

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

In the Matter of )  
                                )  
                                )  
H H                         ) OAH No. 18-0059-MDS  
                               ) Agency No.  
\_\_\_\_\_

**DECISION AFTER REMAND**

**I. Introduction**

H H receives services funded under the Intellectual and Developmental Disabilities (IDD) Medicaid Home and Community-based Waiver (Waiver) program. His 2016 – 2017 Plan of Care (POC) provided him with 33 hours per week of day habilitation services (6,864 15-minute units per year). His 2017 - 2018 Plan of Care (POC) renewal included a request that he receive 22.75 hours per week of day habilitation services. The Division of Senior and Disabilities Services (the Division) partially approved his POC renewal request, reducing the day habilitation services to 624 hours for the plan year, or an average of 12 hours per week. E K, Mr. H's guardian, requested a hearing to challenge the reduction in his benefits.

Mr. H's hearing was held on January 31, 2018. Ms. K represented Mr. H and testified on his behalf. L B, his Medicaid Care Coordinator, also testified on his behalf. Victoria Cobo represented the Division. Division Health Program Managers, Thea Howard and Corinna Castillo-Shepherd testified for the Division.

A proposed decision was issued on March 1, 2018. The delegee of the Commissioner of Health and Social Services, acting in her capacity as the final decisionmaker, remanded the case: “to await a decision in OAH Case No. 17-1193/1194-MDS, another Medicaid Home and Community-based Waiver (Waiver) case, which addressed legal and factual issues similar to those present in this case;”<sup>1</sup> to “exercise discretion to take additional evidence in an evidentiary hearing and make additional findings, either after an evidentiary hearing or on the existing record, as needed, to resolve questions or issues highlighted by the decision in 17-1193/1194-MDS;” and to “[p]repare a proposed final decision making any revisions and additions occasioned by the review set forth above.” After reviewing the existing record and considering the final decision in OAH Case No. 17-1193/1194-MDS, this Decision After Remand replaces the proposed decision issued on March 1, 2018 in its entirety.

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<sup>1</sup> A copy of the decision in OAH Case No. 17-1193/1194-MDS is attached.

The Alaska Medicaid regulations were amended as of October 1, 2017 to limit day habilitation services to a maximum of 624 hours per year, which comes to an average of 12 hours per week for 52 weeks. The applicable regulation allows an exception to that limit if the reduction in day habilitation services would result in a risk to a recipient's health and safety *and* place him or her at risk of institutionalization. However, the federal Centers for Medicare and Medicaid Services (CMS) must approve substantive changes to Waiver services before those changes become effective. The Division partially denied Mr. H's request for day habilitation services, based on the amended regulation, on December 29, 2017—before CMS approved the requested change on March 20, 2018. The Division's decision is thus REVERSED.

## **II. Facts**

Mr. H is 62-year-old man who has intellectual disability and cerebral palsy.<sup>2</sup> Mr. H lives in a trailer home with his niece and guardian, E K and her family.<sup>3</sup> They are a close-knit, loving family that takes care of Mr. H when possible.<sup>4</sup> But his niece and the other adults in the household work long hours, and thus, rely on Medicaid Waiver services to provide support for Mr. H when the family is not available.<sup>5</sup>

Mr. H has muscle contractures, which have recently worsened.<sup>6</sup> His physical therapist recommends that Mr. H swim at least twice per week and that he practice walking with a walker or gait belt at least three times per day.<sup>7</sup> Mr. H used about 20 hours of combined individual and group day habilitative services during the past POC year.<sup>8</sup> Mr. H's day habilitation services are used to get him to the public swimming pool, the field house, and the No Name Place.<sup>9</sup> At the pool, Mr. H performs exercises to improve his range of motion, strength, and mobility.<sup>10</sup> At the field house, Mr. H walks around the track to improve his functional strength.<sup>11</sup> And the art work that Mr. H does at the No Name Place, helps him work on fine motor skills.<sup>12</sup>

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<sup>2</sup> Ex. E at 7.

<sup>3</sup> Ex. E at 7.

<sup>4</sup> Ex. E at 7.

<sup>5</sup> Ex. E at 7.

<sup>6</sup> Testimony of E K; Testimony of L B; Ex. 2 at 1.

<sup>7</sup> Ex. E at 28.

<sup>8</sup> Ex. E at 10.

<sup>9</sup> K Testimony; B Testimony.

<sup>10</sup> K Testimony; Ex. 2 at 1.

<sup>11</sup> K Testimony; Ex. 2 at 1.

<sup>12</sup> K Testimony; Ex. 2 at 1.

Mr. H has experienced home accessibility issues in the trailer that he lives in.<sup>13</sup> The trailer has a tub-shower, the shower chair he currently has is inadequate, and he has significant difficulty getting into the shower.<sup>14</sup> Accordingly, Mr. H's caregivers also take him to the swimming pool to use the more accessible showers—the shower stall at the pool is large enough for him to get clean and decreases his risk of falls.<sup>15</sup> Similarly, Mr. H does not have a vehicle that will allow him to be transported in his wheelchair.<sup>16</sup> As a result, it takes a substantial amount of time and effort for his caregivers to get Mr. H in and out of the vehicle.<sup>17</sup> Ms. K claims that Mr. H needs additional habilitation hours because of Mr. H's deteriorating physical condition and the amount of time it takes for his caregivers to get him in and out of the vehicle.<sup>18</sup> Mr. H's team has not pursued other services, such as Special Olympics, Outdoor and Recreation and Community Access (ORCA), or other Medicaid services like PCS services.<sup>19</sup>

In his POC for 2016 – 2017, Mr. H was approved for an average of 33 hours per week in day habilitation services.<sup>20</sup> When he applied to renew the POC for 2017 – 2018, he requested 22.75 hours per week of day habilitation services.<sup>21</sup> On December 29, 2017, the Division denied his request, providing him with 12 hours per week of day habilitation services, which is 624 hours per year. The Division reasoned that the regulation had changed to cap the number of day habilitation hours to 624 hours per year, and that Mr. H did not meet the requirements for an exception to that cap, which required him to experience a threat to his health and safety and be at risk of institutionalization if the cap was not exceeded.<sup>22</sup>

### **III. Discussion**

The Medicaid Waiver program pays for specified individual services to Waiver recipients, if each of those services is “sufficient to prevent institutionalization and to maintain

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<sup>13</sup> Ex. E at 6.

<sup>14</sup> Ex. 2 at 1; K Testimony.

<sup>15</sup> K Testimony; Ex. 2 at 1.

<sup>16</sup> Ex. 2 at 1; K Testimony.

<sup>17</sup> K Testimony.

<sup>18</sup> K Testimony.

<sup>19</sup> Howard Testimony.

<sup>20</sup> Ex. G at 3.

<sup>21</sup> Ex. E at 28, 33.

<sup>22</sup> Ex. D at 2; Testimony of Thea Howard.

the recipient in the community.”<sup>23</sup> The Division must approve each specific service as part of the Waiver recipient’s POC.<sup>24</sup>

The type of waiver services at issue here, day habilitation services, are provided outside the recipient’s residence. The purpose of these services is to assist the recipient with acquiring, retaining, or improving his or her self-help, socialization, behavior, and adaptive skills.<sup>25</sup> They may also reinforce skills taught in other settings, and promote the skills necessary for independence, autonomy, and community integration.<sup>26</sup> In 2016—when Mr. H’s last POC was approved—the applicable regulations did not limit the number of day habilitation hours available to a recipient, unless the recipient also received group-home habilitation services.<sup>27</sup>

In October 2017, Alaska regulation 7 AAC 130.260(c)—the regulation governing the day habilitation services—was amended to limit day habilitation services to 624 hours per year (an average of 12 hours per week for an entire year) unless a greater number was necessary to “protect the recipient’s health and safety; *and ... prevent institutionalization.*”<sup>28</sup> So, under the amended regulation, the need for a larger amount of day habilitation hours must be justified both by health and safety concerns and by a showing that without the additional day habilitation services, the recipient will face institutionalization. Under the Alaska Administrative Procedure Act, that amendment became effective on October 1, 2017.<sup>29</sup>

The undisputed evidence in this case demonstrates that Mr. H clearly has physical limitations and issues with accessibility in his home and his vehicle. However, the evidence also shows that despite some major life changes, including the death of his guardian and primary caregiver, Mr. H is cheerful and well-adjusted in his home and his community; that he is surrounded by a close-knit, supportive family; and that he has remained healthy and free from hospitalizations or any critical incidents that would place him at risk of institutionalization. The regulation requires an actual present danger of institutionalization which additional day habilitation services can prevent, not a speculative one. But the record here is void of evidence

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<sup>23</sup> 7 AAC 130.217(b)(1).

<sup>24</sup> 7 AAC 130.217(b).

<sup>25</sup> 7 AAC 130.260(b); Howard Testimony,

<sup>26</sup> 7 AAC 130.260(b).

<sup>27</sup> 7 AAC 130.260(c). (Regulation in effect from July 1, 2013 through September 31, 2017).

<sup>28</sup> 7 AAC 130.260(c) (emphasis added). (Regulation in effect as of October 1, 2017; Register 223).

<sup>29</sup> See AS 44.62.180.

showing that Mr. H will be institutionalized if his day habilitation hours are capped at 12 hours per week.

Nevertheless, the issue remains whether the amended regulation can be applied to Mr. H's 2017 – 2018 POC Renewal. And as discussed below, the amendment limiting the number of day habilitation hours was not enforceable until March 20, 2018.

Medicaid agencies are required to comply with federal Medicaid requirements:

Medicaid is a cooperative federal-state program through which the Federal Government provides financial assistance to States so that they may furnish medical care to needy individuals . . . Although participation in the program is voluntary, participating States must comply with certain requirements imposed by the Act and regulations promulgated by the Secretary of Health and Human Services (Secretary).<sup>30</sup>

The controlling federal Medicaid regulations require CMS approval of substantive changes to Waiver services before those changes become effective:

(d) The agency may request that waiver modification be made effective retroactive to the first day of a waiver year, or another date after the first day of a waiver year, in which the waiver is submitted, unless the amendment involves substantive changes as determined by CMS.

(1) Substantive changes include, but are not limited to, revisions to services available under the waiver including elimination or reduction of services, or reduction in the scope, amount, and duration of any service, a change in the qualifications of service providers, changes in rate methodology or a constriction in the eligible population.

(2) A request for an amendment that involves a substantive change as determined by CMS, may only take effect on or after the date when the amendment is approved by CMS, and must be accompanied by information on how the State has assured smooth transitions and minimal effect on individuals adversely impacted by the change.<sup>31</sup>

The amendment to the Alaska day habilitation regulation was a substantive change.<sup>32</sup>

Accordingly, CMS had to approve the amendment before it went into effect.<sup>33</sup> CMS approved the amendment on March 20, 2018, effective March 20, 2018.<sup>34</sup> So even though Alaska adopted

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<sup>30</sup> *Walder v. VA Hospital Ass'n*, 496 U.S. 498, 502 (1990).

<sup>31</sup> 42 C.F.R. § 441.304(d).

<sup>32</sup> *ITMO R.J. and O.J.*, OAH Case No. 17-1193/1194-MDS at 5 (June 13, 2018).

<sup>33</sup> 42 C.F.R. § 441.304(d).

<sup>34</sup> *ITMO R.J. and O.J.*, OAH Case No. 17-1193/1194-MDS at 5 (June 13, 2018).

the amendment as of October 1, 2017, the new regulatory limits could not be enforced until March 20, 2018.<sup>35</sup>

Mr. H applied to renew his POC, requesting 22.75 hours per week of day habilitation services, on December 11, 2017.<sup>36</sup> On December 29, 2017, the Division partially denied his request, relying entirely on the amendment to the regulation.<sup>37</sup> Because the CMS did not approve the amended regulation until March 20, 2018, the Division's December 29, 2017 denial of a portion of Mr. H's requested day habilitation services, based on the day habilitation regulation change, cannot be supported as a matter of law. The Division's decision is thus REVERSED.

#### **IV. Conclusion**

The evidence does not show that Mr. H will face institutionalization if he does not receive more than 624 hours per year of day habilitation services. However, because the amendment to the regulation was substantive and because CMS did not approve the amended regulation until March 20, 2018, the Division's December 29, 2017 denial of a portion of Mr. H's requested day habilitation services, based on the day habilitation regulation change, cannot be supported as a matter of law. The Division's decision is thus REVERSED.

Dated: June 26, 2018

Signed \_\_\_\_\_  
Jessica Leeah  
Administrative Law Judge

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<sup>35</sup> *Id.*

<sup>36</sup> Ex. E at 2, 28, 33.

<sup>37</sup> Ex. D at 2.

## **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 27<sup>th</sup> day of July, 2018.

By: *Signed*  
Name: Erin E. Shine  
Title: Special Assistant to the Commissioner  
Agency: Office of the Commissioner, DHSS

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