

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

In the Matter of )  
 )  
N B ) OAH No. 18-0246-MDS  
 ) Agency No.  
\_\_\_\_\_)

**DECISION AFTER REMAND**

**I. Introduction**

N B receives services funded under the Intellectual and Developmental Disabilities (IDD) Medicaid Home and Community-based Waiver (Waiver) program. Her 2017 – 2018 POC provided her with 20 hours per week of day habilitation services. When she applied to renew the POC for 2018 – 2019, she requested the same level of day habilitation services. The Division of Senior and Disabilities Services (the Division) approved N for only twelve hours of weekly day habilitation, denying the remaining eight hours per week that were requested. N, through her guardian, T B challenged the Division’s reduction in day habilitation hours.

N’s hearing was held on April 13, 2018. Ms. B represented N and testified on her behalf. E P, N’s Medicaid Care Coordinator, also testified on N’s behalf. The Division’s fair hearing representative, Victoria Cobo represented the Division. Division Health Program Manager Eli Haroun testified on behalf of the Division.

A proposed decision was issued on May 18, 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 May 18, 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. While the evidence in this case shows that N requires supervision to assure her safety and she benefits from community activities, the evidence does not show that she faces institutionalization or risk to her health and safety if her day habilitation hours are not increased above the regulatory maximum. 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 N’s request for day habilitation services, based on the amended regulation, on February 27, 2018—before CMS approved the requested change on March 20, 2018. The Division’s decision is thus REVERSED.

## **II. Facts**

N, who was born a “micro-preemie” twin, is a woman with developmental delays and a primary diagnosis of intellectual disability.<sup>2</sup> In addition to her intellectual disability, N’s secondary diagnoses include blindness, neurological disorder, seizure disorder, and intracerebral hemorrhage with elevated cranial pressure requiring a shunt.<sup>3</sup> N suffers debilitating headaches that last several days and sometimes weeks.<sup>4</sup> She has an obsessive compulsive behavior, where she picks at any type of hangnail, minor cut, scrape, or bug bite, causing infection and scars.<sup>5</sup> Emotional stress or overstimulation by such things as loud sounds or lights, often cause N to have seizures.<sup>6</sup> She also has short-term memory problems.<sup>7</sup> And she has sensory input issues, causing her to misinterpret verbal directions and causing confusion when she has several activities that take place at different days and times.<sup>8</sup> N’s most recent Inventory for Client and Agency Planning (ICAP) scoring reflects functional ages of 4 years, 10 months in the domain of Motor Skills; 5 years, 9 months in the domain of Social and Communication skills; 11 years in the domain of Personal Living; 8 years, 3 months in the domain of Community Living; and 7

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<sup>2</sup> Ex. E at 4, 8; Ex. 1 at 2.

<sup>3</sup> Ex. 1 at 2; Ex. 2 at 2.

<sup>4</sup> Ex. E at 5, 9; Testimony of T B.

<sup>5</sup> Ex. E at 4.

<sup>6</sup> Ex. E at 8.

<sup>7</sup> Ex. 1 at 2.

<sup>8</sup> Ex. E at 9.

years, 6 months in the domain of Broad Independence.<sup>9</sup> Her ICAP notes one mild problem behavior of being socially offensive by asking personal questions 1 to 10 times per day.<sup>10</sup> Her Maladaptive Behavior Index Scores were “within normal range.”<sup>11</sup>

N receives waiver services through the IDD program. Her services include supported living, individual day habilitation, daily respite, and hourly respite. N’s day habilitation services are the subject of the current dispute.

N lives near a city with her mother and guardian, T B.<sup>12</sup> N is very close to her family—her mother, twin sister, and older sister.<sup>13</sup> N has good natural supports, and her family ensures that her needs are met.<sup>14</sup> N’s relatively stable health is attributed to N’s mother’s care—Ms. B is “a good nurse.”<sup>15</sup> N has a very close relationship with her twin sister, and as a paid caregiver, her twin provides much of N’s care.<sup>16</sup>

N enjoys being active in the community. She participates in the Special Olympics, a bowling league, Bingo, a social group, and volunteering for special events.<sup>17</sup> N requires monitoring and supervision when participating in community and social activities due to her blindness, seizures, and inability to appreciate risk or danger.<sup>18</sup> Day Habilitation services help N access her favorite activities.

When N has been unable to participate in her regular activities, the negative effect on her mood and behaviors has been noticeable. For example, during the summer of 2017, when one of N’s care providers was gone on vacation for about a month, N lost about 13 hours of day habilitation services, leaving her with just 7 hours of time to access activities in the community.<sup>19</sup> N’s routine was disrupted.<sup>20</sup> During that period, N’s behavior deteriorated. As recalled by

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<sup>9</sup> Ex. 2 at 3.

<sup>10</sup> Ex. 2 at 3.

<sup>11</sup> Ex. 2 at 4.

<sup>12</sup> Ex. E at 3, 8.

<sup>13</sup> Ex. E at 8.

<sup>14</sup> Ex. E at 11.

<sup>15</sup> Testimony of E P.

<sup>16</sup> Ex. E at 13.

<sup>17</sup> Ex. E at 8.

<sup>18</sup> Ex. E at 9, 10; B Testimony.

<sup>19</sup> B Testimony; Testimony of E P.

<sup>20</sup> B Testimony; P Testimony.

Ms. B, N became irritable, angry, and rude.<sup>21</sup> She “bullied” and got physically and verbally abusive with her twin sister.<sup>22</sup>

In N’s POC for March 18, 2017 through March 17, 2018, she was approved for an average of 20 hours per week in day habilitation services. When she applied to renew the POC for 2018 – 2019, she requested the same level of day habilitation services.<sup>23</sup> N’s POC renewal was assigned for review to Eli Haroun, a Health Program Manager in the Division’s IDD unit. Mr. Haroun did not believe that the POC sufficiently documented a need for day habilitation in excess of the presumptive maximum of twelve hours per week.<sup>24</sup> He explained that although N has medical issues, there were no recent hospitalizations, and her health appeared stable.<sup>25</sup> He concluded that there was no support in the records from which to conclude that her health and safety would be put at risk or that she would be at risk of institutionalization without additional day habilitation hours.<sup>26</sup>

The Division denied the request, providing her 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 N did not meet the requirements for an exception to that cap, which required her to experience a threat to her health and safety and be at risk of institutionalization if the cap was not exceeded.<sup>27</sup>

N’s guardian timely appealed the partial denial. A telephonic hearing on N’s appeal was held on April 13, 2018. The Division was represented by fair hearing representative Victoria Cobo. Division Health Program Manager Eli Haroun testified on behalf of the Division. Ms. B represented N and testified on her behalf. E P, N’s Care Coordinator, also testified on her behalf. All exhibits offered by both parties were admitted without objection. The record was kept open until April 20, 2018 to allow Ms. B to submit a copy of N’s most recent ICAP scores. Ms. B submitted those scores on April 16, 2018.

### **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>21</sup> B Testimony.  
<sup>22</sup> P Testimony.  
<sup>23</sup> Ex. E at 17.  
<sup>24</sup> Testimony of Eli Haroun; Ex. D.  
<sup>25</sup> Haroun Testimony; Ex. D.  
<sup>26</sup> Haroun Testimony; Ex. D.  
<sup>27</sup> Ex. D.

the recipient in the community.”<sup>28</sup> The Division must approve each specific service as part of the Waiver recipient’s POC.<sup>29</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. They may also reinforce skills taught in other settings, and promote the skills necessary for independence, autonomy, and community integration.<sup>30</sup> In early 2017—when N’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>31</sup> 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 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>32</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>33</sup>

The undisputed evidence in this case demonstrates that N has some minor behavioral issues and sensory impairments that impair her ability to appreciate or judge risk and danger. As a result, there are legitimate safety concerns for N—she requires supervision to access many of the community activities she enjoys. The evidence also shows that her family notices a change in her mood and behavior when her routine is disrupted. 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.”<sup>34</sup> 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, the evidence does not show that it is more likely true than not true that N’s health and

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<sup>28</sup> 7 AAC 130.217(b)(1).

<sup>29</sup> 7 AAC 130.217(b).

<sup>30</sup> 7 AAC 130.260(b).

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

<sup>32</sup> 7 AAC 130.260(c) (emphasis supplied). (Regulation in effect as of October 1, 2017; Register 223).

<sup>33</sup> See AS 44.62.180.

<sup>34</sup> 7 AAC 130.260(c)(2).

safety are at risk or that she faces institutionalization unless she receives more than 12 hours per week of day habilitation services.

Nevertheless, the issue remains whether the amended regulation can be applied to N'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).<sup>35</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>36</sup>

The amendment to the Alaska day habilitation regulation was a substantive change.<sup>37</sup>

Accordingly, CMS had to approve the amendment before it went into effect.<sup>38</sup> CMS approved the amendment on March 20, 2018, effective March 20, 2018.<sup>39</sup> So even though Alaska adopted

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<sup>35</sup> *Walder v. VA Hospital Ass'n*, 496 U.S. 498, 502 (1990).

<sup>36</sup> 42 C.F.R. § 441.304(d).

<sup>37</sup> *ITMO R.J. and O.J.*, OAH Case No. 17-1193/1194-MDS at 5 (June 13, 2018).

<sup>38</sup> 42 C.F.R. § 441.304(d).

<sup>39</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>40</sup>

N applied to renew her POC, requesting 20 hours per week of day habilitation services on February 22, 2018.<sup>41</sup> On February 27, 2018, the Division partially denied her request, relying exclusively on the amendment to the regulation.<sup>42</sup> Because the CMS did not approve the amended regulation until March 20, 2018, the Division's February 27, 2018 denial of a portion of N'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 it is more likely true than not true that N's health and safety are at risk or that she faces institutionalization unless she 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 February 27, 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

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<sup>40</sup> *Id.*

<sup>41</sup> Ex. E at 1, 17.

<sup>42</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 27th day of July, 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.]