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

In the Matter of	)	
	)	
D H	)	OAH No. 19-0066-MDS
	)	Agency No. 19-SDS-0019

DECISION

I. Introduction

D H receives services under the Intellectual and Developmental Disabilities ("IDD") Medicaid Home and Community Based Waiver program due to a severe traumatic brain injury. Among the Waiver services D receives is day habilitation. In October 2017, the Division of Senior and Disabilities Services ("Division") began implementing new IDD Waiver program regulations, including a new regulation that placed new limits on the number of day habilitation hours a recipient may receive. That regulation limits a recipient's day habilitation hours to no more than twelve hours per week, unless additional hours are necessary "to protect the recipient's health and safety" *or* "to prevent institutionalization."[1]

For her 2018-2019 plan of care, the Division approved D for fifteen hours of weekly day habilitation. It denied the remaining five hours per week that had been requested, citing to the change in its regulations. D's guardian appealed the Division's determination.

Based on testimony at the hearing and the documents submitted as part of the record, the Division has met its burden of establishing that four of the five requested additional hours of day habilitation per week are, more likely than not, unnecessary to protect D's health and safety or to prevent institutionalization. Consequently, the Division's decision is affirmed in part and reversed in part. D's day habilitation services are reduced. However, the reduction is to 16 hours per week, rather than the 15 hours per week sought by the Division.

II. Facts

A. Background

D H is a 31-year-old woman. She lives in No Name with her parents, who are her legal guardians. D suffered a traumatic brain injury in a tragic vehicular accident in 1998 in which two of her siblings – including her twin sister – died, and D was initially left in a vegetative

[1] 7 AAC 130.260(c). Although the regulation says "and" not "or," the regulation is currently read as saying "or" following the settlement of a class action law suit regarding this regulation.

state.[2] She has made significant gains since that time, but will continue to experience persistent deficits throughout adulthood.[3]

As a result of her traumatic brain injury, D continues to experience difficulty in independent living skills, social skills, and memory.[4] As described by her neuropsychologist, "[n]eurological testing has consistently revealed impaired memory, impaired problem solving, and deficient language skills."[5] D's expressive and receptive language skills are similar to those of a nine-year old. She is able to read, write, and perform math functions at the 3rd to 4th grade level.[6]

D's mother is her primary caregiver.[7] D requires supervision to participate in community activities.[8] While she enjoys such activities, she cannot be "dropped off" unattended because D lacks the safety, decision-making, and problem-solving skills to be left alone.[9] She cannot be left unattended, even for a few minutes at a time, because D has short-term memory loss and may not know what she is doing from one moment to the next.[10]

B. D's plan of care

D receives waiver services through the IDD program. Her services include supported living, individual day habilitation, hourly respite, and daily respite.[11] Both the supported living and day habilitation services are classified as "habilitation services." Supported living services are provided in the context of the home; day habilitation services are provided in the community.[12]

Broadly speaking, "habilitation services" are those which help the person "acquire, retain, or improve" skills in related to activities of daily living, including mobility, self-care, communication, social skills, vocational skills and "self-help, social and adaptive skills necessary to enable the recipient to reside in a noninstitutional setting."[13] The purpose of "day habilitation

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2 Ex. E, p. 18.
3 Ex. E, p. 17.
4 Ex. E, pp. 8-10, 13; H, Ex. 1, p. 2.
5 Ex. E, p. 49.
6 Ex. F, p. 13. T H, D's mother and guardian, testified that D has the mentality of a seven to ten year old. *See* Testimony of Mrs. H.
7 Ex. E, p. 8.
8 Ex. E, p. 14.
9 Ex. E. p. 14; Testimony of T C.
10 Ex. F, p. 14.
11 Ex. D, p. 1.
12 Testimony of Ms. J.
13 *See* H Ex. 1, p. 11; Ex. B, p. 34.

services" is to "assist recipients to acquire, retain, and improve the self-help, socialization, and adaptive skills necessary to live successfully live in home and community-based settings."[14] It is D's day habilitation services that are the subject of this appeal.

1. Changes to the day habilitation regulation

In August 2017, the Department amended certain Medicaid regulations, including 7 AAC 130.260(c), the regulation governing day habilitation hours. The Division began implementing these changes as of October 1, 2017. The revised regulation reads as follows:

> 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.[15]

Although this regulation substantively changed the IDD Waiver program, the Department had not sought prior approval for this change from the federal Center for Medicaid Services (CMS). The Department did not submit a request to amend the state IDD Waiver plan until January 2018. CMS approved the amendment, which included this new imposition of new limits on day habilitation services, effective March 20, 2018.[16]

2. Prior year's plan of care

D's plan of care for the December 2017 – December 2018 plan year described D as having had a stable year, with no health emergencies or other critical events.[17] In reporting D's functional abilities and needs, the plan of care stated that D as "unable to access her community independently" and noted that "she requires full time supervision, as she lacks necessary safety, decision-making, and problem-solving skills to be left alone."[18] In addition to supported living services, agency-based respite, and daily respite, the 2017-2018 plan of care requested 20 hours per week of day habilitation services, or eight hours over the "standard" 12 hours per week

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14 Ex. B, p. 52.
15 7 AAC 130.260(c).
16 *See* OAH 18-0050-MDS, pp. 3-4. The 624 hours per year limitation results in an average of 12 hours of day habilitation services a week.
17 Ex. F, p. 8.
18 Ex. F, p. 13.

allowed under the new regulation.[19] The Division reviewed the plan and approved the requested services on December 12, 2017, with the exception of the eight additional hours per week of day habilitation services.[20] T H, D's mother, appealed the partial denial.[21]

After a hearing, the Division's decision was reversed. However, it was not reversed on the merits but rather because the placement of service limits on day habilitation services did not go into effect until March 20, 2018, yet the Division had imposed those limits prematurely when it reviewed D's plan of care in December of 2017.[22] Consequently, D continued to have 20 hours per week of day habilitation services under the prior plan of care.

3. *2018-2019 plan of care*

On November 8, 2018, D's team submitted a plan of care for the December 6, 2018 to December 5, 2019 plan year.[23] This plan of care describes D as having had "no significant health concerns or improvements" in the past year.[24] Similar to the prior year's plan of care, the 2018-2019 plan of care described D's functional abilities and needs, as follows:

> D is unable to access her community independently. She requires full time supervision, as she lacks necessary safety decision-making, and problem solving skills to be alone . . . due to her loss of short-term memory and difficulty learning and remembering new skills and routines.[25]

The 2018-2019 plan noted that it was important for D "to have consistent staff." According to the plan, if D fails to have a consistent routine, she is not able to function, becomes lethargic, and she experiences physical and emotional declines.[26]

Like the previous plan of care, the 2018-2019 plan of care requested 20 hours of day habilitation a week – *i.e.,* eight hours more than the standard amount referenced in the new

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19 Ex. F, p. 26.

20 Ex. F, p. 1; *see also* In the Matter of D H, OAH No. 18-0050-MDS, pp. 5-6.

21 *See* In the Matter of D H, OAH No. 18-0050-MDS, p.6.

22 When the prior decision relating to D's 2017-2018 plan of care was issued, the new regulation required a recipient to justify additional hours beyond the 12-hour cap for day habilitation services as necessary to protect the recipient's health and safety *and* to prevent institutionalization. However, the Division conceded the issue of health and safety in OAH No. 18-0050-MDS but denied the additional hours because of the lack of risk of institutionalization. *See* OAH No. 18-0050-MDS. The new regulation is now interpreted as requiring that any hours of day habilitation services in excess of 12 hours a week must be justified as necessary to protect the recipient's health and safety *or* to prevent institutionalization, giving rise to a two-pronged test. *See infra*, at p. 1, n. 1.

23 Ex. E, p. 1.

24 Ex. E, p. 4.

25 Ex. E, p.14.

26 Ex. E, pp. 18-19.

regulation.[27] The plan states that these additional hours are "truly needed to promote the highest level of support for D's health, safety, behavioral management, and overall welfare." [28] As in the previous year, the plan of care's day habilitation goal includes community activity goals focused on improving D's communication and fine motor skills, as well as a separate goal of completing her Vision Therapy and Physical Therapy assignments five days a week to maintain or improve her current cognitive memory and physical abilities.[29] Elsewhere in the plan of care, D's therapeutic program is described as attending the gym 5 days a week, yoga, 3 times a week, and swimming 3 days a week. These physical therapy activities are described as "crucial" because "atrophy sets in immediately when there is a lapse."[30]

D's 2018-2019 plan of care was reviewed by Health Program Manager I U J.[31] As part of her review, Ms. J also considered additional documents provided by B C, D's care coordinator. These materials supplemental materials included: a letter from Ms. C; a medical visit note from Dr. K C dated November 28, 2018; two letters from D's medical providers that had been submitted in connection with the appeal of the prior year's plan; and care notes from D's service provider during the period from November 13, 2018 to November 26, 2018.[32]

On December 29, 2018, the Division, through Ms. J, sent a letter which approved most of the hours that the 2018-2019 plan had requested: 20 hours per week of supported living; 10 hours per week of agency-based respite; and 14 days per year of agency based daily respite [33] The Division also approved 15 hours a week of day habilitation services – three hours more than the standard 12 hour-per week limit – but denied the remaining 5 hours of day habilitation which the plan had requested.[34] According to the denial letter, the Division was unable to conclude from the plan of care and the supplemental materials that the additional five hours were necessary for D's health and safety or to prevent institutionalization.[35]

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27 Ex. E, p. 27

28 Ex. E, p. 27. D had been receiving 20 hours per week of day habilitation services since 2009. *See* Ex. D, p. 3.

29 *Compare* Ex. F, p. 12 *with* Ex. E, pp. 28-31.

30 Ex. E, p. 12.

31 Ex. D; *see also* Testimony of Ms. J.

32 Ex. E, pp. 1-54 (plan of care), Ex. E, pp. 44-45 (a December 7, 2018 statement from T C, D's care coordinator), Ex. E, pp. 46-48 (11/29/18 medical visit notes from Dr. K C), Ex. E, p. 49 (letter from Dr. S G dated 2/1/18), Ex. E, p. 50 (1/4/18 letter from Dr. T L); Ex. E, 51-54 (care notes from D's service provider).

33 Ex. D, p. 1.

34 Ex. D, p. 1. By approving 15 hours of day habilitation services a week, the Division conceded that D needs more than 12 hours per week of day habilitation.

35 Ex. D, pp.4-5.

The denial letter gave various reasons why the Division had not approved the additional five hours of day habilitation. The letter noted that plan of care stated that D had no significant health concerns during the past year and that the letters from Dr. G and Dr. L did not address D's needs for the *current* waiver year.[36] The letter also pointed out that in a medical visit note dated November 29, 2018, Dr. C stated that D's social interactions had decreased due to a reduction in her day habilitation hours, yet such a reduction had *not* occurred because D continued to be authorized to receive 20 hours of day habilitation a week throughout the prior plan year.[37] Other reasons cited included the plan's failure to explore other community resources that would provide D with greater access to the community prior to requesting an exception to the twelve-hour cap for day habilitation services.[38]

D. *Appeal*

D's mother, T H, timely appealed the partial denial. The agency record was admitted without objection. Mrs. H also submitted various documents to be considered as part of the appeal.[39] The Division objected to certain documents submitted by Mrs. H which either related to the mediation that was conducted in this matter or were produced long after the Division sent its decision concerning the hours authorized under the 2018-2019 plan of care.[40] Some of these documents Ms. H provided have been considered in rendering this decision to the extent that they deal with D's condition as of the date of the Division's denial letter or are indicative of her needs as of the date of the Division's denial letter.[41]

The hearing on D's appeal was held on March 6, 2019, at the Office of Administrative Hearings. D was represented by Mrs. H, who also testified in her daughter's behalf. Other

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[36] The letters from Dr. G and Dr. L appear to have been submitted in connection with Mrs. H's appeal of the Division's denial of the request day habilitation hours during the *prior* plan year. *See* Ex. D, p. 2; *see also* OAH No. 18-0050-MDS, pp. 6-7.

[37] Ex. D, p.3. D received continued benefits during the fair hearing process after her mother appealed the Division's decision to only authorize 12 hours each week of day habilitation services. See Ex. D. p. 3. After the Division's determination was reversed, she continued to be authorized to receive 20 hours per week of day habilitation services throughout the prior plan year.

[38] Ex. D, p. 3. According to the denial letter, Alaska is a work first state and the waiver program is the payer of last resort. To that end, the denial letter noted that D had repeatedly said that she wanted to have a job again, yet pointed out that her care team did not help her access community supports to find a job for her. *See* Ex. D, p. 3.

[39] *See* H Exs. 1-2. Some of these documents, such as Dr. G's letter, Dr. L's letter, and the medical notes from Dr. C, were also part of the agency record. *Compare* Ex. 1, pp. 6-10 *with* Ex. E, pp. 46-50.

[40] Specifically, the Division objected to the following documents Mrs. H submitted in H Exhibit 1: Ex. 1, pp. 1-3, Ex. 1, pp. 11-25, and Ex. 1, pp. 26-37. This objection was sustained in part and overruled in part. Ex. 1, pp. 26-37 has been admitted into the record to the extent they deal with D's condition as of the date of the Division's denial letter or are indicative of her needs. Ex. 1, pp. 1-3 and Ex. 1, pp. 11-25 were not admitted into evidence.

[41] *See* Ex. 1, pp. 26-37.

witnesses testifying on D's behalf were B C, D's care coordinator, and K O, a supervisor at Hospital A. The Division was represented by Fair Hearing Representative Terry Gagne. U J was the Division's sole witness.

In presenting the Division's case, Ms. Gagne argued that the new regulation capped day habilitation services to 12 hours unless additional hours were justified as necessary to protect the recipient's health and safety *or* to prevent institutionalization.[42] She then asked U J to explain the reasons why the Division had denied five of the 20 hours a week of Day Habilitation services requested in D's 2018-2019 plan of care.[43]

Ms. J testified that she made the final decision concerning the number of day habilitation hours D would receive after consulting with her supervisor.[44] She noted that the Division uses a two-pronged analysis whenever a request is made for day habilitation hours above the twelve-hour cap.[45] Under this analysis, a recipient can receive day habilitation services if the recipient satisfies either the prong – *i.e.*, the recipient has justified the additional day habilitation hours as necessary for the recipient's health and safety *or* as necessary to prevent the risk of institutionalization.[46] With regard to the second prong, Ms. J testified that, after reviewing and considering the plan of care and the supplemental information, she had concluded that the risk of institutionalization here did not rise to the level of meeting the exception to the 12 hour a week cap.[47] Mrs. H did not produce any evidence to rebut this aspect of the Division's determination.[48]

Ms. J engaged in a more detailed analysis concerning whether the request for additional habilitation hours was necessary to protect D's health and safety, observing that D's primary diagnosis was intellectual disability.[49] She testified that habilitation services are designed to assisting a person in acquiring, retaining, or improving skills in order to improve the person's

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42 Presentation of Ms. H.
43 Presentation of Ms. H.
44 Testimony of Ms. J.
45 Testimony of Ms. J.
46 Testimony of Ms. J.
47 Testimony of Ms. J. As noted in a prior OAH decision, the question is whether a reduction of day habilitation hours will place the recipient at risk for placement in an intermediate care facility or other institutional facility of equivalent or greater restrictiveness during the course of the plan year. *See* In the Matter of K.C., OAH No. 18-0011-MDS.
48 As in the prior appeal related to the 2017-2018 plan of care, the focus was on whether the additional hours were necessary to protect D's health and safety.
49 Testimony of Ms. J; *see also* Ex. E, p. 4.

overall level of functioning to allow them to remain in a home or community-based setting.[50] Although she reviewed the letters submitted by Dr. K G and Dr. T L, Ms. J noted that she had considered them but gave them less weight because they were submitted in response to a previous denial of additional hours during the prior plan of care (2017-2018) and thus were "a little outdated."[51] Ms. J further noted that D had been no critical incident reports – which are completed when there are injuries, violent outbursts, hospitalizations, surgeries, or procedures -- during the prior plan year (2017-2018).[52] Although the plan of care mentioned that D would be attending yoga three times a week, Ms. J pointed that the log of her activities submitted in support of increased day habilitation hours did not show that D had engaged in any yoga activities. [53]

In assessing whether additional hours beyond the 12-hour cap for needed to protect D's health and safety, Ms. J looked at the services D was receiving and how she was doing with her services. She said D did well with her goals and objectives in the prior year, as demonstrated in the service notes.[54] Finally, Ms. J also looked at the utilization of the services authorized for D. D was authorized to receive 20 hours of day habilitation a week. However, she testified that D's utilization of these services averaged *under* 15 hours a week during the prior plan year, yet D had no documented challenging behaviors or critical incidents in the prior plan year.[55] She pointed out that D was basically using day habilitation services five days a week for three hours a day on the average yet still was meeting her goals and objectives.[56] For these reasons, Ms. J concluded the 20 hours per week in day habilitation were not needed for D's health and safety.[57] Instead, she concluded that 15 hours of day habilitation services – three additional hours above the 12-hour regulatory cap -- was appropriate here.[58]

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50 Testimony of Ms. J.

51 Testimony of Ms. J.

52 Testimony of Ms. J.

53 *See* Testimony of Ms. J; *compare* Ex. E, p. 12 (stating that D needs to attend yoga three times a week) *with* Ex. E, pp. 51-54 (log of her actual activities from November 12, 2018 to November 28, 2018).

54 She noted that D goes to the gym five days a week, knows her exercises, and can complete them independently. *See* Testimony of Ms. J.

55 Testimony of Ms. J.

56 Testimony of Ms. J.

57 Testimony of Ms. J. Ms. J also noted there were some inconsistencies in the plan, such as D attending yoga three times a week, yet the notes did not show her doing yoga.

58 Testimony of Ms. J. She also testified that an agency's ability to provide staffing has no bearing on the assessment of whether services are needed.

Ms. H had a different view. She testified that the 20 hours of day habilitation have worked well for D over the years. She noted that the reason D had no critical incident reports last year because she kept D healthy. Mrs. H said that if D's day habilitation hours are cut, she would have to find other activities for D. She observed that options for such activities are limited in City A where they live and explained that D had not been taking yoga was because the instructor had left and had not been replaced. She also noted that she could not put D in certain groups because she is a vulnerable adult.[59]

According to Mrs. H, D utilized less than her weekly allotment of day habilitation hours during the prior year because from May to October, there was no staff to take D out into the community.[60] Consequently, during May through October, D received little to no day habilitation services.[61] During that time frame, Mrs. H testified that D was getting more depressed, wanted to stay in her room, experienced a decline in her ability to recall, and started to engage in other inappropriate behaviors in July.[62] Mrs. H, however, did not report these changes to D's care coordinator.[63] B C, D's care coordinator since May of 2018, stated that she had observed D talking more negatively about doing her exercises when she did not have a consistent caregiver.[64]

When D got a new caregiver in October, she began to engage in day habilitation activities on a routine basis again.[65] At that time, her behavior improved.[66] Mrs. H was adamant that D was best suited to volunteer activities rather than a job since she gets too tired. She noted that D needs a rigorous exercise program to stave off atrophy and does not complete her exercises or do them properly without supervision. The current 15 hours of day habilitation a week would only

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59 Testimony of Mrs. H.

60 *See* Testimony of Mrs. H. K O, a supervisor at Hospital A, testified that D does best with a single caregiver rather than multiple caregivers. She noted that her agency was unable to find staff to meet that need in the May to October period. *See* Testimony of K O. Ms. C testified that she investigated other agencies to see if they could find staff for D but did not identify another agency who could meet D's need for a single full-time staff person. *See* Testimony of T C. Mrs. H also contacted several agencies to see if they could supply a caregiver for forty hours a week but had no success. *See* Testimony of Mrs. H. However, an agency's inability to provide staffing has no bearing on whether the services are need and thus does not factor into the Division's decision. *See* Testimony of Ms. J.

61 Testimony of Ms. C; Testimony of Ms. H.

62 Testimony of Mrs. H.

63 Testimony of Mrs. H. Consequently, there is no mention of these changes in D's behavior in the 2018-2019 plan.

64 Testimony of Ms. C.

65 Testimony of Ms. H.

66 Testimony of Mrs. H.

be enough time for D's exercise regimen, Mrs. H said, and would not allow time for other community involvement activities.[67]

After the hearing, the record was kept open until March 15, 2019. The Division submitted a utilization report showing that from October 1 through December 5, 2018, D had used 15.86 hours a week of day habilitation services. [68]

III. Discussion

A. Given the facts of this case, the Division has the burden of proof regarding its proposed reduction of day habilitation hours

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.[69] Although there are several OAH decisions that have assumed, without meaningful discussion, that the recipient bears the burden of proof where the reduction in hours was solely due to a change in regulations, this is not entirely accurate in all cases.[70] In this specific case category, 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.[71] 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.[72]

Here, the Division previously conceded that D H needed 20 hours of day habilitation services a week for health and safety reasons.[73] Now, the Division is seeking to reduce this

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67 Testimony of Mrs. H.

68 *See* Division's letter dated March 7, 2019 and accompanying chart. Although the Division's chart also included D's utilization rate from May to October, this was the time period when D lacked a full time caregiver who could accompany her to day habilitation activities and, as per the testimony of Mrs. H and Ms. C, this had impacted on D's ability to utilize day habilitation services. *See* Testimony of Mrs. H; Testimony of Ms. C.

69 7 AAC 49.135.

70 *See e.g.*, OAH No. 18-005-MDS, p. 8; OAH No. 18-0011-MDS, p. 11.

71 *See* 7 AAC 130.260(c).

72 *See* 7 AAC 130.260(c).

73 *See* In the Matter of D H, OAH No. 18-0050-MDS.

allotment to 15 hours a week, so it bears the burden of proof with regard to this reduction. The Division has already acknowledged that D needs three more hours a week above the "soft cap" of 12 hours of day habilitation services a week to protect her health and safety.[74] So, the only issue is whether the Division can meet its burden of proof in showing that D does not need an additional five hours of day habilitation services a week.

2. Are more than 15 hours per week of day habilitation services necessary to protect D's health and safety?

Neither the testimony presented at hearing, nor the documentary evidence in the record, established that the Division's reduction of five hours of day habilitation services would increase D's risk of institutionalization. Consequently, the sole issue here is whether these five additional hours are necessary to protect D's health and safety.

The evidence in the record established that D did decline in certain aspects from May to October when she was using day habilitation hours infrequently because she did not have a full-time care giver.[75] That, however, was not attributable to any action on the Division's part, because D was authorized to receive 20 hours of day habilitation services per week.[76] Dr. C, in his medical notes dated November 28, 2018, references that D's mother noticed a decline in D's speech, fine motor controls and independence during that time, which was consistent with Mrs. H's testimony.[77] However, Dr. C incorrectly assumed that D's day habilitation hours had been "cut" and that this cut attributed to the decline. Instead, the reality was that D had been unable to utilize her full allotment of day habilitation for about six months, from May to October, because she no longer had a full-time care giver.[78] Mrs. H testified that D's behavior improved in October after she had a new full-time caregiver.[79] It was at that time that D also resumed utilizing more day habilitation hours.[80] Importantly, Dr. Dr. C's notes also stated that since D's

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74 Testimony of Ms. J; *see also* Ex. D, p. 1.

75 See Testimony of Mrs. H; Testimony of Ms. C; Ex. E, p. 46.

76 Ex. E, p. 46.

77 Ex. E, p. 46.

78 The Division's records show that D's use of day habilitation services during the time she did not have a full-time care giver was sporadic at best. She used no services during the month of July, which is when her mother testified that her behavior began to decline. *See* Division's letter of March 7, 2019 and accompanying chart.

79 Testimony of Mrs. H.

80 *See* Division's letter of March 7, 2019 and accompanying chart. D's loss of a full-time caregiver was inextricably entwined with D's inability to access the day habilitation services she was authorized to receive.

day habilitation "*hours were returned to normal* she has improved her eye to eye contact and her social interactions *and she is back to normal*."[81]

As soon as D began to participate in day habilitation services on a routine basis in October, her behavior improved and, as per Dr. C, she returned to "normal."[82] Although she had declined slightly in her overall success rate regarding her fine motor skills and in completing her assigned therapies, such a decline is most likely attributable to her inability to utilize day habilitation services consistently for six months.[83] In spite of this decline in day habilitation usage, there were no critical incident reports.[84] From October through December, D was utilizing 15.86 hours of day habilitation services a week.[85] By her mother's account, the problem behaviors that surfaced in July improved in October.[86] Dr. C also noted that D was "back to normal."[87] Moreover, there is ample evidence in the record to support the conclusion that D has functioned well utilizing just under 16 hours a week of day habilitation services. Although Ms. J considered that only 15 hours of day habilitation services a week were necessary to protect D's health and safety, her conclusion may be explained by her mistaken belief that D was utilizing less than 15 hours of day habilitation services a week from October through December.[88]

The evidence therefore shows that D's health and safety are at risk when her day habilitation benefits are significantly reduced, but that she functions well when she receives 16 hours a week in day habilitation services. Accordingly, the Division has met its burden in establishing that D's day habilitation hours can be reduced from 20 hours a week. However, it has not met its burden in demonstrating that 15 hours per week is the appropriate allotment given that D is functioning well with approximately 16 hours per week of such services. Therefore, the Division's determination is modified to authorize 16 hours per week of day habilitation hours for D.

IV. Conclusion

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81 H Ex. 1, p. 6*; see also* Ex. E, p. 46.
82 Testimony of Mrs. H*; see also* Ex. E, p. 46.
83 *Compare* Ex. E, p. 10 (2018-2019 plan of care) *with* Ex. F, p. 12 (2017-2018 plan of care).
84 Testimony of Ms. J.
85 See Division's letter dated March 7, 2019 and accompanying chart.
86 Testimony of Mrs. H.
87 Ex. E, p. 46.
88 Testimony of Ms. J.

The evidence presented at hearing supported the conclusion that 16 hours per week of day habilitation were necessary to protect D's health and safety but did not show that 20 hours per week were necessary to protect D's health and safety. For this reason, the Division's decision is AFFIRMED in part and REVERSED in part.

Dated: April 17, 2019

By:*Signed*
Signature
Kathleen A. Frederick
Name
Administrative Law Judge
Title

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