

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

In the Matter of:	)	
	)	OAH No. 13-1575-MDS
H C	)	HCS Case No.
_____	)	Medicaid ID No.

**DECISION**

**I. Introduction**

The issue in this case is whether H C continues to require the level of nursing care provided in an inpatient psychiatric hospital so as to remain eligible for TEFRA Medicaid (TEFRA). The Division of Public Assistance (Division) conducted a review and on September 20, 2013 determined that H no longer requires the level of care provided in an inpatient psychiatric hospital.<sup>1</sup> The Division terminated H's TEFRA benefits based on this finding.

This decision concludes, based primarily on the evidence provided at hearing, that H no longer requires the level of care offered in an inpatient psychiatric hospital as that level of care is defined by 7 AAC 100.424(c). As a result, and because H does not satisfy the requirements of any other TEFRA eligibility category,<sup>2</sup> he is no longer eligible for TEFRA. Accordingly, the Division's decision terminating H's TEFRA eligibility is affirmed.

**II. Facts**

**A. Mr. C's Medical Condition and Care Needs**

H C is a seven-year-old boy who lives at home with his parents.<sup>3</sup> H's primary diagnosis is autistic disorder, and he has secondary diagnoses of attention deficit hyperactivity disorder (ADHD) and disruptive behavior disorder n.o.s.<sup>4</sup> He experienced developmental delays as to speech / communication skills, social interaction, and motor and play skills.<sup>5</sup> H has historically suffered from impulsivity, restlessness, and inability to focus.<sup>6</sup> He has a history of

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<sup>1</sup> Exhibit D.

<sup>2</sup> Pursuant to 7 AAC 100.424(a), H could also qualify for TEFRA benefits by requiring the level of care provided in an acute care hospital or long-term care (as determined under 7 AAC 140.505), or by requiring the level of care provided in an intermediate care facility for individuals with an intellectual disability or related condition (as determined under 7 AAC 140.600). However, it was not asserted in this case that H qualifies for TEFRA under either of these two alternative criteria.

<sup>3</sup> Ex. 2 p. 1; Ex. 3 p. 1.

<sup>4</sup> Exs. 2 p. 1; Ex. 3. pp. 5 - 6; Ex. 4 p. 1; Ex. 5 p. 1.

<sup>5</sup> Ex. 3 p. 2.

<sup>6</sup> Ex. 3 p. 2.

exhibiting aggressive behaviors, including hitting, kicking, punching, and pushing.<sup>7</sup> He also has a history of tantrums which include screaming, hysterical crying, throwing himself to the floor, and throwing himself against other objects.<sup>8</sup> He has historically lacked empathy and remorse and has had difficulty maintaining friendships.<sup>9</sup> He sometimes experiences fixations and the compulsion to perform certain repetitive movements.<sup>10</sup> He often requires continuous one-on-one supervision.<sup>11</sup> H takes or has taken Abilify, Intuniv, and Paxil to help control his symptoms.<sup>12</sup>

H was dismissed from two preschools due to behavioral problems, but was able to attend kindergarten in the public school system using in individual education plan (IEP).<sup>13</sup> His ability to function in an educational environment with age-appropriate supervision has been rated as fair.<sup>14</sup> H's strengths are that he is often lively and friendly.<sup>15</sup>

On May 8, 2013 the No Name School District held H's IEP annual review meeting.<sup>16</sup> A memo from that meeting states that "H seems to enjoy school," that he had good attendance during the past school year, that he was doing well socially and academically, and that he had "made good progress on his IEP goals and objectives." A more detailed memo from the meeting states in relevant part as follows:<sup>17</sup>

H was identified as a child experiencing an Early Childhood Developmental Delay on 4/27/11 . . . . [He] has had a very successful kindergarten year. He is above average in reading skills. His . . . math and writing skills are at least average. He has made friends and follows classroom and school rules very well. He has met all his IEP goals and objectives. H continues to be eligible for special education based on a history of needs in the areas of behavior and social skills. There have been some minor incidents of rough play at recess but nothing out of the ordinary for a kindergarten boy . . . . At this time H does not need an [IEP] . . . . H's behavior and social skills have improved a great deal since the 4/27/2011 eligibility report. At this time, H needs very little special education support . . . . H continues to demonstrate a need for special education transportation due to safety concerns.

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<sup>7</sup> Ex. 3 p. 1.

<sup>8</sup> Ex. 3 p. 1.

<sup>9</sup> Ex. 3 p. 2.

<sup>10</sup> Ex. 3 p. 2.

<sup>11</sup> Ex. 3 p. 2.

<sup>12</sup> Ex. 3 p. 3.

<sup>13</sup> Ex. 3 p. 3.

<sup>14</sup> Ex. 3 p. 3.

<sup>15</sup> Ex. 3 p. 5.

<sup>16</sup> All facts this paragraph are based on Ex. E22 unless otherwise stated.

<sup>17</sup> Ex. E24 (paragraph breaks in original omitted here for brevity).

H currently receives three types of services from No Name Family Services.<sup>18</sup> First, he receives weekly individual therapy to learn age-appropriate social skills, how to cope with frustration and verbalize his needs in socially appropriate ways, how to comply with caregiver instructions, how to transition from one activity to another with a minimum of prompts, and how to keep himself safe. This therapy includes active / reflective listening, pre-teaching, coaching, modeling, processing, and role playing. H also receives weekly individual therapeutic behavioral health services so he can practice the above-referenced skills, in a variety of settings, with one-on-one support.

At hearing, H's mother testified that, fairly recently, H exited her car while in a parking garage and ran to the edge, oblivious to safety concerns. She and Ms. J also testified about two fairly recent and fairly severe tantrums or outbursts by H, one in Ms. C's car while driving, and one in Ms. C's home.

K Q also testified at hearing regarding her experiences with and insights as to H's behavior. In addition to being H's grandmother, she was a special education teacher for many years, and is currently a care coordinator for persons receiving Medicaid. Based on her experience, she believes that, if H's TEFRA benefits are terminated, his condition will regress to the extent that he will require inpatient psychiatric services.

***B. The Division's Level of Care Determination***

The portion of Alaska's TEFRA program involving Level of Care (LOC) determinations (the only aspect of TEFRA eligibility at issue in this case) is performed by the Division of Senior and Disabilities Services (DSDS).<sup>19</sup> DSDS has in turn contracted with Qualis Health, a company headquartered in Seattle, Washington, to perform LOC assessments in TEFRA (and other) cases.<sup>20</sup>

Wandal W. Winn, M.D. is a board-certified psychiatrist licensed in the state of Alaska.<sup>21</sup> He has been Qualis' Regional Medical Director for several years.<sup>22</sup> His primary role at Qualis is to evaluate psychiatric cases and provide utilization review; he also has some supervisory duties. He was the Qualis physician who reviewed H's case. He reviewed H's

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<sup>18</sup> All factual findings in this paragraph are based on Ex. 1 and U J's hearing testimony unless otherwise stated.

<sup>19</sup> See Division of Public Assistance *Aged, Disabled, and Long Term Care Medicaid Eligibility Manual* at Section 533(C)(5).

<sup>20</sup> See Division of Public Assistance *Aged, Disabled, and Long Term Care Medicaid Eligibility Manual* at Section 533(E)(3).

<sup>21</sup> Wandal W. Winn, M.D. hearing testimony.

<sup>22</sup> All facts found in this paragraph are based on Dr. Winn's hearing testimony unless otherwise stated.

medical records and is familiar with his diagnoses. Dr. Winn testified in relevant part at hearing that:<sup>23</sup>

1. H has an autism spectrum disorder which qualifies as a mental illness and which has been diagnosed by a psychiatrist or other mental health professional.
2. Although H has impulse control problems, he is not likely to harm himself or others.
3. H's diagnoses have existed for longer than six months to date, and are expected to persist for twelve months or more, although the extent or severity of his symptoms is decreasing.
4. H had no psychotic symptoms, no known suicide attempts within 90 days of his TEFRA renewal application, and no known suicidal plans within 30 days of his TEFRA renewal application.
5. H has in the past had emotional disturbances which made him cause or attempt to cause personal injury or property damage, but none were documented within 30 days of his TEFRA renewal application.
6. H has functional impairments as to self-care, interaction with the community, social relationships, family relationships, and school, but his impairments in these areas are not severe enough to qualify him to receive psychiatric hospitalization.
7. H *could* require psychiatric hospitalization absent appropriate intervention in the home and community, but is currently receiving adequate medication and other support.
8. H can be expected to functionally improve, or can avoid further deterioration, if care is provided in the home and community.

Based on the foregoing, Dr. Winn testified that, in his opinion, H no longer requires the level of care offered in an inpatient psychiatric hospital.

### **C. *Relevant Procedural History***

On or about July 30, 2013 H's Care Coordinator submitted a TEFRA Plan of Care (POC) renewal application to the Division; the proposed POC was to run from August 1, 2013 through July 31, 2014.<sup>24</sup> On September 20, 2013 the Division notified H's parents that his participation in TEFRA would end on August 31, 2014.<sup>25</sup> The notice stated in relevant part:<sup>26</sup>

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<sup>23</sup> All facts found in this paragraph are based on Dr. Winn's hearing testimony unless otherwise stated.

<sup>24</sup> Exhibit E. The exact date of the submittal of H's TEFRA renewal application is not at issue.

<sup>25</sup> Ex. D.

<sup>26</sup> Exs. D1 - D2.

At this time the only level of care that would apply to H is the level of care provided in an inpatient psychiatric hospital. Qualis Health received documentation from your care coordinator to make a level of care decision pursuant to State regulations 7 AAC 100.002(d)(5) and 7 AAC 100.424. Licensed nurses and an additional review by a physician at Qualis Health determined that H does not meet the level of care requirements for TEFRA Medicaid . . . .

Upon physician review Qualis Health stated the following regarding H's current health status:

Although your son might require continued monitoring and periodic assessments, his behaviors appear to have improved so that he no longer meets all the criteria required to continue TEFRA in the IPH category at either a skilled or intermediate level. He does not have documentation indicating a psychiatric disorder at present nor [does he receive] special assistance or services other than some special education at school. He also does not appear to have psychiatric needs that would require hospital-level care should special services be unavailable at home.

Based on the above, H no longer meets the level of care criteria for TEFRA Medicaid and his level of care approval is terminated . . . .

H's mother requested a hearing on October 21, 2013 to contest the Division's termination of her son's TEFRA Medicaid coverage.<sup>27</sup> H's hearing was held on January 31, 2014. H was represented by his mother, B C, who participated in the hearing by phone and testified on her son's behalf. K Q and U J<sup>28</sup> also participated by phone and testified on H's behalf. The Division was represented by Angela Ybarra, who participated by phone. Division employee Cheri Herman, and Qualis employees Janet Cordell, R.N. and Wandall Winn, M.D. testified by phone for the Division. The record closed at the end of the hearing.

### **III. Discussion**

#### **A. TEFRA Medicaid Overview**

TEFRA Medicaid (also known as "Katie Beckett Medicaid" based on the name of its first recipient) permits the states to ignore parental income and resources when determining Medicaid eligibility for certain disabled children. States are allowed, at their option, to provide benefits to children 18 years of age or less who qualify as disabled individuals under §1614 of the Social

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<sup>27</sup> Exhibit C.

<sup>28</sup> Ms. J is Case Management Supervisor at No Name Family Services.

Security Act and who live at home rather than in an institution. Qualification is not based on medical diagnosis but rather on the level of care the child requires.<sup>29</sup>

**B. Relevant Alaska Medicaid Statutes and Regulations**

The Alaska statute authorizing the Division to provide TEFRA Medicaid is AS 47.07.020(b)(11). The statute contains four substantive criteria and a cost criterion. First, the recipient must be 18 or younger. Second, the recipient must qualify as a disabled individual under 42 U.S.C. 1382c(a). Third, the recipient must require a level of care provided in a hospital, nursing facility, or intermediate care facility for the mentally retarded. Fourth, it must be appropriate to provide care for the recipient outside of an institution. Finally, the estimated cost to care for the recipient outside an institution must not be greater than the estimated cost to care for the recipient inside an appropriate institution. Only the third criterion (level of care) is at issue in this case.

Alaska's regulation implementing TEFRA is 7 AAC 100.424, titled "Disabled child living at home." With regard to level of care requirements, it states in relevant part:

(a) A child with a disability who does not qualify for SSI because of parental income or resources is eligible for Medicaid under 7 AAC 100.002(d) (5) and this section if . . . (5) the department has determined that the child needs a level of care offered in (C) an inpatient psychiatric hospital, as determined under (c) of this section . . . .

. . . .

(c) For the purpose of determining eligibility under this section, a child requires a level of care provided in an inpatient psychiatric hospital if the child

(1) has a mental illness or severe emotional disturbance that (A) is diagnosed by a psychiatrist or mental health professional; (B) is likely to result in harm to self and others; and (C) has persisted six months and is expected to persist for a total of 12 months or longer;

(2) has at least one of the following mental health symptoms:

(A) psychotic symptoms, characterized by defective or lost contact with reality, hallucinations, or delusions;

(B) a suicide attempt, in the 90-day period before the date of application;

(C) suicidal thoughts, in the 30-day period before the date of application, that include a plan for suicide;

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<sup>29</sup> The statutory provisions establishing TEFRA are in § 1902(e) of the Social Security Act (42 U.S.C. § 1396a(e)(3)). The federal regulation implementing TEFRA is 42 CFR § 435.225.

(D) violent behavior as the result of an emotional disturbance, in the 30-day period before the date of application, characterized by a documented attempt by the child to cause injury to a person or substantial property damage;

(3) has functional impairments, relative to expected developmental levels for the child's age and at a level that qualifies the child to receive inpatient psychiatric hospitalization, in at least three of the following areas: (A) self-care; (B) interaction with the community; (C) social relationships; (D) family relationships; (E) functioning at school or work;

(4) absent appropriate intervention in the home and community, requires psychiatric hospitalization as documented by a mental health professional; and

(5) can be expected to functionally improve or can avoid further deterioration if care is provided in the home and community.

### ***C. Applicable Burden of Proof and Standard of Review***

Because the Division is the party seeking to change the status quo by terminating H's previously existing TEFRA benefits, the Division bears the burden of proof in this case.<sup>30</sup>

The standard of review in a Medicaid "Fair Hearing" proceeding, as to both the law and the facts, is *de novo* review.<sup>31</sup> The substantial evidence test is the standard of review that would be applied to factual determinations only *after* a final decision is made by the agency and an appeal is made to the Superior Court. Likewise, the reasonable basis test is the standard of review for questions of law involving agency expertise only *after* a final decision is made by the agency and the case is appealed to the Superior Court.<sup>32</sup>

In this case, evidence was presented at hearing that was not available to the Division's reviewers. The administrative law judge and/or the Commissioner may independently weigh the evidence and reach a different conclusion than the Division staff, even if the original decision is factually supported and has a reasonable basis in law. The Commissioner, as chief executive of the department, is not required to give deference to factual determinations or legal interpretations of his staff or the staff's contractors.

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<sup>30</sup> 42 CFR § 435.930, 7 AAC 49.135.

<sup>31</sup> 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. Brown*, 935 A.2d 1128 (Md. App. 2007); *In re Parker*, 969 A.2d 322 (N.H. 2009); *Murphy v. Curtis*, 930 N.E.2d 1228 (Ind. App. 2010).

<sup>32</sup> See *Simpson v. State, Commercial Fisheries Entry Commission*, 101 P.3d 605, 609 (Alaska 2004).

***D. Does H Require the Level of Care Offered in an Inpatient Psychiatric Hospital as Defined by 7 AAC 100.424?***

H remains eligible for TEFRA if he requires the level of care provided in an inpatient psychiatric hospital as that level of care is defined by 7 AAC 100.424(c). That regulation has five main criteria, each of which must be satisfied in order to demonstrate a need for an inpatient psychiatric hospital level of care. At the hearing, Dr. Winn was questioned in detail regarding whether H's condition currently satisfies these criteria. Dr. Winn's testimony, summarized at page 4, above, was essentially that H's condition satisfies the criteria at subsections (c)(1) and (c)(5), and might possibly satisfy the criteria at subsection (c)(4), but does not satisfy the criteria of subsections (c)(2) or (c)(3).

Ms. C and Ms. J provided testimony at hearing that could, if found more persuasive than Dr. Winn's testimony, support a finding that H satisfies the criteria of subsection (c)(2). However, Dr. Winn's testimony that H does not satisfy the criteria of subsection (c)(3) was both credible and undisputed. Because 7 AAC 100.424(c) requires that persons asserting a need for the level of care provided in an inpatient psychiatric hospital satisfy the criteria of *all five* of subsections of 7 AAC 100.424(c), and because H satisfies, at best, *four of the five* criteria, H no longer meets Alaska's regulatory definition of the inpatient psychiatric hospital level of care.

**IV. Conclusion**

H no longer requires the level of care offered in an inpatient psychiatric hospital as that level of care is defined by 7 AAC 100.424(c). As a result, and because H does not satisfy the requirements of any other TEFRA eligibility category, he is no longer eligible for TEFRA. The Division's decision terminating H's TEFRA eligibility is therefore affirmed.

DATED this 24th day of March, 2014.

*Signed* \_\_\_\_\_  
Jay Durych  
Administrative Law Judge



## Adoption

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

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

DATED this 7<sup>th</sup> day of April, 2014.

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.]