6-2-2017.pdf

1. Bed Mobility

The Division allotted Ms. X bed mobility assistance 14 times per week, which would be twice daily. Bed mobility involves moving from side to side in bed, and sitting up in bed.³³ Ms. X, as a quadriplegic, is completely dependent in this activity. She told the assessor that she was repositioned “every hour or more during the evening/night.” The assessor coded her as being completely dependent, and provided her assistance twice daily.³⁴ Ms. X testified that she needed to be repositioned in bed approximately once per hour. She spends between 9 to 10 hours daily in bed.³⁵ Her care calendars show multiple repositionings in bed, which varies from day to day. For instance, her care calendar for May 24, 2017 does not show frequent repositioning between 12:00 a.m. and approximately 8:00 a.m. It shows catheterization at 2:00 a.m., 6:30 a.m., and 8:00 a.m. It also shows that her pillow was moved. Her care calendars for other days show more frequent repositioning in bed.³⁶ In contrast, her care calendar shows very frequent repositioning in her wheelchair.³⁷

Ms. X, a quadriplegic who cannot reposition herself, is at risk for bed sores. For instance, her Medicaid Waiver Plan of Care application states that she checks her skin integrity daily.³⁸ The PCS program allows repositioning in bed “every two hours as needed, up to 12 x daily, reduced by frequencies for the ADLs of transferring, locomotion, toileting, and bathing.”³⁹ Given her condition, and her testimony regarding the amount of time she spends in bed, she should receive bed mobility assistance a minimum of 4 times daily, rather than the twice daily allotted by the assessor. It should be noted, however, as discussed below, that Ms. X should receive 2 transfers daily, and 7 toiletings daily, each of which impacts the number of times she can receive bed mobility assistance.⁴⁰ Her care calendars show a variation in the amount of times she is repositioned, in addition to catheterization. Her daily transfers and toiletings total 9, which in turn results in her receiving bed mobility assistance three times daily, per the

³³ CAT, p. 6.

³⁴ CAT, p. 6.

³⁵ Ms. X’s testimony.

³⁶ Ex. B, pp. 269 – 270. For instance, her care calendars for May 13 and 14 show several repositions in addition to catheterization. Ex. B, pp. 42, 54.

³⁷ Ex. B, pp. 42 – 328.

³⁸ Ex. E, p. 12.

³⁹ *Personal Care Services: Service Level Computation*, p. 1.

⁴⁰ Ms. X receives no locomotion assistance. Accordingly, there is no reduction due to this.

requirement that bed mobility assistance is limited to 12 times daily reduced by transfer and toileting assistance.⁴¹

Ms. X should therefore receive bed mobility assistance three times daily, seven days per week, which comes to 15 minutes per day or 105 minutes per week.⁴²

2. Transfers

Transfers involve the act of moving to and from one surface to another.⁴³ In this case, it would only involve Ms. X moving from her bed to her wheelchair and vice-versa.⁴⁴ Ms. X uses a mechanical (hoyer) lift for her transfers. The assessor found that Ms. X was completely dependent in this regard and allotted her assistance twice daily (14 times per week for transfers).⁴⁵ Ms. X disagreed. While, the minimum amount of times she is transferred daily is twice, she testified that she is, on the average, transferred four times daily.⁴⁶ While this does not appear unreasonable, her care calendars contained in the record, only show an average of two transfers daily, once in the morning out of bed and once in the evening back to bed.⁴⁷ Consistent with the care calendars, she should receive assistance with transferring twice daily (14 times per week). This comes to 30 minutes daily (2 x 15 minutes per mechanical transfers) or 210 minutes per week.⁴⁸

3. Locomotion

Locomotion is the act of moving within the home.⁴⁹ The assessor found that Ms. X was independent in this regard, because she can independently operate her electric wheelchair.⁵⁰ Ms. X wished to receive assistance with locomotion. Although she agreed that she could operate her wheelchair, she testified that she occasionally has to be pushed.⁵¹ Because the facts show that Ms. X can operate her wheelchair independently within the home, she does not qualify for locomotion assistance.

⁴¹ Because Ms. X has to be catheterized at least once every four hours, as discussed below, she would be repositioned at night at least once for this procedure.

⁴² The *Personal Care Services: Service Level Computation*, p. 1.

⁴³ CAT, p. 6. .

⁴⁴ Transfers that are incidental to bathing and toileting are covered under the times provided for those activities. See 7 AAC 125.030(b)(2).

⁴⁵ CAT, p. 6.

⁴⁶ Ms. X's testimony.

⁴⁷ Ex. B, pp. 42 – 328.

⁴⁸ The *Personal Care Services: Service Level Computation*, p. 1.

⁴⁹ CAT, p. 7.

⁵⁰ CAT, p. 7.

⁵¹ Ms. X's testimony.

4. Toileting

Toileting encompasses not only actual toilet use, but also includes catheterization, and ostomy management.⁵² The assessor found, based on Ms. X's reporting and observation, that she is both catheterized and had "mini" enemas four days per week. The assessor found that Ms. X is completely dependent with toileting and allotted assistance with this activity three times daily (21 times per week).⁵³

Ms. X testified that she has a daily bowel regimen and has to be catheterized every two to three hours. She requested toileting assistance nine times daily.⁵⁴ Ms. X's Medicaid Plan of Care paperwork, which she signed, however, states that she is catheterized every three to four hours.⁵⁵ In addition, Ms. X supplied care calendars logging the type of assistance she received, and the time that assistance occurred for 12 days, May 13 – 24, 2017. Those calendars show multiple catheterizations, which generally occurred six times per day, although there were several days where she was catheterized seven times.

A review of the care calendars in the record does not explicitly show a mention of "bowel regimen." Over the 12 day period her care calendars cover, there is only one explicit reference to bowel care, which occurred on May 14, 2017.⁵⁶ However, on May 13, 2017, there is a cryptic, somewhat illegible entry, that appears to refer to bowel care: "assisted N in using [washroom (?)] #2 manually [illegible] or it gets stuck."⁵⁷ On May 22, 2017, there is an extended "hygiene routine" which immediately preceded bathing.⁵⁸ Because Ms. X undisputedly requires a bowel care regimen, and because there is evidence in the care calendars showing some bowel care, her testimony as to frequency is credible. The combination of evidence therefore supports toileting assistance seven times daily (49 times per week), which would be six catheterizations based on her average (once every four hours) and one bowel regimen. Given that she sometimes requires catheterizations seven times daily, providing her with toileting assistance seven times daily will average out the days when she might not receive bowel care with those days when she requires a

⁵² CAT, p. 9.

⁵³ CAT, p. 9.

⁵⁴ Ms. X's testimony.

⁵⁵ Ex. B, p. 23.

⁵⁶ Ex. B, p. 57.

⁵⁷ Ex. B, p. 45. This entry is fairly illegible, and the quote is provided as best as can be determined.

⁵⁸ Ex. B, p. 202.

higher frequency of catheterization. This comes to 84 minutes per day (7 x 12 minutes), or 588 minutes weekly.⁵⁹

5. Bathing

Bathing encompasses not only taking a bath or a shower. It also includes sponge baths.⁶⁰ The assessor, based on Ms. X's reporting and her observation of the bathing facilities, determined that Ms. X was completely dependent with bathing and provided her with assistance twice weekly.⁶¹

Ms. X testified that the bathing allotment was not entirely accurate. When she is not receiving an actual bath, she has a sponge bath, *i.e.*, she is bathed daily.⁶² Accordingly, she is to receive bathing assistance seven times weekly. This comes to 30 minutes daily, or 210 minutes per week.⁶³

6. Washing Hair

Washing the hair is also allowed as a PCS a maximum of three times per week "only if no bathing occurs on the same day."⁶⁴ Ms. X testified that she has her hair washed three times per week. Two of those times involve her getting her hair washed in the sink.⁶⁵ While Ms. X is credible, the PCS program does not allow service time for hair washing if bathing occurs that same day. Because she is to be provided bathing services, as discussed above, seven days per week, she cannot also receive PCS for washing her hair.

7. Medication

The CAT does not list any medications for Ms. X: "No Medications Listed."⁶⁶ Ms. X testified that she has two regular daily medications and one prescription suppository.⁶⁷ Given her condition, her testimony is credible. In addition, Ms. X's care calendars show medications in the morning and the evening.⁶⁸ Ms. X is obviously completely dependent in this regard, and

⁵⁹ The *Personal Care Services: Service Level Computation*, p. 1.

⁶⁰ CAT, p. 11.

⁶¹ CAT, p. 11.

⁶² Ms. X's testimony.

⁶³ The *Personal Care Services: Service Level Computation*, p. 1.

⁶⁴ *Personal Care Services: Service Level Computation*, p. 1.

⁶⁵ Ms. X's testimony.

⁶⁶ CAT, p. 20.

⁶⁷ Ms. X's testimony.

⁶⁸ *See, e.g.*, Ex. B, pp. 271, 279.

should receive medication assistance twice daily for four minutes each time, which would come to 8 minutes daily, and 56 minutes weekly.⁶⁹

8. Respiratory Equipment Maintenance.

Ms. X has a nebulizer which she uses once or twice a week.⁷⁰ PCS, for someone who is completely dependent, is allowed for “minor maintenance of respiratory equipment” at 11.25 minutes per week.⁷¹ Accordingly, Ms. X is to be allowed this amount of time per week for cleaning of her nebulizer.

9. Summary of PCS

Ms. X did not dispute all the PCS approved by the Division. The undisputed items consist of the following:

Dressing	14x/wk (twice daily)	30 min/day	210 min/wk
Eating – Supervised	21x/wk (three times daily)	45 min/day	315 min/wk
Personal Hygiene	7x/wk (once daily)	20 min/day	140 min/wk
Light Meals	14x/wk (twice daily)	30 min/day	210 min/wk
Main Meal	7x/wk (once daily)	25 min/day	175 min/wk
Housework	Per week		90 min/wk
Shopping	Per week		60 min/wk
Laundry	Per week		<u>60 min/wk</u>
SUBTOTAL WEEKLY TIME			1,260 min

The resolution of the disputed items, as discussed above, consists of the following:

Bed Mobility	21x/wk (three times daily)	15 min/day	105 min/wk
Transfers – Mechanical	14x/wk (twice daily)	30 min/day	210 min/wk
Toileting	21x/wk (three times daily)	36 min/day	252 min/wk
Bathing	7x/wk (once daily)	30 min/day	210 min/wk
Medication	14x/wk (twice daily)	8 min/day	56 min/wk
Respiratory Equip	1x/wk		<u>11.25 min/wk</u>
SUBTOTAL WEEKLY TIME			844.25 min

⁶⁹ The *Personal Care Services: Service Level Computation*, p. 3.

⁷⁰ Ms. X’s testimony.

⁷¹ The *Personal Care Services: Service Level Computation*, p. 3.

The total minutes per week that Ms. X should receive for PCA services is therefore 2,104.25 minutes, which comes to 35.07 hours per week, or 5 hours per day.

C. Supported Living Services

Ms. X was receiving Group Home services in her own home. Group Home services are residential habilitation services “provided to a recipient . . . living full-time in residence licensed as an assisted living home . . . that provides 24-hour care.”⁷² When Ms. X filed to renew her Waiver plan of care, she opted to discontinue group home services, which is a 24-hour care model, to a model that allowed her more control over her activities.

She applied for PCS and her Waiver plan of care requested 56 hours per week of supported living (eight hours per day) in addition to supported employment and day habilitation. In her plan of care, she noted that she was applying for PCS and that PCS “limit[s] the amount of times per day for certain tasks and activities.”⁷³ As support for the request for supported living services, the plan of care mentions Ms. X’s frequent needs for repositioning, her need for hydration, her need for small frequent meals and snacks, her need for assistance with fine motor tasks for various activities (letter, crafts, etc.), care of her house pet, for transportation to appointments, work, volunteer, and social activities.⁷⁴

The Division denied the 56 hours of supported living in its entirety.⁷⁵ Its rationale was:

Habilitative services are structured in 15-minute increments, with the expectation that each unit will be filled with active habilitative skill building tasks that will support an individual to acquire, build, or retain skills aimed at increasing the individual’s overall level of functioning. The Supported Living description of service explanation in the POC states you are very capable of coordinating the tasks of running your own home. The majority of the tasks identified in the Typical Day/24-hour Care calendar provided are tasks which are not habilitative in nature and are actually more descriptive of tasks which would be provided through the Personal Care Assistance program, as are the majority of the specified goals.⁷⁶

As discussed above, Ms. X should receive PCS of 35.07 hours per week, which comes to just over 5 hours per day. However, as also discussed above, the PCS program that limits the amount of assistance that can be provided, and what type of assistance can be provided. For

⁷² 7 AAC 130.265.

⁷³ Ex. B, p. 23.

⁷⁴ Ex.B, pp. 23 – 25.

⁷⁵ Ex. E.

⁷⁶ Ex. E, p. 2.

instance, PCS only allows three meals per day. There is no flexibility to provide items such as providing a recipient with water or snacks. There is no flexibility to allow a recipient to have frequent repositioning in a wheelchair. There is no allowance to take care of a household pet, or to turn a light on, or to turn on a computer, or put a blanket on someone if he or she is cold. Ms. X's complete quadriplegia means that her needs far outstrip the capabilities of the PCS program.

Supported living services can be provided in a recipient's own home. They fall in the general category of residential habilitation services.⁷⁷ The services have to be "provided in accordance with the department's *Residential Habilitation Services Conditions of Participation*."⁷⁸ The *Conditions* document, which is adopted into regulation,⁷⁹ states:

Residential habilitation services may be provided to assist recipients to acquire, retain, and improve the self-help, socialization, and adaptive skills necessary to live in the most integrated setting appropriate to the recipient's needs. These services must be individually tailored, and may include personal care and protective oversight and supervision, in addition to skills development.⁸⁰

The Division's denial of Ms. X's request for supported living services only focuses on the skill development component. It completely overlooks the fact that "personal care and protective oversight and supervision, in addition to skills development" are allowable supported living services. In fact, the Division's denial letter misstates the allowable use of residential habilitation services when it says that "[t]he majority of the tasks identified in the Typical Day/24-hour Care calendar provided are tasks which are not habilitative in nature and are actually more descriptive of tasks which would be provided through the Personal Care Assistance program . . ." While the Division referred to regulation 7 AAC 130.319, which has a general definition of habilitation services as only allowing skill development, the Division ignores the introduction to that regulation which specifically states "[i]n this chapter, unless the context requires otherwise."⁸¹ There is context here: given the *Conditions* document, which is adopted into regulation, the Division cannot ignore it in favor of the more restrictive "habilitation services" definition. Accordingly, the Division's arguments on this point are not at all persuasive. Personal care services of the type sought by Ms. X clearly fall within the acceptable range of supported living services: supported living services are not limited to "15-minute

⁷⁷ 7 AAC 130.265(a) and (d).

⁷⁸ 7 AAC 130.265(a)(2) (emphasis in original).

⁷⁹ 7 AAC 160.900(d)(45).

⁸⁰ Ex. FF, p. 1.

⁸¹ 7 AAC 130.319.

increments, with the expectation that each unit will be filled with active habilitative skill building tasks.” Accordingly, the Division’s denial of the supported living services request for the reason that the requested care is outside the acceptable parameters for supported living services is reversed.

The reversal, however, does not completely dispose of the issue. The Division correctly pointed out that supported living services may not duplicate other services provided to a recipient, which includes PCA services.⁸² Supportive-living services are also capped at 18 hours per day.⁸³ It is also necessary to look at the other services provided Ms. X through her POC. She has 15 hours per week of day habilitation services and 15 hours per week of supported employment services. This is 30 hours per week when she does not require supported living services. In addition, as discussed above, she should receive 35.07 hours per week of PCA services. Per Ms. X’s testimony, she spends between 9 to 10 hours per day in bed. However, 45 minutes per day of her PCS are furnished while she is in bed (three bed mobilities – 15 minutes, and at least one catheterization – 30 minutes). This would reduce Ms. X’s “daytime” PCS by 5.25 hours per week to 29.82 hours per week.

Ms. X’s care calendars show that she does not sleep the entire time she is in bed. However, estimating her sleeping time at 9 hours per night based upon her testimony, (during which she will receive 45 minutes daily of PCS) she would have 15 hours per day of “active time.” This comes to 105 hours per week. Subtracting the 30 weekly hours of day habilitation/supported employment time and 29.82 weekly hours of her “daytime” PCS from the 105 hours per week of Ms. X’s non-sleeping time hours results in 45.18 hours of time in which she requires supported living services.

Accordingly, the Division’s denial of Ms. X’s request for 56 hours of supported living service is reversed. Ms. X is to receive, not the 56 hours of requested time, but rather 45.18 hours per week of supported living services.

IV. Conclusion

Ms. X has the burden of proof in this case by a preponderance of the evidence. She has successfully demonstrated that the Division’s allowance of PCS was inadequate. She has also

⁸² 7 AAC 130.265(e)(2).

⁸³ 7 AAC 130.265(e)(1).

successfully demonstrated that she should receive supported-living services. As discussed above, she should receive 35.07 hours per week of PCS, and 45.18 hours per week of supported living services.

DATED this 13th day of December, 2017.

Signed _____

Lawrence A. Pederson
Administrative Law Judge

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