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

In the Matter of	)	
	)	
B N	)	OAH No. 17-1286-MDS
	)	Agency No.

DECISION

I. Introduction

B N has been profoundly disabled from birth. Now 32, she remains tiny, has the mental functioning of an infant, has difficult physical limitations, and appears to be declining in overall health. Because she functions as a child, she will be referred to as "B" in this decision, with the name "Mrs. N" reserved for her guardian and mother, T N. B's family managed her care without state aid for 14 years, but now accepts substantial assistance through both Waiver and Personal Care Services (PCS).

The Division of Senior and Disabilities Services (SDS) performed a desk review of B's care last autumn and notified the family on November 20, 2017 that it would be reducing B's total weekly PCS from 54.5 hours to 40.25 hours, or a total reduction of 14.25 hours per week. The reductions that were explained fell in four areas: minor respiratory equipment maintenance, transfers, locomotion, and dressing. These reductions added up to 9.4 hours. No explanation at all was provided for the remaining 4.85 hours of reduction.

Mrs. N requested a hearing on behalf of her daughter, which was held in a single session on January 26, 2018. SDS had the burden of proving that the PCS reduction was appropriate. For reasons that are unclear, SDS chose to attempt this without presenting the key document it had relied on in its desk review.

Weighing the evidence presented at the hearing, I conclude that SDS did meet its burden of justifying three of the four areas of reduction, totaling approximately 4.75 hours. However, the reduction cannot be sustained regarding the fourth area, locomotion, because the agency's showing in this area was too weak. Further, the unexplained reduction likewise cannot be sustained, due to inadequate notice. The net outcome will be to sustain a reduction of approximately 4.75 hours, leaving B with approximately 49.75 hours per week of PCS.

II. The PCS Determination Process

The Medicaid program authorizes personal care assistants (PCAs) for the purpose of providing "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 . . . ."[1] 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."[2]

The Division uses the Consumer Assessment Tool, or "CAT", as a methodology to score eligibility for the PCS program, and the amount of assistance, if any, that an eligible person needs to perform ADLs, IADLs, and other covered services.[3] In general, if certain levels of assistance are required, the regulations prescribe a fixed number of PCA minutes per instance of that activity. There is also generally a ceiling on the number of instances per day.

III. Background Facts[4]

B N is 32 years old, but is in the size range for an eight-year-old and functions as an infant. She has suffered since birth from an enigmatic constellation of medical difficulties associated with trisomy 18, a chromosomal disorder.[5] Apart from profound intellectual disability, she has cardiac dysfunctions that cause her to need oxygen supplementation, ren arcuatus (fused "horseshoe" kidneys), atelectasis (collapsed lung), inoperable hiatal hernia, malformations of the mouth and lower extremities, a sleep disorder, and a number of severe allergies. Her life is spent in laps and in a wheelchair. She cannot feed herself, nor crawl more than a few feet, nor turn over by herself. She is "essentially non-verbal," although she does use a few words.[6]

The youngest of 14 children, B remains in her mother's home. She receives 91 hours per week of supported living through the Home and Community-Based Waiver Program.[7] While there can be concerns that supported living can be duplicative of PCS, no evidence was offered in this case that any overlap occurs in B's case.

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1 7 AAC 125.010(a).

2 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.*

3 *See* 7 AAC 125.024(a)(1). The CAT is itself a regulation, adopted in 7 AAC 160.900.

4 Except as supplemented in the footnotes, the background information about B comes from her mother's testimony, which was undisputed.

5 *See* Ex. B, p. 5.

6 Ex. B, p. 12.

7 Testimony of Melissa Meade.

The quality of the evidence in this case is poor. SDS, which has the burden of proof, submitted neither the 2013 CAT nor the 2016 plan of care that were the basis for its desk review. These were not strictly necessary for review of purely regulatory reductions, but their absence was unfortunate insofar as the agency wanted to raise factual issues about B's condition.

IV. Analysis of the Areas of Reduction

In this case, in which the Division is seeking to terminate or reduce a benefit a citizen is already receiving, the Division has two burdens to meet. The first is to provide notice of the basis for the reduction.[8] Second, for each area of reduction in the notice, SDS has the burden to prove, by a preponderance of the evidence,[9] facts that show the citizen's level of eligibility has changed.[10] The Division can meet this second burden using any evidence on which reasonable people might rely in the conduct of serious affairs,[11] including such sources as written reports of firsthand evaluations of the patient. The relevant date for purposes of assessing the state of the facts is, in general, the date of the agency's decision under review.[12]

A. Transfers (Non-Mechanical) – 70 Minutes Removed

The 2013 assessment led to an award of time for one-person total assist, non-mechanical transfers eight times per day, seven days per week, which translates to 56 times per week in total. Under the old Service Level Computation chart adopted by reference in former regulation 7 AAC 160.900(d)(29), such transfers were allocated five minutes per instance and eight instances per day did not exceed the limit, and thus the total weekly minutes for this activity would have been 280.[13] On July 22, 2017, however, new regulations became effective that cap the award for such transfers at six instances per day, or 42 per week.[14] The number of minutes allocated per instance has stayed constant at five. Thus, the resulting maximum time award is 42 x 5, or 210 minutes. The change from 280 to 210 minutes yields a reduction of 70 minutes per week for B.

Mrs. N testified that neither the 2013 allocation nor the revised one covers all of the transfers in B's day, which can be as many as 20. Nonetheless, apart from the override discussed

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8 *See* 42 C.F.R. § 431.210(a).

9 Proof by a preponderance of the evidence means that the fact in question is more likely true than not true.

10 7 AAC 49.135.

11 2 AAC 64.290(a)(1).

12 *See* 7 AAC 49.170; ***In re T.C.,*** OAH No. 13-0204-MDS (Commissioner of Health & Soc. Serv. 2013) (http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130204.pdf).

13 The Service Level Computation adopted by reference in that former regulation can still be found at http://dhss.alaska.gov/dsds/Documents/pca/PCA%20Service%20Computation.pdf.

14 7 AAC 125.024(a)(1); 7 AAC 160.900(d)(29) (amended 7/22/17); Ex. B, p. 24.

in part F below, there is no legal authority to grant time for this activity in excess of the maximum set by the new regulations. The removal of 70 minutes for this activity is affirmed, subject to consideration of the override below.

B. Dressing – 210 Minutes Removed

Following the 2013 assessment, B's PCA time was calculated based on four instances of dressing per day, or 28 per week, with each instance allocated 15 minutes.[15] The new regulations that became effective on July 22, 2017, however, cap the award for dressing at two instances per day, or 14 per week.[16] This resulted in a reduction of the time allocated for dressing from 420 minutes to 210 minutes per week.

Mrs. N explained that because of her body structure, B soils her lower clothing with each urination, and thus must be re-dressed—at least in part—after each diaper change. It therefore seems likely that more time is spent on dressing than the 30 minutes per day that are now allocated for this activity. Nonetheless, short of the override discussed in part F below, there is no legal basis to award time for this activity in excess of the maximum set by the new regulations. The removal of 210 minutes for this activity is affirmed, subject to consideration of the override below.

C. Minor Maintenance of Respiratory Equipment – 3.75 Minutes Removed

Following her 2013 assessment, B apparently received one instance per week of maintenance for minor respiratory equipment based on a score of 3/4. Each instance of this activity, with this score, used to be allocated 15 minutes of PCA time.[17] The maximum time award for this activity has been reduced, however, so that even with a score of 3/4 a patient can now receive only 11.25 minutes per week of PCA time for this activity.[18] There is no dispute about this. The reduction by 3.75 minutes per week is therefore affirmed, subject to consideration of the override discussed in part F below.

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[15] Ex. D, pp. 3, 9.

[16] 7 AAC 125.024(a)(1); 7 AAC 160.900(d)(29) (amended 7/22/17); Ex. B, p. 24.

[17] Testimony of Melissa Meade.

[18] 7 AAC 125.024(a)(1); 7 AAC 160.900(d)(29) (amended 7/22/17); Ex. B, p. 25. The Division attached the outdated version of 7 AAC 160.900 to its Position Statement in this case. The Division should contact its contractor and correct this error in the materials being sent out with Position Statements. Sending the wrong regulations can (and in this case, did) increase costs by confusing the ALJ. It can also confuse the recipient.

D. Locomotion (Between Locations in Home) – 280 Minutes Removed

B was assessed in 2013 as needing a one-person assist, with total dependence, for eight transfers per day, seven days per week. At five minutes each, these 56 transfers translated to 280 minutes per week of PCA time. The Division's desk reviewer removed all of this time. The stated reason for this removal is that B's 2016 plan of care reportedly said that B was (i) able to self-propel her wheelchair wherever she wanted to go, and (ii) that it was a goal of her caregivers to teach her to go where she was *directed* to go, with verbal prompts alone.[19] The reviewer interpreted this reported language to mean that B needs "supervision and setup help only" to transfer around the house as required for her daily activities.[20]

Unlike the reductions discussed in the preceding three sections, this reduction was not based on a regulatory ceiling. Instead, the desk reviewer used an interpretation of language in a document to override the observations of the professional assessor who assessed B in person in 2013.

There are three fundamental problems with the Division's showing in this area. The first problem is that the Division did not supply a copy of the 2016 plan of care it relied on. It is impossible to check whether it contains other language that qualifies the snippets the reviewer has quoted. The Division did supply a plan of care, but the one it supplied was the 2017 plan (approved December 14, 2017), which does not support the Division's position at all. Second, the Division has not supplied the 2013 CAT, either—the assessment that it is overriding. It is difficult to uphold a decision to discard firsthand, documented observations when one is not given an opportunity to review those observations, including any text or notes the assessor may have entered in addition to the scores. Third, even as summarized by the Division, the 2016 plan of care does not really say that B can manage her transfers with cueing alone. It seems to say that she can go where she *wants* to go and indicates that her caregivers would like to teach her to go where she *needs* to go based on verbal cues, but not even the language cited by the Division says that she actually *does* this.

The 2017 plan of care (which the Division did submit for the record) makes it quite clear that she does not. To the extent that she can still propel a wheelchair in spite of her physical decline, she "only propels her wheelchair to a requested location if it's something she wants to

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19 Ex. D, p. 3; testimony of Melissa Meade.
20 *Id*.

do."[21] This is consistent with all of the other evidence, which shows that she functions as an infant. Like an infant, she generally needs to be physically taken to the places she needs to go, even though she is capable of moving of her own volition to places that attract her.

The Division did not meet its burden of showing that the time allocation for transfers should be removed.

E. Unexplained Reductions – 291.25 Minutes Removed

The following chart, using figures taken from Position Statement Exhibit D, pages 6, 7, 9, and 10, shows how the reductions in the hearing notice added up:

Activity	Prior Time Allowed	New Time Allowed	Net Weekly Reduction
Transfers	56 x 5 = 280	42 x 5 = 210	70.00
Dressing	28 x 15 = 420	14 x 15 = 210	210.00
Minor Resp.	1 x 15 = 15	1 x 11.25 = 11.25	3.75
Locomotion	56 x 5 = 280	0 x 0 = 0	280.00
TOTAL			563.75

The total reduction accounted for by these items, even if they all were sustained, would be 563.75 minutes per week, or 9.39 hours. But SDS actually reduced B's PCS by 14.25 hours, which is 855 minutes. What accounts for the misplaced 291.25 minutes?

The SDS hearing notice provided no answer. The testimony at the hearing likewise gave no clue. It seems possible that SDS had never added up the reductions and did not know there was a discrepancy.

To be sure, the "Total Weekly Minutes Authorized" column of the calculation attached to the hearing notice does add up to the correct total, *i.e.,* 40.32 hours, rounded very slightly to 40.25 hours.[22] But to get to that total from an original figure of 54.5 hours, something must have changed beyond the four items discussed in the notice.

The change may be entirely justifiable. Perhaps the original 54.5 hours was miscalculated or was a misprint. Or, perhaps some other regulatory cap has changed since 2013, beyond the ones SDS pointed out. On the other hand, it could be that in initiating this case, SDS or its contractor has forgotten to list a category of PCS that B should still be receiving, or has listed one of those activities erroneously. It is impossible to tell. The critical point is that to

[21] 2017 plan of care, p. 7.
[22] Ex. D, p. 10.

obtain a reduction, however justified, SDS must issue a notice to the recipient explaining the factual and legal basis for the reduction.[23] This has not been done as to 291 minutes, or just under five hours, of the reduction in this case, and that portion of the reduction cannot be sustained. Of course, *if the reduction was not a mistake*, SDS is free to issue a new notice of reduction, complying with the requirement for an explanation.

F. Risk of Institutionalization

The total reduction affirmed above is 283.75 minutes per week, or approximately 4.75 hours. For a patient, such as B, who is eligible to receive Home and Community-Based Waiver Services, the department will not reduce PCA time—notwithstanding any new maxima or other considerations—if the reduction would make it "likely that . . . the recipient would require relocation from the recipient's current residence to a hospital or nursing facility in 30 days."[24] In a case such as this one, where the reduction is not due to a new assessment,[25] the evaluation of this risk must encompass the four factors covered in the four paragraphs below:

1. Impact over a 24-hour period, taking into consideration total time from any source:[26] B receives 91 hours per week of Waiver services, and even after the proposed reduction will continue to receive 49.75 hours of PCS, which yields a total of 140.75 hours, or just over 20 hours per 24-hour period. The proposed reduction of 283.75 minutes works out to 41 minutes per day, which is quite small in comparison.

2. Whether the recipient's representative, family members, or other natural supports provide assistance:[27] B is fortunate to have a devoted family, and she does receive support from her elderly mother and some adult siblings that is rendered outside the context of the Medicaid programs.

3. Whether other individuals living in the same residence receive services that benefit the recipient:[28] B does not seem to live with other disabled individuals, so this factor does not apply in her case.

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[23] 42 C.F.R. § 431.210(a); *see also Allen v. State, Department of Health & Social Services*, 203 P.2d 1155, 1168 – 1170 (Alaska 2009) ("If a major purpose served by benefit change or denial notices is protecting recipients from agency mistakes, then it stands to reason that such notices should provide sufficient information to allow recipients to detect and challenge mistakes.").

[24] 7 AAC 125.026(f), (g).

[25] If there had been a new assessment, two additional factors would have to be considered. *See* 7 AAC 125.026(f)(1), (2).

[26] 7 AAC 125.026(f)(3).

[27] 7 AAC 125.026(f)(4).

[28] 7 AAC 125.026(f)(5).

4. The recipient's history of use of the time authorized:[29] So far as the evidence went, B appears to benefit from and need all time that has been authorized. In real life, the number of instances of most activities, and the time required to complete them with B, seems to exceed the maxima that the regulations permit.

All in all, the evidence does not support a finding that reducing B's services by 41 minutes per day will likely push her over the edge toward institutionalization in the next 30 days. B is a person who, in many other contexts, would already be cared for in an institution, but her strong family supports and relatively substantial allocation of supported living time make it likely that she will remain home in spite of this reduction.

V. Conclusion

The Division demonstrated that, due to regulatory changes, the weekly PCS time for B N must be reduced by 283.75 minutes, which is approximately 4.75 hours. The Division did not otherwise sustain its burden. PCS for B N will therefore be set at approximately 49.75 hours per week. In applying this decision, the Division may round the time allowance up or down in accordance with its standard practices.

This decision does not preclude the Division from reassessing B N.

DATED this 13th day of April, 2018.

Signed
Christopher Kennedy
Administrative Law Judge

Adoption

The undersigned, by delegation from of the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

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

DATED this 27th day of April, 2018.

By: *Signed*
Name: Christopher Kennedy
Title: Commissioner's Delegate

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]

[29] 7 AAC 125.026(f)(6).