

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

In the Matter of)
)
U X) OAH No. 19-0014-MDS
) Agency No. 19-SDS-0005
_____)

DECISION

I. Introduction

U X is an adolescent who 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 an average of 20 hours per week of day habilitation services. U applied to renew his POC for 2018 – 2019 and requested that he continue to receive 20 hours per week of day habilitation services. The Division of Senior and Disabilities Services approved the plan of care overall but reduced his day habilitation hours to 12 hours per week. U’s parents challenged the Division’s decision.

The Alaska Medicaid regulations limit day habilitation services to 624 hours per year, or an average of 12 hours per week for 52 weeks, unless a waiver recipient faces institutionalization or risk to his health and safety without additional day habilitation hours. The evidence shows that U’s social skills are impaired and that he displays aggressive behaviors at school. He also displays those aggressive behaviors at home and with his day habilitation provider when his day habilitation services are cancelled or delayed, to the point that both his mother and day habilitation provider have felt physically threatened. As a result, a reduction in his day habilitation services poses a risk of institutionalization and threatens his health and safety. Accordingly, the Division’s decision to reduce his day habilitation hours is reversed, and the Division is directed to provide him with the 20 hours of day habilitation hours as requested in his plan of care.

II. Facts

A. Background

U is 15 years old. U lives with his parents, N and E X.¹ He is intellectually disabled, autistic, experiences attention deficit hyperactivity and Charge syndrome. He is also severely

¹ Ex. E, p. 3.

hearing impaired and communicates with a combination of American sign language and verbal speech.² He uses a bone conduction device, known as a BAHA, to assist with his hearing.³ He has experienced infections due to the BAHA.⁴

U attends school during the year, where he receives counseling. He has recently yelled and been verbally aggressive in school.⁵ His speech therapist states, “U often has meltdowns involving verbal and physical aggression when he cannot express himself or advocate for his wants/needs.”⁶ The speech therapist further states that “without the support of his caregivers ... U engages in inappropriate verbal and physical interactions without realizing that this puts his safety at significant risk” and that his verbal and physical aggression has increased in the past year.⁷

He experiences meltdowns at school and displays aggressive outbursts with his caregivers. When he cannot participate in a scheduled activity, he has meltdowns and gets aggressive. His caregiver has felt physically threatened by him at least three times during the 2018 – 2019 school year. His mother has also felt physically threatened by him.⁸

The primary focus of U’s day habilitation is to work on his socialization, communication, and safety skills in public. In addition, his plan of care emphasizes physical exercise, a need to improve his balance skills, which includes walking on differing surfaces.⁹

B. U’s IDD Plans of Care

U receives waiver services through the IDD program. His services include in-home supports, individual day habilitation, daily respite, and hourly respite. U’s day habilitation services are the subject of the current dispute.¹⁰

1. U’s 2017 – 2018 Plan of Care

U’s 2017 – 2018 Plan of Care (POC) was approved for a total of 20 hours per week of day habilitation services. The primary focus of U’s day habilitation services, as described in his goals and objectives, was to increase his exercise, provide outdoor activities, improve his

² Ex. D, p. 4; Ex. 1, pp. 3 – 4.

³ Mr. X’s testimony.

⁴ Ex. E, p. 4.

⁵ Ex. 1, p. 2; Ex. 2, p. 2.

⁶ Ex. 1, p. 3.

⁷ Ex. 1, p. 4.

⁸ Mr. and Ms. X’s testimony.

⁹ Ex. E, pp. 31 – 38.

¹⁰ Ex. D; Ex. E, p. 2.

balance, practice his community safety skills, and improve his communication and socialization skills. Those goals and objectives emphasized a need for developing safety skills in his physical activities, improving balance, and learning how to move between different surfaces, for instance from a smooth surface to a graveled surface or moving from a stationary surface to a moving surface. The goals and objectives also included learning appropriate physical boundaries and distinguishing between friends/acquaintances and strangers.¹¹

2. *Changes to the day habilitation regulation*

Before October 2017, there was no cap for day habilitation services. In 2017, the Department of Health and Social Services amended certain Medicaid regulations, including the regulation governing day habilitation hours. That amended regulation, which went into effect on October 1, 2017, reads:

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

- (1) requested in a recipient's plan of care; and
- (2) justified as necessary to
 - (A) protect the recipient's health and safety; and
 - (B) prevent institutionalization.¹²

After litigation over procedural errors in how the new regulation was implemented, the Department entered into a settlement, agreeing to temporarily change how the Division would apply the new regulatory cap to requests for day habilitation services:

Until SDS can issue a regulatory amendment for public comment that offers more definition on what SDS will consider when approving day habilitation services, SDS will review requests for day habilitation that exceed an average of 12 hours per week to consider whether the additional hours are needed to protect the recipient's health and safety *or* to prevent institutionalization.¹³

3. *U's 2018 – 2019 Plan of Care*

U submitted his POC for August 6, 2018 through August 5, 2019 to the Division. In that POC, he requested that he continue to receive an average of 20 hours of day habilitation services

¹¹ Ex. F, pp. 14 – 22.

¹² 7 AAC 130.260(c).

¹³ SDS E-Alert: Change in Implementation of Day Habilitation Regulation, dated July 18, 2018, *available at* <http://list.state.ak.us/pipermail/sds-e-news/2018-July/002414.html>. The parties are also directed to the July 2018 settlement agreement filed in *R. L., et. al., v. State, DHSS, DSDS, U.S. District Court for the District of Alaska* Case No. 1:18-CV-00004-HRH.

per week (4140 15 minute units for the year).¹⁴ His day habilitation goals and objectives were largely the same, emphasizing exercise, outdoor activities, improvement in his balance, practice of his community safety skills, and improvement of his communication and socialization skills, and learning appropriate physical boundaries and to distinguish between friends/acquaintances and strangers.¹⁵

U's 2018 – 2019 POC specifically mentioned that he has difficulty exercising self-control and regulating his behavior in public. He has yelled at a wait person at a restaurant. He has social interaction problems and thinks that it is appropriate for him to tell people that they smell. He is having problems in understanding how to interact with the opposite sex.¹⁶

C. The Division's Review and Partial Denial

On December 24, 2018, the Division notified U's parents that his day habilitation hours would be reduced to 12 hours per week, and that the request for the other eight weekly day habilitation hours was denied.¹⁷

The denial letter cited the changed regulation for day habilitation services and provided a link to all the Medicaid waiver regulations.¹⁸ While the letter acknowledged the benefits of day habilitation services for U, the Division concluded that the approved level of services meets U's needs:

While the division acknowledges that U benefits from engaging in Day Habilitation activities, the POC does not demonstrate why the additional hours of Day Habilitation are necessary to protect U's health and safety or prevent institutionalization or what other wavier or non-wavier resources the team explored to meet U's needs.¹⁹

D. Appeal

U's parents/guardians requested a hearing to challenge the reduction in U's day habilitation benefits. The hearing for that appeal was held on March 15, 2019. Victoria Cobo-George represented the Division. Division Health Program Manager F J testified for the Division. N and E X, U's parents and court-appointed guardians, represented him and testified

¹⁴ Ex. E.

¹⁵ Ex. E, pp. 31 – 38.

¹⁶ Ex. E, p. 12.

¹⁷ Ex. D.

¹⁸ Ex. D, p. 2.

¹⁹ Ex. D, p. 2.

on his behalf. N J, U’s Medicaid Care Coordinator, also testified on his behalf. All exhibits were admitted without objection.

E. Day Habilitation Activities

U attends school and receives counseling from the school. He uses 8 to 15 hours per week of day habilitation during the school year. His day habilitation hours increase during the summer vacation. Typical activities involve going to a church youth group in the evenings on Wednesdays for about 2.5 hours and Fridays for about 2 hours, going to the recycling center and other activities on Saturday for about four hours, and going to the mall both for walking, and shopping. In the summer, he adds both yoga classes and swimming to his activities.²⁰

III. Discussion

A. Day Habilitation Services and Applicable Regulation

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.”²¹ The Division must approve each specific service as part of the Waiver recipient’s POC.²²

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.²³

Before October 2017 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.²⁴ In October 2017, 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.”²⁵ So, under the

²⁰ Mr. and Ms. X’s testimony; Ex. E, p. 30.

²¹ 7 AAC 130.217(b)(1).

²² 7 AAC 130.217(b).

²³ 7 AAC 130.260(b).

²⁴ 7 AAC 130.260(c). (Regulation in effect from July 1, 2013 through September 31, 2017).

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

amended regulation, the need for a larger amount of day habilitation hours must be justified by health and safety concerns and by a showing that without the additional day habilitation services, the recipient will face institutionalization. As discussed above, after litigation over how the new regulation was implemented, the Department entered into a settlement, agreeing to temporarily review requests for day habilitation that exceed an average of 12 hours per week to consider whether the additional hours are needed to protect the recipient's health and safety *or* to prevent institutionalization.²⁶

B. Burden of Proof

In a case where the Division is proposing a reduction in the level of services, it bears the burden of proof to show that the reduction is justified.²⁷ This case, however, involves a change to the regulation controlling the provision of day habilitation services, that requires the allowance of over 624 hours per year (an average of 12 hours per week) be "justified."²⁸ Resolving the question of who has the burden of proof in this specific case first requires a factual inquiry. If the prior, higher allocation of day habilitation services was granted solely for reasons *unrelated* to health, safety, or risk of institutionalization, the Division may meet its initial burden by demonstrating that the prior allocation was not based on health, safety, or risk of institutionalization and pointing out that such day habilitation hours are now capped at 12 hours per week by regulation, unless justified by health, safety, or institutionalization concerns.²⁹ In that circumstance, if the recipient nonetheless seeks to maintain an allocation above 12 hours, then it would be up to the recipient to prove that previously unrecognized health, safety, or risk of institutionalization dictate a higher level of service. Where the prior, higher allocation was granted for reasons that *did* relate to health, safety, or risk of institutionalization, then the Division needs to show why those considerations no longer justify the higher allocation.³⁰

A review of U's 2017 – 2018 POC reveals that it contains goals and objectives related to U learning appropriate social interaction skills and physical safety skills. These are health and safety concerns. As a result, the Division therefore has the burden of proof to demonstrate that

²⁶ SDS E-Alert: Change in Implementation of Day Habilitation Regulation, dated July 18, 2018 (emphasis added), available at <http://list.state.ak.us/pipermail/sds-e-news/2018-July/002414.html>.

²⁷ 7 AAC 49.135.

²⁸ 7 AAC 130.260(c).

²⁹ See 7 AAC 130.260(c).

³⁰ See 7 AAC 130.260(c).

the reduction in U's day habilitation hours will not either place his health and safety at risk or put him at risk of institutionalization.

C. Whether more than 12 hours per week of day habilitation services are necessary to protect U's health and safety or prevent institutionalization.

While the revised regulations limit the number of weekly habilitation hours to 12 unless more is necessary to protect the recipient's health and safety or prevent institutionalization, the regulations do not define or quantify the protection to health and safety, or risk of institutionalization associated with this exception.

The evidence in this case demonstrates that U has significant impairments with communication and social interactions. He attends school and has engaged in outbursts. His mother and his day care provider have felt physically threatened by him. He behaves inappropriately in public, which places him at risk. As a result, there are legitimate safety concerns for U—he requires supervision to access community activities, and he needs to learn self-control. His physical functionality has some limitations regarding balance. In addition, if aggressive outbursts continue to occur, he has a foreseeable risk of institutionalization, either through the juvenile justice system or some type of inpatient psychiatric care. His communication and social interaction skills are a primary focus of his day habilitation activities. In addition, his day habilitation helps with his physical functionality.

The Division has the burden of proof in this case. It has not shown that reducing U's hours to the cap will not result in a risk to his health and safety or place him at a risk of institutionalization. The evidence also does not show that his behaviors have meaningfully improved. Instead, the evidence shows that U has a continued need to work on his social and communication skills, and the 2018 – 2019 POC as well as statements from his school and speech therapist recount aggressive behaviors that appear to have increased in the past year. The weight of the evidence therefore shows that it is more likely true than not true that U continues to require an average of 20 hours per week of day habilitation services.

IV. Conclusion

The Division sought to reduce U's day habilitation services to an average of 12 hours per week. Because his prior POC demonstrated a need for hours in excess of 12 per week due to health and safety concerns, the Division had the burden of proof. The Division did not meet its burden. Instead, the evidence shows a continued need for the same amount of day habilitation

due to health and safety concerns, as well as aggressive behaviors that demonstrate a foreseeable risk of institutionalization. The Division is therefore to provide U with 20 hours per week of day habilitation services, as requested in his POC.

Dated: April 25, 2019

By: Signed
Signature
Lawrence A. Pederson
Name
Administrative Law Judge
Title