

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

In the Matter of )

J B )  
\_\_\_\_\_ )

OAH No. 16-0320-MDX  
Agency No.

**CORRECTED DECISION<sup>1</sup>**

**I. Introduction**

J B applied for Medicaid benefits covering developmentally disabled children. The Division of Health Care Services denied her application because she did not meet the program’s level of care standard. The Division reviewed evaluations of J’s learning and adaptive skills, which showed that J’s impairments, though significant, did not meet the statistical standards for a “qualifying disability.” S M, J’s mother, appealed.

Because J’s impairments do not meet the qualification requirements, the Division’s denial is affirmed.

**II. TEFRA program overview**

J applied for a special category of Medicaid frequently referred to as “TEFRA,” which stands for “Tax Equity and Fiscal Responsibility Act.” TEFRA benefits are eligible to children with developmental delays requiring an institutional level of care. In J’s case, the institution is an intermediate care facility for individuals with an intellectual disability or related condition services (ICF/IDD).

7 AAC 140.600(c) states:

in determining whether a recipient qualifies under this section for ICF/IDD 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...

The regulation then describes five qualifying conditions. The conditions are cerebral palsy, seizure disorder, autism, or an intellectual or development disability with a specific diagnostic code. The other qualifying condition does not require a specific diagnosis. Instead, it is defined as:

- 2) a condition that is
  - (A) one other than mental illness, psychiatric impairment, or a serious emotional or behavioral disturbance; and

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<sup>1</sup> The original proposed decision was incorrectly dates as July 24, 2016. It was issued on June 24, 2016. That is the only change in this document.

(B) found to be closely related to intellectual or developmental disability because that condition results in impairment of general intellectual functioning and adaptive behavior similar to that of individuals with intellectual or developmental disabilities; the condition must be diagnosed by a licensed physician and require treatment or services similar to those required for individuals with intellectual or developmental disabilities.<sup>2</sup>

The Division has adopted standards in its Policy and Procedure Manual for when it will approve an application for TEFRA based on the fifth, “closely related” category of 7 AAC 140.600(c)(2).<sup>3</sup> 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 comparison to peer norms, in three of the following developmental areas:
  - self-care
  - communication
  - learning
  - mobility
  - self-direction.<sup>4</sup>

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<sup>2</sup> 7 AAC 140.600(c)(2)(A)-(B).

<sup>3</sup> The Manual, which was last updated in 2011, still refers to this category as “other mental retardation-related condition.” The Division now uses the term “intellectual disability.”

<sup>4</sup> Ex. B, p. 39. These developmental areas are taken from Alaska Statute 47.80.900(6), which defines a “person with a developmental disability” as:

a person who is experiencing a severe, chronic disability that

(A) is attributable to a mental or physical impairment or combination of mental and physical impairments;

(B) is manifested before the person attains age 22;

(C) is likely to continue indefinitely;

(D) results in substantial functional limitations in three or more of the following areas of major life activity: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency; and

(E) reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated.

The measurement standards in the manual cannot be strictly enforced as standards of general application because they have not been adopted into law as regulations. 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 necessarily 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). The requirements in the manual explain AS 47.80.900(6) and appear reasonable. The “two standard deviations” measurement also aligns with a yardstick used in a Department of Education and Early Development regulation. See 4 AAC 52.790(25)(A).

### III. Facts

J B is ten-years old. J's diagnoses include Attention Deficit Hyperactivity Disorder (ADHD), Obsessive Compulsive Disorder (OCD), Disruptive Mood Dysregulation Disorder, Unspecified Anxiety Disorder, Developmental Coordination Disorder, Social (Pragmatic) Communications Disorder, Unspecified Eating Disorder, and Mathematics Disorder.<sup>5</sup> J consistently exhibits severe social and behavioral challenges. She has significant sensory issues, refuses to eat, defies authority, displays inappropriate anger and aggression, throws tantrums, and does not get on well with peers.<sup>6</sup> J has poor tolerance for oral hygiene and hair brushing. She is very anxious and does not sleep well. J has extreme food safety anxiety and choking fears. She eats only a few soft foods and has been hospitalized because of her refusal to eat and resultant dehydration. According to Dr. Z, many of J's behavior challenges stem from her OCD and anxiety, not cognitive deficits.<sup>7</sup>

J's social and behavioral issues qualify her for special education.<sup>8</sup> She participates in an extensive Behavior Intervention Plan. Ms. M works tirelessly with school staff to ensure supports for J. In terms of testing, J scores average or high average in reading and writing, and scores low to very low average in math and numbers. J scores average to well above average with coordination, dexterity and motor control.<sup>9</sup> J's sensory profile scores capture her greatest areas of challenge.

Sensory profiles measure a student's sensory processing abilities and their effect on functional performance. Measurement categories include: touch, seeking and avoiding behaviors, need for external supports, awareness, attention, tolerance, auditory and visual. J scored as having much higher sensory challenges than other students.<sup>10</sup> J's October 2015 Neuropsychological report supports these results.<sup>11</sup> J's testing results, teacher's reports, and Ms. M's testimony demonstrate that J consistently exhibits challenging behaviors, and has some cognitive limitations.

A E, TEFRA specialist and qualified intellectual disability professional, reviewed evaluation materials from J's school, U X, the school psychologist, L T, MD, and two

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<sup>5</sup> Neuropsychological Evaluation, J Z, PhD, Clinical Neuropsychologist (October 15, 2015); Ex. E, p.1.

<sup>6</sup> M testimony; Neuropsych. Eval. (2015).

<sup>7</sup> Neuropsych. Eval. (2015).

<sup>8</sup> M testimony; Ex. E pp. 1 - 38.

<sup>9</sup> Ex. E, p.4.

<sup>10</sup> Ex. E, pp. 4-5.

<sup>11</sup> Neuropsych. Eval. (2015).

neuropsychologists, K C and Y Z.<sup>12</sup> Ms. E reviewed the initial application materials as well as updated information received at hearing. Ms. E determined that J did not have substantial impairment in three of the five developmental areas, as defined in the manual, and was therefore ineligible for TEFRA. According to the Division, J meets the “substantial impairment” criteria for only one of the five areas – self-direction.<sup>13</sup>

The Division denied J’s application on March 15, 2016.<sup>14</sup> Ms. M appealed the denial and requested a fair hearing.<sup>15</sup> The hearing was held on May 26, 2016. Ms. M testified on J’s behalf. Terri Gagne represented the Division; Ms. E testified on its behalf.

#### **IV. Discussion**

The Division argues that J does not meet the level of care required for TEFRA eligibility. Ms. M argues that J should qualify under an autism diagnosis, because her Social (Pragmatic) Communication Disorder diagnosis is very closely related to autism. As discussed, children with autism, cerebral palsy, or a seizure disorder qualify for TEFRA. The record does not contain these diagnoses for J. If J’s diagnoses included autism, she would qualify for TEFRA.<sup>16</sup> Ms. M asserts that J’s behavioral issues and diagnosis are very closely related to autism. Ms. M testified persuasively that J’s behavioral issues impact her as much as autism or other qualifying disabilities would.

The regulatory scheme, however, does not permit program approval based solely on a diagnosis being “closely related” to a qualifying condition. An applicant seeking qualification under a “disability found to be closely related to intellectual or developmental disability” must meet additional requirements.<sup>17</sup> The applicant must have substantial functional limitations in at least three of the five measured developmental areas (learning, communication, mobility, self-care, and self-direction). The Division agreed that J showed substantial functional limitations in

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<sup>12</sup> Ex. D; Neuropsych. Eval. (2015); E testimony.

<sup>13</sup> See Ex. D; E testimony

<sup>14</sup> Division Exhibit D.

<sup>15</sup> Ex. C.

<sup>16</sup> Dr. Z considered diagnosing J with autism, but did not because she does not meet the necessary criteria. See Ex. 3, email from Alaska Neuro to Ms. M, May 26, 2016.

<sup>17</sup> The “closely related” category excludes a condition that is a mental illness, psychiatric impairment, or serious emotional or behavior disturbance. According to Dr. Z, the great majority of J’s challenges stem from her OCD and anxiety. OCD and anxiety are mental health diagnoses. J also suffers from behavior disturbance. This may place J in the excluded category according to regulation. The Division did not rely on this potential exclusion for its denial and the record does not contain evidence supporting this theory. Therefore, this decision focuses solely on whether J meets the intellectual and behavioral functional limitation criteria.

one area, self-direction.<sup>18</sup> We next examine the other four developmental areas.

**Mobility:** The record contains no indication that J has mobility issues; she does not meet this criterion. **Learning:** J's learning abilities generally fall in the average range, with math proving more difficult. J's assessments demonstrate that she does not meet the "substantial impairment" threshold for learning. **Self-care:** Like other areas, self-care is challenging for J. She is able to toilet and feed herself, dress herself and perform other activities of daily living, but struggles due to her OCD and anxiety. The record, however, does not contain enough information to support a finding that she has substantial impairment in the area of self-care.

**Communication:** J has the language skills necessary to communicate. Her verbal skills are in the average range.<sup>19</sup> However, J lacks social communication skills, as evidenced by her Social (Pragmatic) Communication Disorder diagnosis. According to her assessments and her mother's testimony, J is oblivious to social cues, dominates conversation, asks inappropriate questions, fails to respond to others' interests, and focuses on narrow topics of interest to her. She is ostracized by her peers. J's social functioning is severely impaired, in part because of her communication disorder.

Both Ms. E and the Division's denial letter stated that J does not meet the substantial impairment requirement for language. The Division used the word "language" in its denial letter and at hearing, as opposed to the more expansive "communication" from the manual.<sup>20</sup> Communication entails reading cues from other people and responding appropriately, which J is unable to do. Although J has average language skills, she has substantial functional limitations with the social aspects of communication. Balancing J's average language skills and impaired social communication skills creates a low average or moderate impairment for overall communication. J, therefore, does not meet the communication impairment standard.

J does not have a qualifying diagnosis and does not meet the level of impairment required for the "closely related" disabling condition.

## **V. Conclusion**

TEFRA approval requires either specific diagnoses or highly impaired intellectual functioning and adaptive behaviors. J has many severe issues to work through, but her problems

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<sup>18</sup> Ex. D. The Division did not testify as to what it specifically considers when determining "self-direction" impairment.

<sup>19</sup> Neuropsych. Eval. p. 12 (2015).

<sup>20</sup> No evidence on this distinction was taken at hearing. The Division may rely on "language" based on AS 47.80.900(6), which uses the phrase, "receptive and expressive language" to describe one of the five developmental areas. Regulation does not define the five developmental areas considered under "other qualifying condition."

do not equate to a qualifying condition. The Division's denial of TEFRA Medicaid benefits is affirmed. If Ms. M obtains additional measures or J's diagnoses change, she may reapply for TEFRA in the future.

DATED this 24<sup>th</sup> of June, 2016.<sup>21</sup>

Signed \_\_\_\_\_  
Bride Seifert  
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 12<sup>th</sup> day of July, 2016.

By: Signed \_\_\_\_\_  
Name: Bride Seifert  
Title/Division: ALJ/OAH

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

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<sup>21</sup> The original decision incorrectly listed July 24, 2016 as the date.