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

In the Matter of	)	
	)	
J N	)	OAH No. 18-0245-MDS
	)	Agency No.

DECISION AFTER REMAND

I. Introduction

J N receives services funded under the Intellectual and Developmental Disabilities (IDD) Medicaid Home and Community-based Waiver (Waiver) program. His 2017 – 2018 Plan of Care (POC) provided him with 37.5 hours per week (7,800 15-minute units per year) of day habilitation services. J's 2018 – 2019 Plan of Care (POC) renewal included a request for 40 hours per week of community-based day habilitation services (8,320 15-minute units per year) and about 40 minutes per week of site-based day habilitation services (144 15-minute units per year), for a total of 40 hours and 40 minutes per week (8,464 15-minute units per year) of day habilitative services. The Division of Senior and Disabilities Services (the Division) partially approved J's POC renewal request, denying the request for site-based day habilitation hours and reducing the community-based day habilitation services to 12 hours per week or 624 hours for the plan year. J's guardian, Q "Q" Z challenged the reduction in day habilitation hours.

J's hearing was held on April 13, 2018. Ms. Z represented J and testified on his behalf. M E, his Medicaid Care Coordinator, also testified on his behalf. The Division's fair hearing representative, Terri Gagne represented the Division. Division Health Program Manager Glenda Aasland testified for the Division.

A proposed decision was issued on May 17, 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;"[1] 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-

[1] A copy of the decision in OAH Case No. 17-1193/1194-MDS is attached.

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 May 17, 2018 in its entirety.

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. While the evidence in this case shows that J has behavioral issues requiring continuous observation to assure his safety and he benefits from community activities, the evidence does not show that he faces institutionalization or risk to his health and safety without additional day habilitation hours. However, the federal Centers for Medicare and Medicaid Services (CMS) must approve substantive changes to Waiver services before those changes become effective. The Division's partially denied J's request for day habilitation services, based on the amended regulation, on March 13, 2018—before CMS approved the requested change on March 20, 2018. The Division's decision is thus REVERSED.

II. Facts

A. Background

J N is a 41-year-old developmentally disabled man who has been diagnosed with intellectual disabilities, Fetal Alcohol Spectrum Disorder, Post-Traumatic Stress Disorder, HIV, and psychotic disorder.[2] J also experiences anxiety, chronic pain, and night terrors.[3]

In 1992, when J was 15 years old, he was placed by OCS in foster care with Q and X Z.[4] The Zs consider J part of their family.[5] Ms. Z is J's guardian, and she has been a mother figure to him since 1992.[6] Ms. Z manages all of J's affairs, including all medical and financial decisions.[7] Ms. Z sees J almost daily.[8] And J has at least weekly contact with his foster family.[9]

[2] Ex. E at 7.
[3] Ex. E at 7.
[4] Ex. E at 7.
[5] Testimony of Q "Q" Z; Ex. E at 7, 20.
[6] Ex. E at 7.
[7] Z Testimony; Ex. E at 7.
[8] Z Testimony; Ex. E at 7.
[9] Ex. E at 20.

J lives in No Name, a 10-unit supported living facility with 12 residents, operated by City A Housing Initiative.[10] The facility has an office with a support staff person present 24 hours a day, 7 days per week.[11] J's placement at the facility was contingent on him having direct support providers with him for most of the day every day.[12] Initially, he was required to have a direct support provider present from 7 a.m. to 8 p.m., daily.[13] He currently has a direct support provider with him from 9 a.m. to 5 p.m., 7 days per week.[14]

J is impulsive and lacks self-control.[15] He is very volatile.[16] When J is stressed, he chews on his hand or hits himself on the head.[17] J suffers significant mood swings, and when frustrated, he reacts with anger, physical demonstrations, defiance, and aggression, including throwing things, swearing, yelling, making aggressive facial expressions, and threatening harm to himself or others.[18] J is often physically aggressive with his direct service provider.[19] Once while his direct support provider was driving, J pulled the provider's hair and grabbed him by the neck.[20] J requires 24/7 supervision.[21]

J is disruptive and has had issues with other residents and staff members, putting his placement at No Name at risk.[22] Some of J's disruptive behaviors include: banging on or throwing objects at shared walls; slamming his door; and turning on his vacuum to disrupt other residents' sleep.[23] He has received two Notice to Quit letters.[24] He received the most recent Notice to Quit on March 7, 2017, after he brandished a knife at a staff person.[25] No Name's staff has warned J's care team that if another incident occurs, J will have to move out.[26]

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[10] Ex. E at 7.
[11] Ex. E at 7.
[12] Ex. E at 7.
[13] Ex. E at 7.
[14] Ex. E at 7.
[15] Ex. E at 7, 15.
[16] Ex. E at 7, 15.
[17] Ex. E at 9, 15.
[18] Ex. E at 9, 16.
[19] Ex. E at 15.
[20] Ex. E at 15.
[21] Ex. E at 8, 14.
[22] Ex. E at 7; Ex. G at 5 – 6.
[23] Ex. E at 7.
[24] Ex. G at 2 – 4.
[25] Ex. E at 9.
[26] Ex. E at 8; Z Testimony.

J is very physically active and energetic.[27] He is constantly in motion from the time he wakes up until the time he goes to bed.[28] Fishing is his favorite activity.[29] He gets anxious when stuck at home and around the other residents.[30]

Being out in the community is beneficial to J, helping him to release some of his restless energy and anxiety, giving him space between social encounters, and helping him respond to interventions and practice coping skills.[31] Lack of access to community activities is a particular source of anxiety, frustration, and anger for J.[32] When J has experienced a decrease in his day habilitation hours, the effect on his mental health and critical behaviors has been noticeable.[33]

In addition to the Waiver services, J receives Mental Health Services from No Name Behavioral Health Services (NNBHS).[34] He receives 30 hours of Individual Comprehensive Community Support Services (CCSSI)—those hours were recently increased from 20 hours to 30 hours.[35] Because J is better able to respond to interventions and practice coping skills when away from his residence, he uses his mental health hours out in the community.[36] J receives up to 24 hours per day of Recipient Support Services (RSS), which are used to monitor his health and safety in the evening and overnight when he is not receiving Waiver services.[37] The provider rendering the RSS must be awake and able to hear or observe J's behavior and respond to prevent harm to him or others.[38] He receives 4 hours per week of mental health case management to help him access and coordinate needed services.[39] And although he does not participate, 1 hour of therapy is available to him every week.[40]

B. J's IDD Plan of Care

J receives waiver services through the IDD program. His services include supported living and day habilitation. J's day habilitation services are the subject of the current dispute.

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27 Ex. E at 8, 14; E Testimony.
28 Ex. E at 8, 14; E Testimony.
29 Ex. E at 14; Z Testimony; E Testimony.
30 Ex. E at 8; E Testimony.
31 Ex. E at 9-10.
32 Ex. E at 8 – 9; Z Testimony; E Testimony.
33 Ex. E at 9; Z Testimony; E Testimony.
34 Ex. E at 9, 21.
35 Ex. E at 9, 21; Ex. G at 11.
36 Ex. E at 9.
37 Ex. G at 12; Ex. E at 16, 21.
38 Ex. E at 16, 21.
39 Ex. E at 21; Ex. G at 11.
40 Ex. E at 21; Ex. G at 11.

1. J's 2017 – 2018 Plan of Care

J's 2017 – 2018 Plan of Care (POC) for February 21, 2017 through February 20, 2018 provided him with 12.5 hours per week (2,600 15-minute unites per year) of supported living services and 37.5 hours per week (7,800 15-minute units per year) of day habilitation services.[41] The plan noted that J requires supervision to ensure his safety, to complete his daily living tasks, and to manage his medication to keep his AIDS symptoms in remission.[42]

The plan described J's Day Habilitation services as helping him form caring relationships, promoting appropriate social behavior, and increasing his stress reduction skills, and promoting good health.[43] His day habilitation goals included multiple objectives around planning and accessing social opportunities in the community, including both activity planning and appropriate social behavior; choosing and participating in relaxing, healthy, and recreational activities; and using and maintaining his Universal Precautions kit to prevent exposure of HIV to others.[44]

2. Changes to the day habilitation regulation

In October 2017, Alaska regulation 7 AAC 130.260(c)—the regulation governing the day habilitation services—was amended. Under the revised regulation:

> The department will not pay for more than 624 hours per year of any type of day habilitation services from all providers combined, unless the department approves a limited number of additional day habilitation hours that were
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> (1) requested in a recipient's plan of care; and
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> (2) justified as necessary to
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> (A) protect the recipient's health and safety; and
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> (B) prevent institutionalization.[45]

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. Care coordinators were notified of this change via email on September 11, 2017.[46] The notice reflected that plans of care received after October 1 would be "reviewed in light of the new limit on day habilitation

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41 Ex. F at 3.
42 Ex. F at 9.
43 Ex. F at 12 – 13, 27.
44 Ex. F at 12 – 14.
45 7 AAC 130.260(c).
46 Ex. B at 52.

services." The Division advised providers that "[r]equests for service amounts exceeding the yearly cap will be considered exceptions to the rule and should only be requested in extreme circumstances." The Division explained that it would review such requests "to determine whether a limited amount of additional day habilitation hours are necessary to protect a recipient's health and safety and to prevent institutionalization," and that such reviews would be undertaken "in the context of individual's entire service plan and person centered goals." Under the Alaska Administrative Procedure Act, that amendment became effective on October 1, 2017.[47]

3. J's 2018 – 2019 Plan of Care

In January 2018, J's Care Coordinator, M E submitted a plan of care for services from February 21, 2018 through February 20, 2019.[48] The 2018 – 2019 POC requested 14 hours a week (2,912 15-minute units per year) of supported living services;[49] 40 hours per week (8,320 15-minute units per year) of community-based day habilitation services;[50] and 36 hours per year (144 15-minute units per year) of site-based day habilitation services.[51]

As with the previous year's plan, the 2018 – 2019 plan indicates that day habilitation services will be used to help J form caring relationships, promote appropriate social behavior, increase his stress reduction skills, and promote good health.[52] The plan notes that staying active is an important part of J's emotional health, social growth, and stress relief; and that J will access the community with or without support.[53] The plan expresses concern that a reduction in day habilitation hours would adversely impact J's health and safety and put him at risk of institutionalization:[54]

> Starting this month, he lost one hour of one-on-one support in the morning, and one hour in the evening in order to budget his day hab units for the remainder of the plan year. The residential staff are seeing a difference in this decrease. It is pertinent that J be out of the facility for most of the day. J is running out of housing options, and is at risk for institutionalization if he cannot have one-on-one time out in the community. Having 40 hours of day habilitation and 30 hours of mental health hours allows J to have one-on-one [direct support providers] for

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47 *See* AS 44.62.180.
48 Ex. E.
49 Ex. E at 23.
50 Ex. E at 26.
51 Ex. E at 32.
52 Ex. E at 27.
53 Ex. E at 27.
54 Ex. E at 9.

> 10 hours a day, 7 days a week. J cannot be alone in the community other than for short walks. . . . [I]f he was out in the community by himself for long periods of time, there is potential for him, or another person because of him to be in danger. It is also problematic for J to be expected to stay home with or without a [direct support provider] for several hours of the day.

Like the previous year's plan, J's day habilitation goals include objectives related to planning and accessing social opportunities in the community, including both activity planning and appropriate social behavior; choosing and participating in relaxing, healthy, and recreational activities; and using and maintaining his Universal Precautions kit to prevent exposure of HIV to others.[55]

Although J's team advocates for site-based day habilitation services at No Name Community Center, the plan notes that J "doesn't routinely enjoy going to No Name as it is busy and noisy, and J does not respond well to crowds."[56] The plan explains that access to the No Name Community Center is necessary for J to carry out his monthly hosted lunch—an activity intended to help him work on his cooking skills and acquire or improve "skills in the areas of self-help, socialization, appropriate behavior, and adaptation within his community."[57]

C. The Division's Review and Partial Denial

J's plan of care renewal was assigned for review to Glenda Aasland, a Health Program Manager I in the Division's IDD unit. Ms. Aasland did not believe that the plan of care sufficiently documented a need for day habilitation in excess of the presumptive maximum of twelve hours per week.[58] She noted that J has not been treated in the emergency department of a hospital or institutionalized during the previous year.[59] And she noted other services—an average of 124 hours per week of supports from NNBHS—provided to J.[60] Ms. Aasland concluded that "considering the amount of community supports J receives through NNBHS, it does not seem probable that he would be institutionalized if Individual Day Habilitation services are not provided above the current regulatory cap."[61]

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55 Ex. F at 12 – 14.
56 Ex. F at 32.
57 Ex. F at 32.
58 Aasland testimony; Ex. D at 2.
59 Aasland testimony; Ex. D at 2.
60 Ex. D ay 1.
61 Ex. D at 2; Aasland testimony.

On March 13, 2018, the Division notified J's guardian of the partial denial of his plan of care. The Division approved the following:[62]

1. Individual Day Habilitation – avg. of 12 hours per week for 52 weeks or 2,496 units
2. Supported Living – avg. of 14 hours per week for 52 weeks or 2,912 units

Citing 7 AAC 130.217 and 7 AAC 130.260, the Division denied the remaining Individual Day Habilitation sought (an average of 28 hours and 40 minutes per week).[63]

D. Appeal

Ms. Z requested a hearing to challenge the reduction in J's day habilitation services. The hearing for that appeal was held on April 13, 2018. The hearing was telephonic. Ms. Z represented J and testified on his behalf. M E, his Medicaid Care Coordinator, also testified on his behalf. The Division's fair hearing representative, Terri Gagne represented the Division. Division Health Program Manager Glenda Aasland testified for the Division. All exhibits offered by both parties were admitted without objection.

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 the recipient in the community."[64] The Division must approve each specific service as part of the Waiver recipient's POC.[65]

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. They may also reinforce skills taught in other settings, and promote the skills necessary for independence, autonomy, and community integration.[66] In 2017—when J'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.[67]

As discussed above, in October 2017, Alaska regulation 7 AAC 130.260(c)—the regulation governing the day habilitation services—was amended to limit day habilitation

[62] Ex. D at 1.
[63] Ex. D ay 1.
[64] 7 AAC 130.217(b)(1).
[65] 7 AAC 130.217(b).
[66] 7 AAC 130.260(b).
[67] 7 AAC 130.260(c). (Regulation in effect from July 1, 2013 through September 31, 2017).

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."[68] 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.[69]

The undisputed evidence in this case demonstrates that J clearly has behavioral issues, including angry outbursts and impulsive behaviors. As a result, there are legitimate safety concerns for J. The evidence also shows that his residential service providers notice a change in his behavior when his time in the community is reduced. However, the regulation requires that providing day habilitation hours in excess of the 12 hours per week cap must be "justified as necessary . . . to protect the recipient's health and safety and . . .to prevent institutionalization."[70] In other words, there must be an actual risk to health and safety and a present danger of institutionalization which additional day habilitation services can prevent, not speculative ones. Here, given the high level of services J receives through the combination of Waiver services and mental health services—indeed, more than 20 hours of combined services per day—the evidence does not show that it is more likely true than not true that his health and safety are at risk or that he faces institutionalization unless he receives more than 12 hours per week of day habilitation services.

Nevertheless, the issue remains whether the amended regulation can be applied to J's 2018 – 2019 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).[71]

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[68] 7 AAC 130.260(c) (emphasis supplied). (Regulation in effect as of October 1, 2017; Register 223).

[69] *See* AS 44.62.180.

[70] 7 AAC 130.260(c)(2).

[71] *Walder v. VA Hospital Ass'n*, 496 U.S. 498, 502 (1990).

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.
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> > (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.[72]

The amendment to the Alaska day habilitation regulation was a substantive change.[73] Accordingly, CMS had to approve the amendment before it went into effect.[74] CMS approved the amendment on March 20, 2018, effective March 20, 2018.[75] So even though Alaska adopted the amendment as of October 1, 2017, the new regulatory limits could not be enforced until March 20, 2018.[76]

J applied to renew his POC, requesting 40 hours per week (8,320 15-minute units per year) of community-based day habilitation services and 36 hours per year (144 15-minute units per year) of site-based day habilitation services on January 22, 2018.[77] On March 13, 2018, the Division partially denied his request, relying exclusively on the amendment to the regulation.[78] Because the CMS did not approve the amended regulation until March 20, 2018, the Division's March 13, 2018 denial of a portion of J'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.

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72 42 C.F.R. § 441.304(d).
73 *ITMO R.J. and O.J.*, OAH Case No. 17-1193/1194-MDS at 5 (June 13, 2018).
74 42 C.F.R. § 441.304(d).
75 *ITMO R.J. and O.J.*, OAH Case No. 17-1193/1194-MDS at 5 (June 13, 2018).
76 *Id.*
77 Ex. E at 26, 32.
78 Ex. D at 2.

IV. Conclusion

Given the high level of services J receives through the combination of Waiver services and mental health services—indeed, more than 20 hours of combined services per day—the evidence does not show that it is more likely true than not true that his health and safety are at risk or that he faces institutionalization unless he receives more than 12 hours per week 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 March 13, 2018 denial of a portion of 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 27, 2018

Signed
Jessica Leeah
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 27th day of June, 2018.

Signed
Erin Shine
Special Assistant to the Commissioner
Department of Health and Social Services

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