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

In the Matter of	)	
	)	
K D	)	OAH No. 14-2301-MDX
	)	Agency No.

DECISION

I. Introduction

The Division of Health Care Services denied Medicaid benefits for K D because he did not meet the level of care standard required for the Medicaid category for which he sought benefits. His parents appealed, and came forward with evidence that K does have serious impairments. The Division responded with evidence of evaluations of K's learning and adaptive skills, which did not meet the statistical standards for eligibility found in the Division's Policy Manual.

Although the standards in the Division's manual will not be strictly enforced, the totality of the evidence in this record does not meet the burden of providing that K's impairments are at the level described in the governing regulation, 7 AAC 140.600(c)(2). Therefore, the Division's denial of benefits is affirmed.

II. Facts

K D recently turned four years old. He lives in No Name. In February 2014, K began living with his father and his stepmother, S and L, in a very supportive home. Before that time, however, K lived in a home with his mother, whose parental rights have since been terminated.[1]

When K came to live with S and L, his learning and development were delayed, and he exhibited considerable behavioral problems. He could not even say his name. The record indicates that K is being evaluated for Attention Deficit Hyperactivity Disorder (ADHD) and Fetal Alcohol Spectrum Disorder (FASD).[2]

S and L have worked very hard to improve K's skills. They have provided an enriched environment, enrolled him in preschool, including the No Name School District's special education program, and obtained speech and occupational therapies. Because of this effort, K has made progress. Even now, however, to avoid accidents, they will set an alarm to remind them to remind him to use the bathroom. He has difficultly focusing long enough to brush his

[1] Division ExhibitE at 4.
[2] Division Exhibit E at 4.

teeth, snap his clothes, or put on a coat. Instead of doing his tasks himself, he will fall into a pattern of saying "need help, need help, need help." His language skills are still delayed. He cannot say his ABCs or his numbers. He cannot say three sentences.[3]

K has physical problems as well. His left eye and right eye go different directions. He does not like to be touched. He runs into objects. He has to be restrained in a parking lot to keep him from running in an unsafe manner. He does not have the wariness that most children have with regard to avoiding strangers.[4]

To obtain assistance with caring for and providing special services to K, the family applied for a special category of Medicaid frequently referred to as "TEFRA," which stands for "Tax Equity and Fiscal Responsibility Act." The Division of Health Care Services evaluated the application. It determined that K did not meet the "level of care" requirement for TEFRA because the evaluations of K's functioning in five measured developmental areas (learning, language, mobility, self-care, and self-direction) showed substantial functional limitations in only one area—self direction. To qualify for institutional level of care under the Division's Policy and Procedural Manual, a child must have substantial limitations in three of the five areas.[5] Therefore, on November 17, 2014, the Division denied K's application.[6]

On December 8, 2014, L and S D appealed the denial, and requested a fair hearing. A hearing was held on March 10, 2015. Administrative Law Judge Jay Durych presided over the hearing. L and S D represented themselves, assisted by Registered Nurse B J. Angela Ybarra represented the Division. On June 23, 2015, the case was transferred to Administrative Law Judge Stephen Slotnick. ALJ Slotnick listened to the recording of the hearing and reviewed the documents in the record in preparing this proposed decision.

III. Discussion

The Tax Equity and Fiscal Responsibility Act is a federal law that permits families with children who meet certain disability eligibility requirements to qualify for Medicaid even if they would otherwise be over the normal income limit for participation in Medicaid.[7] Qualifying children are those who receive at-home medical care that would be provided in a medical

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3 L. D testimony.
4 *Id.*
5 Division Exhibit B at 25.
6 Division Exhibit E.
7 http://www.qualishealth.org/patients-families/alaska-tefra.

institution.[8] Thus, the question in this hearing is whether K needs what is called an "institutional level of care" at an "intermediate care facility for individuals with intellectual disabilities."

The Department has adopted a regulation to define institutional level of care for children who, like K, have an intellectual or related disability. The regulation describes five qualifying conditions. The first four require a diagnosis for either cerebral palsy, seizure disorder, autism, or an intellectual or development disability with a specific diagnostic code.[9] K does not have any of these four conditions.

The fifth qualifying condition is not as easy to pinpoint as the first four. To qualify under this condition, a child must have a

- disability that is "found to be closely related to intellectual or developmental disability"
- condition that is "diagnosed by a licensed physician" and "results in impairment of general intellectual functioning and adaptive behavior similar to that of individuals with intellectual or developmental disabilities"
- condition that "require[s] treatment or services similar to those required for individuals with intellectual or developmental disabilities."[10]

In short, the fifth qualifying condition is for children who have severe functional limitations. They are not so severely disabled that they qualify for a diagnosis that would put them in the category of severe intellectual or developmental disability, but their functioning is at a very similar low level.

In order to give content and definition to this category, the Division has adopted standards in its Policy and Procedure Manual for when it will approve an application for TEFRA based on the related category of 7 AAC 140.600(c)(2). The Manual, which was last updated in 2011, still refers to this category as "other mental retardation-related condition."[11] Although the "mental retardation-related" label is no longer favored, the fact that it was used at one time to designate this category demonstrates how serious this disability category is.

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8 42 C.F.R. § 435.225.

9 7 AAC 140.600(c). The lead-in language that precedes the list of qualifying conditions states:

> (c) In determining whether a recipient qualifies under this section for ICF/IID services, the department will base its decision on the determination of a qualified intellectual disability professional within the department that the recipient meets the functional criteria in (d) of this section, and that the recipient has at least one of the following conditions:

10 7 AAC 140.600(c)(2)(B).

11 Division Exhibit B at 25.

For children over three and under sixteen years of age, a condition will meet this related category if it is

- diagnosed by a physician, and
- the diagnosis is based on an evaluation that demonstrates cognitive impairment that shows a delay of 25 percent or is two standard deviations below the mean in three of the following developmental areas
    - self care
    - communication
    - learning
    - mobility
    - self-direction.[12]

K meets the first criteria. Dr. N C certified that he has a diagnosis of a condition that is closely related to the eligible intellectual disabilities categories.[13]

With regard to the criteria to establish the degree of K's impairment, the evidence compiled by the Division to determine whether K meets the level of care was drawn largely from the No Name School District's special education evaluations. These evaluations tested many of K's developmental areas, including communication, pre-academic skills, and behavior. Based on this evidence, the Division found that the only developmental skill for which the test results showed the necessary two-standard deviation deficit was self-direction.[14]

At the hearing, K's family presented generalized evidence that K still has significant delays in his development, and a long way to go before he would be a "normal little boy."[15] The family did, however, raise one argument to dispute the Division's interpretation of the evidence and the requirements of the manual. The policy manual states that "an evaluation demonstrating cognitive impairment" may be "indicated by a delay of at least 25%, or two standard deviations below the mean, in comparison to peer norms."[16] K's family argues that this means that if K is 25 percent below the mean on a measure, then K meets the standard for the developmental skill being measured. For the developmental skill of pre-academic readiness, for example, K was tested using the "Batelle Developmental Inventory 2nd Edition" (BDI-2) assessment. K received a scaled standard score of 71. Because this score was more than 25 percent below the mean

12 *Id.*
13 Division Exhibit at 3.
14 Division Exhibit D at 2.
15 L. D testimony.
16 Division Exhibit B at 25.

score of 100 for children his age, K's family argues that K met the criteria in the manual for a delay of 25 percent on the developmental skill of learning.

The family's argument does raise an issue that will require further inquiry, which is discussed below. As a technical matter, however, the argument that a score of 71 meets the criterion in the manual is not correct because the manual requires a *delay* of 25 percent. What the family has pointed to is a score that is 25 percent below the mean. A test score of 25 percent below the mean is not the same thing as a delay of 25 percent.

A development delay is often expressed in terms of chronological age-equivalents—a child's score on a particular test will be converted to an age-level, such as "2 years, 11 months." For the BDI-2, however, the test results were not expressed in terms of an age-equivalence. Because raw scores are often normalized or scaled, having a score that is 25 percent less than the mean does not tell us much about the child. Much more informative is where the child fits on a distribution of scores. These statistics, often expressed in terms of standard deviation, tell us something about how he compares with other children. This is the criterion employed in the manual for evaluation of scores that are not expressed in terms of age-equivalence. On the BDI-2 for pre-academic skills, K was 1.7 standard deviations below the mean, which does not meet the criterion of the manual for being two standard deviations below the mean.

An example of a test score expressed in terms of "age-equivalence" is found in the record at Exhibit E, at pages 5-6, where K's age equivalent for receptive language is identified as 26 months, and for expressive language 27 months. On phonological processes, he was less than 24 months. At the time K was tested for these measures, he was 36 months old. Therefore, for receptive language on phonological processing, K would meet the criterion in the manual for a 25 percent delay. For expressive language he would not.

This analysis shows that the broad developmental category of "communication" has several different elements. K meets the age-equivalence measure on some elements but not on others. No testimony was provided to give a basis for an overall determination of K's developmental age-equivalent on communication. Even if K were considered to meet the criteria for communication, that would only qualify him on two of the five development areas described in the manual. Therefore, if the criteria in § 4-3 2.b. of the manual are strictly applied, K would not be eligible.

This analysis, and the family's general concern that K is eligible without regard to the technical statistics, raises a complex legal issue about how to apply the criteria in the manual.

The manual contains precise standards for when a child will meet the regulatory standard for being "closely related to intellectual or developmental disability."[17] In general, having standards is a good thing, because they allow us to measure and sort applicants for benefits. The standards in the manual, however, cannot be strictly enforced as standards of general application because they have not been adopted into law as regulations. [18]

An example of a standard that is very similar to the standard in § 4-3 2.b. of the manual that has been adopted into law as a regulation can be found in the regulations of Department of Education and Early Development at 4 AAC 52.790(25)(A). These regulations address special education issues—some of the same issues that the Division relies on here, when the Division relies on No Name School District special education assessments. That regulation, much the same as the manual, provides that rudimentary facility in adaptive skills will be defined as "scoring two standard deviations below the mean on a standardized adaptive measure."[19]

The similarity between the Education regulations and the manual raises some interesting issues. Although this similarity does not mean that the manual can be strictly enforced, it lends support to an inference that the measuring stick (two-standard deviations) and the criteria (developmental skills) in the manual are reasonable. It also opens the door for the family to work with the No Name School District to determine whether K qualifies under this measure. The family's representative, Ms. J, mentioned during the hearing that she frequently works with the district's school psychologist. In a future application, the family may be able to provide additional information on developmental/adaptive measures to the Division using school district evaluations.

For purposes of this application, the fact that K does not meet the criteria in the manual will not be strictly enforced, but it will be taken into consideration. Here, the determination of whether he has a condition that is "similar to that of individuals with intellectual or developmental disabilities" will be made on the basis of all of the evidence in this record.

To find that K meets this level of disability would require a finding that his disability and treatment are "closely related" to the level of disability, and "similar" to the treatment, experienced by a child who has an IQ of 70 points or less—the qualifying measure for those

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[17] 7 AAC 140.600(c)(2)(B).

[18] Under the law, when an agency wants to strictly enforce a standard of general application, it must formally adopt that standard in a regulation. Merely writing the standard into a manual does not make the standard enforceable. *Kenai Pen. Fisherman's Co-op Ass'n v. State*, 628 P.2d 897, 908 (Alaska 1981) (holding comprehensive management policy for fisheries not adopted into regulation not enforceable).

[19] 4 AAC 52.790(25)(A).

children for whom the deficits must be "similar."[20] This is a very high level of disability, and requires a showing of substantial developmental delays. Reviewing all the evidence in the record, K does not meet this requirement. K has many delays and many issues to work through, but, fortunately, nothing in this record indicates that his problems are severe enough to be similar to those of the children who have been determined to be "individuals with intellectual or developmental disabilities." For example, the occupational therapy evaluation submitted by the family shows that he has "age appropriate function with self-care."[21] It breaks his communication skills into 11 different categories, for which his delays range between "moderate" or "mild" delay to "within normal limits." On the DBI-2, he was within average range on reasoning and academic ability.[22] On fine motor skills, although he has deficits, one test found that he appeared to be "within age expectation;" another found that he was "average to low average."[23]

This is not to ignore K's deficits. The division acknowledges that he would meet the manual's high standard for impairment on the "self-direction" developmental area.[24] The evidence shows he has significant difficulties with sensory processing and significantly delayed speech.[25] The family's testimony is compelling evidence that K has significant issues. Based on the entirety of the evidence, however, including the fact that he does not meet the criteria in the manual, the family has not met its burden of proving that K qualifies for TEFRA benefits.

At the hearing, the family members expressed dismay that their hard work and expense to bring K up from the level at which he was functioning when he first came to live with them should now be the reason why they are denied benefits. They also expressed dismay because, in spite of his gains, K still has significant delays, and significant behavioral issues. He needs considerable professional help to make progress.

Yet, on the other hand, the fact that K has made progress is a good sign that he can continue to make progress. In the long run, having the test results, and the opinions of professionals, reflect that his delays are *not* similar to those of the children in the very low category is a positive result for the family. Finally, if the family obtains additional measures, they can contact the Division to reapply on K's behalf.

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20 7 AAC 140.600(c)(1).
21 Division Exhibit E at 17.
22 Division Exhibit E at 7.
23 Division Exhibit E at 10, 16.
24 Division Exhibit B at 25; E at 8-9.
25 Division Exhibit E at 7, 15.

IV. Conclusion

K D has delays in his developmental and adaptive skills. Based on the totality of the evidence in the record, however, his impairments of intellectual functioning and adaptive behavior, while serious, do not meet the criteria adopted in regulation for being similar to those of individuals within the eligible diagnostic category of intellectual or developmental disabilities. The Division's denial of TEFRA Medicaid benefits is affirmed.

DATED this 16th of July, 2015.

By: *Signed*
Stephen C. Slotnick
Administrative Law Judge

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 21st day of August, 2015.

By: *Signed*
Name: Jared C. Kosin, J.D., M.B.A.
Title: Executive Director
Agency: Office of Rate Review, DHSS

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