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

In the Matter of	)	
	)	
C U	)	OAH No. 19-0252-MDS
	)	Agency No.

DECISION

I. Introduction

C U is a severely disabled Medicaid recipient who receives Acuity services as part of his Medicaid Waiver Plan of Care. When he applied to renew his Medicaid Waiver Plan of Care (POC) for 2019, he requested that he continue to receive those Acuity services. The Division of Senior and Disabilities Services (Division) notified him that his request to renew the Acuity services was denied. His guardians requested a hearing to challenge that denial.

The evidence shows that Mr. U's condition and need for constant oversight has essentially unchanged since the last time the issue of his eligibility for Acuity services went to full hearing in 2017. Because his needs have not changed, consistent with the Commissioner level decision reached in 2017, the denial of his request for Acuity services is REVERSED.

II. Background

The Medicaid program has a number of coverage categories, one of which is the Waiver program.[1] The Waiver program provides supports to individuals who would otherwise be institutionalized due to physical or intellectual disabilities.[2]

The Medicaid program pays for specified individual services to Waiver recipients.[3] The Division must approve each individual service as part of the Waiver recipient's Plan of Care.[4]

Particularly high-needs waiver recipients receiving group home habilitation services may also qualify to receive Acuity services.[5] Acuity services are provided to a recipient receiving group home habilitation services who must, "because of the recipient's physical condition or behavior," need "direct one-to-one support from direct care workers whose time is dedicated

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1 7 AAC 100.002(d)(8); 7 AAC 100.502(d).
2 7 AAC 130.205.
3 7 AAC 130.205(a).
4 7 AAC 130.217.
5 7 AAC 130.267(a). Acuity services are also available for recipients who receive residential supportive living services under 7 AAC 130.255; for simplicity in light of Mr. U' particular situation, this summary is limited to recipients of group-home habilitation services under 7 AAC 130.265(f).

solely to providing [those] services ... to that one recipient 24 hours per day, seven days per week."[6] The request for Acuity services must be supported by documentation establishing the need for this extra level of support.[7] There are between 12 to 15 people statewide who receive Acuity services.[8]

III. Procedural History

Mr. U first received Acuity services in 2011 due to an uncontrolled seizure disorder.[9] He has had a series of administrative hearing cases over the recent years regarding his eligibility for Acuity services.

A. 2016 - Renewal

Mr. U was receiving Acuity services in 2015. When he applied to renew those services as part of his 2016 POC, the Division denied the renewal of those services. Mr. U requested a hearing, OAH Case No. 16-0366-MDS. After hearing, the Administrative Law Judge (ALJ) issued a proposed decision finding that Mr. U did not require dedicated one on one staffing 24 hours per day, 7 days per week, and as a result no longer qualified for Acuity services.[10] Neither party submitted a proposal for action objecting to the proposed decision and it was adopted as final.

B. 2017 - Application

Mr. U applied to receive Acuity services in 2017.[11] The Division denied the request. Mr. U requested a hearing, OAH Case No. 17-0217-MDS. After hearing, the ALJ issued a proposed decision finding that his "dysphagia, high risk of aspiration, and bowel issues, the new behavior of eating inedible objects now warrants constant care, at least for the time being."[12] The Division filed a proposal for action objecting to the proposed decision. The case was then sent up to the Commissioner of Health and Social Services' (Commissioner) delegate for final action. The delegate remanded the case to the ALJ to take additional evidence. The ALJ held a supplemental hearing and issued a revised decision, again finding that Mr. U qualified for Acuity

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6 7 AAC 130.267(b)(2).
7 7 AAC 130.267.
8 Ms. Rogers' testimony.
9 Ms. Rogers' testimony.
10 That decision did not immediately terminate Mr. U' Acuity services. Instead, it gave him a limited amount of time to request alternative care services prior to the Acuity services being terminated. *See* OAH Case No. 16-0366-MDS Decision, pp. 7 - 8.
11 This was effectively a request to receive a new service, because the Acuity services had been terminated as a result of the decision in OAH Case No. 16-0366-MDS.
12 *See* OAH Case No. 17-0217-MDS, Proposed Decision, p. 14.

services. The basis for that decision was again his eating inedible objects. In addition, another significant factor in the decision was that Mr. U has a g-tube, which he has pulled out. He has an abdominal binder, a wrap around his abdomen covering the g-tube to prevent it being dislodged. However, he can and has been able to circumvent the binder and pull out the g-tube. That decision also noted that the group home "has assigned dedicated staff to work specifically with Mr. U 24-hours a day, in two 12 hour-shifts. Staff sometimes stay with Mr. U in his room through the night. Other nights they check on him frequently."[13] The Commissioner's delegate adopted the revised decision, which approved the Acuity services.

C. 2018 - Renewal

In 2018, Mr. U applied to renew his Acuity services. The Division denied the renewal. Mr. U requested a hearing, OAH Case No. 18-0244-MDS. The parties settled the case prior to hearing, wherein the Division agreed to renew Acuity services for Mr. U for that POC year.

D. 2019 - Renewal

This case arises as a result of Mr. U requesting to renew his Acuity services for the 2019 POC year, and the Division's denial of that request. A hearing was held on May 15 and 29, 2019. Mr. U's father and Guardian, P U represented Mr. U and testified on his behalf. Y X, Mr. U's Medicaid Care Coordinator, E H, the human resources director who also provides oversight for the City A Resource Agency's residential program, and A B, the residential site supervisor for Mr. U's Group home, testified on Mr. U's behalf. Victoria Cobo-George, a Fair Hearing Representative with the Division, represented the Division. Kathryn Allen and Caitlin Rogers, both of whom are Health Program Managers with the Division's Intellectual and Developmental Disabilities Medicaid Waiver unit, testified for the Division.

IV. Facts[14]

Mr. U is a severely disabled adult. His parents, P and N U, are his guardians. His conditions include cerebral palsy, seizure disorder, autistic disorder, intellectual disability, and dysphagia.[15] Mr. U's last serious seizure occurred in 2017.[16]

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13 *Decision on Remand*, p. 10. OAH Case No. 17-0217-MDS.
14 The following facts were established by a preponderance of the evidence.
15 Ex. E, p. 4.
16 D C, Psyd, ABPP, evaluation notes from May 3, 2018, p. 1.

Mr. U has very poor balance and very limited ability to stand. He uses a wheelchair.[17] He is not capable of getting out of either the bed or the wheelchair on his own. Mr. U lives in House A, a group home operated by City A Resource Agency. There are three other residents in Erickson A. Erickson House is staffed 24 hours a day with two people. One of the staff is solely for Mr. U. The other staff member cares for the other three residents, none of whom have the same extensive care needs as Mr. U.[18]

Mr. U engages in a variety of self-injurious behaviors. They consist of items such as banging his head on his bed rail, grabbing for and eating inedible objects, and pulling out his g-tube.[19] Mr. U has visible scar tissue on his forehead from hitting his head.[20] His bed rail is padded to reduce any injury. He also has a helmet and knit gloves, all of which are designed to reduce his chance of injuring himself.[21] Mr. U is also aggressive towards staff and others.[22]

Mr. U has an abdominal binder which completely wraps around his abdomen and covers the g-tube. Staff then covers the binder with a blanket. He is capable of removing the binder on his own and tries to remove it daily. His staff person keeps a close eye on him and is able to stop him. The last time he pulled out his g-tube was on February 7, 2019, while he was in the process of being changed.[23] His care log for November 1, 2018 provides that he "made few attempts to put non-edible items into his mouth."[24] His care log for November 4, 2018 indicates that he tried to put his foot in his mouth between 7 p.m. and 8 p.m.[25] His evening care logs are replete with mentions of trying to place his foot in his mouth and trying to put non-edible objects in his mouth.[26]

Mr. U has erratic sleep patterns. His nighttime (midnight to 7:00 a.m.) care logs for January 2019 shows the following:

January 1 – 3	Slept well all night.
January 4 – 5	Kicking his bed rails repeatedly during the night.
January 6 - 14	Either slept well, or nothing unusual noted.

17 Ex. E, p 16.
18 Mr. B's testimony.
19 Mr. B's testimony.
20 D C, Psyd, ABPP, evaluation notes from May 3, 2018, p. 2.
21 Ex. E, pp. 13 – 14.
22 *See* Ex. E, pp. 9 – 10. Mr. P U' testimony.
23 Mr. B's testimony. Ex. 4, p. 28.
24 Ex. 4, p. 33.
25 Ex. 4, p. 33.
26 *See* Ex. 4, pp. 33 – 47.

January 15	Awake from 3 a.m. on.
January 16 – 25	Either slept well, or nothing unusual noted.
January 26	Awake about 6 a.m.
January 27 – 31	Either slept well, or nothing unusual noted.[27]

The sleep logs for Mr. U all indicate that he "was checked on every 15 minutes for health and safety."[28] Mr. B and Ms. H both testified that the 15 minute check in is a feature of the forms used and does not conform to reality: Mr. U always has someone with him at all times.[29] They were both credible witnesses. Their testimony was also corroborated by that of Mr. P U, who visits his son every night, and testified that staff is always with Mr. U, unless they have to leave very briefly to get his medications or use the restroom.[30]

On May 16, 2019, PA-C Olsen, who is one of Mr. U's medical providers, wrote that Mr. U "remains at his healthcare baseline which requires continuation of his 1 to 1 care."[31] On May 22, 2019, another one of Mr. U's medical providers, Dr. G, M.D., wrote that Mr. U "requires one-on-one care at this point. He also requires total 24-hour care for his safety."[32]

V. Discussion

The critical issue here is whether Mr. U satisfies the strict requirements of the Acuity services regulation. Does he "because of [his] physical condition or behavior," need "direct one-to-one support from direct care workers whose time is dedicated solely to providing [those] services ... to that one recipient 24 hours per day, seven days per week"?[33] Because Mr. U was receiving Acuity services as part of his 2018 POC and is seeking to renew them, the Division has the burden of proof to establish that he no longer requires these services.[34]

The evidence in this case shows that Mr. U continues to place himself at risk by self-injurious behaviors, by trying to place inedible objects in his mouth, and by trying to dislodge the abdominal binder which protects his g-tube. His staff are able to forestall his behavior for the most part. They are not always successful, as shown by the fact that he was able to dislodge his g-tube, while being changed on February 7, 2019. However, the fact that staff are present means

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27 Ex. 4, pp. 18 – 26.
28 *Id.*
29 Mr. B's testimony; Ms. H's testimony.
30 Mr. P U' testimony.
31 Ex. G, p. 2.
32 Ex. G, p. 3.
33 7 AAC 130.267(b)(2).
34 7 AAC 49.135.

that when he does engage in self-injurious behaviors, they can intervene and, if necessary, seek immediate medical attention.

The credible witness testimony of Ms. H, Mr. B, and Mr. P U established that, the care logs showing 15-minute checks notwithstanding, that Mr. U does receive continuous care. This case could possibly have been averted if Mr. U's caregivers did not use a care log format that confused the issue.

The evidence as a whole, however, does not show any improvement to Mr. U's condition or that his care needs have diminished. This issue was squarely dealt with in 2017 when the Commissioner's delegate's decision found that Mr. U qualified for Acuity services, despite the fact that the revised decision found at one point that "[s]taff sometimes stay with Mr. U in his room through the night. Other nights they check on him frequently."[35] Given the consistency of Mr. U' care needs and the evidence showing that Mr. U receives round the clock care from a dedicated staff member, the Division has not met its burden of proof. As a result, Mr. U remains eligible for Acuity services.

VI. Conclusion

The Division's denial of Mr. U' request to renew his Acuity services is REVERSED.

Dated: June 28, 2019

Signed
Lawrence A. Pederson
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 9th day of July, 2019.

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

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

[35] *Decision on Remand*, p. 10. OAH Case No. 17-0217-MDS.