

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

In the Matter of)
)
M L) OAH No. 18-1031-MDS
_____)

DECISION AFTER REMAND

I. Introduction

M L receives services funded under the Intellectual and Developmental Disabilities (IDD) Medicaid Home and Community-based Waiver (Waiver) program. His 2018 – 2019 Plan of Care (POC) provided him with an average of 12 hours per week of day habilitation services. In August 2018, M’s team submitted an amendment to his POC, seeking to “transfer” 17 hours per week, during 3 non-school weeks (204, 15-minute units) of in-home support services to day habilitation services. The Division of Senior and Disabilities Services approved the reduction of in-home support services, but denied the increase of day habilitation services, effectively reducing M’s over-all service hours by 17 hours during 3 non-school weeks. M’s mother, N L challenged the Division’s decision.

A hearing was held on January 9, 2019. Following the hearing, a proposed decision was issued concluding that Alaska Medicaid regulations plainly intended to limit a recipient’s use of day habilitation services to 624 hours per year, or an average of 12 hours per week for 52 weeks, unless the recipient faces institutionalization or risk to his health and safety without additional day habilitation hours. The proposed decision found that assisting recipients with acquiring, retaining, or improving their self-help, socialization, behavior, and adaptive skills is the very purpose of day habilitation services, and thus, the fact that day habilitation may be a successful tool for teaching and practicing communication skills that will eventually make a recipient safer and more independent in the community, is not enough to justify hours over the regulatory cap. The administrative law judge concluded that because the decision being appealed is the approval or denial of an amendment to a year-long POC, the appropriate standard is whether denying hours above the 12-hour regulatory cap, will create an actual risk to health and safety during the plan year. The proposed decision found that while the evidence showed that M benefits from day habilitation services, the evidence did not show that he faces institutionalization or risk to his health and safety if his day habilitation hours are not increased above the regulatory maximum. The proposed decision affirmed the Division’s decision to deny the additional day habilitation hours. But because the preponderance of the evidence showed that M needs the waiver service hours he receives, and his team did not intend to request a

reduction of overall service hours through the amendment, the proposed decision remanded the case to the Division to allow Ms. L and M’s team the opportunity to withdraw the POC Amendment.

Ms. L filed a proposal for action, arguing that the proposed decision arbitrarily incorporates a one-year limit on health and safety issues. Ms. L argued that M endures significant deficits in communication, social interaction, and sensory processing that threaten his health and safety and place him at risk of institutionalization now and in the future—that the services are necessary for M’s future health and safety.

After considering the proposal for action and reviewing the record in the case, the Commissioner of Health and Social Services’ delegatee declined to adopt the proposed decision and returned the case to the Office of Administrative Hearings (OAH) to conduct an evidentiary hearing for additional evidence relevant to issues of health and safety. A remand hearing was held on March 20, 2019.

This decision concludes that assisting recipients with acquiring, retaining, or improving their self-help, socialization, behavior, and adaptive skills is the very purpose of day habilitation services, and thus, the fact that day habilitation may be a successful tool for teaching and practicing communication skills that will *eventually* make a recipient safer and more independent in the community, is not enough to justify hours over the regulatory cap. Moreover, because POCs are reviewed annually and recipients may seek amendments as needed, determining whether a denial of hours above the regulatory cap poses actual health and safety risks during the plan year at issue is not arbitrary. However, because the additional evidence presented at the remand hearing shows a risk to M’s health and safety if his day habilitation hours are not increased above the regulatory maximum, the Division’s decision to deny the POC Amendment is REVERSED.

II. Facts

A. Background

M is a child, whose primary diagnosis is autism.¹ His most recent Inventory for Client and Agency Planning (ICAP) scoring reflects an overall age equivalence of 2 years, 4 months for Adaptive Behavior, with functional ages of: 3 years, 5 months in the domain of Motor Skills; 1 year, 2 months in the domain of Social and Communication skills; 3 years, 9 months in the domain of Personal Living; 1 year, 11 months in the domain of Community Living; and 2 years, 4 months in the domain of Broad Independence.² His ICAP notes one mild problem behavior of hurting self, 1 to 10 times per day.³ His Maladaptive Behavior Index

¹ Ex. F at 4; Ex. 5 at 13.

² Ex. 7 at 2.

³ Ex. 7 at 2.

Scores were “within normal range.”⁴ He requires regular personal care and close supervision.⁵ As a result of his autism, M has delays in social awareness and development.⁶ He has severe deficits with communication, social interaction, and sensory processing.⁷ M requires structure and supervision.⁸ He has limited ability to cope with changes or deal with unexpected events.⁹

M lives with his parents, N and E L.¹⁰ He has good natural supports, and his family ensures that his needs are met.¹¹ Ms. L is M’s primary caregiver,¹² and his parents ensure that he has supervision 24 hours per day.¹³ Ms. L has devoted her career to navigating the special needs system and advocating for M and other individuals with special needs.¹⁴

M’s health has been stable over the past year.¹⁵ He has not been hospitalized.¹⁶ He has not had any procedures or surgeries in the last year, and there are no surgeries or procedures scheduled in the future.¹⁷

M is mostly non-verbal.¹⁸ While he can occasionally greet people and say some words, when he does talk, his speech is generally echolalia (i.e. meaninglessly repeating or echoing what other people say to him).¹⁹ He is making progress with his communication skills, but it is sometimes difficult to understand what he is saying.²⁰ M has a speaking device, but he does not independently use it unless prompted to do so.²¹ M’s echolalia has gotten increasingly worse as he has gotten older.²²

M cannot communicate what he wants or needs, and he needs prompts to do the most basic day-to-day activities.²³ Ms. L has noticed a marked regression in M’s ability to take initiative for things as simple as getting out of bed.²⁴ If someone does not prompt him or engage him, M just sits.²⁵

4 Ex. 7 at 3.

5 Ex. 7 at 3.

6 Ex. 2.

7 Ex. 1 at 18.

8 Ex. E at 7; Ex. F at 13.

9 Ex. E at 7; Ex. F at 13.

10 Ex. F at 5.

11 Ex. F at 5.

12 Ex. 8.

13 Ex. F at 5.

14 Ex. 8.

15 Ex. F at 5.

16 Ex. F at 5.

17 Ex. F at 5.

18 Testimony of N L.

19 L Testimony.

20 Ex. F at 6.

21 L Testimony.

22 L Testimony.

23 L Testimony.

24 L Testimony.

25 L Testimony.

Although M is usually happy and easy-going, he frequently becomes frustrated.²⁶ This generally occurs when he is unable to verbalize what he needs or when his routine is interrupted.²⁷ When frustrated, he acts out by banging or hitting himself on the head.²⁸ M's frustration escalates to the point of hitting himself a couple of times a day, and he hits himself hard enough to cause a bloody nose.²⁹ The frequency and intensity of M's outbursts have increased within the last six months.³⁰ M has kicked his mom twice within the last year—a problem behavior that is new.³¹

M's safety in the community is a concern.³² He requires prompting to do basic, day-to-day activities.³³ Because of his profound communication impairments, he is unable to communicate with strangers.³⁴ He is unable to express needs, fear, or danger, and he does not know his address or phone number.³⁵ He does not pay attention to his surroundings, and he is unable to identify dangerous situations, risks, or “stranger danger.”³⁶ M requires supervision when out in the community to assure his safety and protect him from vehicles both in parking lots and on the street.³⁷

Day habilitation services are beneficial to M.³⁸ He is generally happier after he has been out in the community.³⁹ He needs exposure to the community to work on his communication and socialization skills.⁴⁰ The primary focus of M's day habilitation is to work on his socialization, communication, and safety skills in public.⁴¹ M is more productive, more communicative, and usually easier to work with at home, after day habilitation time.⁴² Whereas when M has experienced a decrease in his day habilitation hours, M's level of frustration has increased and his problem behaviors have escalated.⁴³ M's providers have also noticed less progress with his speech therapy.⁴⁴ M acts less independently and requires more prompts when he has less practice in the community.⁴⁵

²⁶ Ex. F at 6; L Testimony.

²⁷ Ex. F at 6; L Testimony.

²⁸ L Testimony.

²⁹ L Testimony.

³⁰ L Testimony.

³¹ L Testimony.

³² Ex. F at 7; L Testimony; Testimony of D J; Testimony of K D.

³³ L Testimony.

³⁴ Ex. E at 7; L Testimony.

³⁵ Ex. E at 7; L Testimony.

³⁶ Ex. E at 7; L Testimony.

³⁷ Ex. F at 7.

³⁸ J Testimony.

³⁹ L Testimony.

⁴⁰ J Testimony.

⁴¹ Ex. E at 7; Ex. F at 13.

⁴² L Testimony.

⁴³ J Testimony.

⁴⁴ J Testimony.

⁴⁵ D Testimony.

In addition to the Waiver services, M receives four hours of speech therapy and one hour of occupational therapy each week. He receives special education services for six and a half hours per day, 5 days a week through the a School District.⁴⁶ He receives one hour of Hippotherapy each week in the summer and two hours of adaptive skiing each week in the winter.⁴⁷ M also attends a week-long therapy camp each summer.⁴⁸

B. M's IDD Plans of Care

M receives waiver services through the IDD program. His services include in-home supports, individual day habilitation, daily respite, and hourly respite. M's day habilitation services are the subject of the current dispute.⁴⁹

1. M's 2017 – 2018 Plan of Care

M's 2017 – 2018 Plan of Care (POC) for April 4, 2017 through April 3, 2018 provided him with an average of 13 hours per week of day habilitation services.⁵⁰ The plan noted that M requires structure and supervision; that he does not socialize well with his peers; and that he has limited ability to cope with changes.⁵¹ The primary focus of M's day habilitation was to work on his safety skills in public and socialization.⁵² The plan described M's day habilitation services as essential to help him learn needed skills and behaviors.⁵³

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. Under the new 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

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

⁴⁶ Ex. F at 7.

⁴⁷ Ex. F at 7.

⁴⁸ Ex. F at 7.

⁴⁹ Ex. F at 3.

⁵⁰ Ex. 6 at 4 & 5.

⁵¹ Ex. 6 at 5.

⁵² Ex. 6 at 5.

⁵³ Ex. 6 at 5.

(B) prevent institutionalization.⁵⁴

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.⁵⁵

The Department did not, however, rescind the day habilitation regulation.

3. *M's 2018 – 2019 Plan of Care*

In January 2018, M's Care Coordinator, D J submitted a POC for services from April 4, 2018 through April 3, 2019.⁵⁶ The 2018 – 2019 POC requested 5 hours a week for school weeks and 27 hours per week for non-school weeks (for a total of 2,448, 15-minute units) of in-home support services;⁵⁷ and an average of 12 hours a week (2,496, 15-minute units) of day habilitation services.⁵⁸

As with the previous year's plan, the 2018 – 2019 POC noted that M requires structure and supervision; that he does not socialize well with his peers; and that he is limited in his ability to cope with changes.⁵⁹ The primary focus of M's day habilitation was to work on his safety skills in public and socialization.⁶⁰ The plan described M's day habilitation services as essential to help him learn needed skills and behaviors.⁶¹ M's day habilitation goals include objectives related to effective social communication skills and learning age-appropriate social boundaries and interactions.⁶² Ms. J testified that without the regulatory change, she would have recommended the same amount of day habilitation hours as requested in the previous POC.⁶³

4. *M's 2018 – 2019 Plan of Care Amendment*

On August 8, 2018, Ms. J submitted an Amendment to POC for services April 4, 2018 through April 3, 2019 through the Division's DSM service.⁶⁴ In the amendment, M's team sought "to transfer some

⁵⁴ 7 AAC 130.260(c).

⁵⁵ 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>.

⁵⁶ Ex. F.

⁵⁷ Ex. F at 3 & 10.

⁵⁸ Ex. F at 3 & 13.

⁵⁹ Ex. F at 13.

⁶⁰ Ex. F at 13.

⁶¹ Ex. F at 13.

⁶² Ex. F at 13 – 14.

⁶³ Ex. F at 13 – 14.

⁶⁴ Ex. E.

of [M's] In Home Support services hours to Day Habilitation services to better meet M's needs."⁶⁵ In particular, the POC Amendment sought to reduce M's in-home support services to 10 hours weekly for three non-school weeks and to increase his day habilitation hours to 17 hours per week, during the three non-school weeks.⁶⁶ According to the POC Amendment, M's Speech Language Pathologist, W O H requested that M receive additional day habilitation hours to allow him more opportunities to practice his social language skills in the community.⁶⁷ Like M's other POCs, the Amendment noted that M requires structure and supervision; that he does not socialize well with his peers; and that he is limited in his ability to cope with changes.⁶⁸ In addition, the amendment noted M's profound "communication impairment" and added communication skills, as well as safety skills and socialization, to the primary focus of M's day habilitation.⁶⁹ M's day habilitation goals and objectives remained the same: effective social communication skills and learning age-appropriate social boundaries and interactions.⁷⁰ Ms. J explained that M's inability to communicate is a safety concern, and part of the reason M's team requested the amendment was that they noticed that M was not progressing as well as he was before they reduced the day habilitation hours.⁷¹

C. The Division's Review and Partial Denial

Due to technical issues with the Division's DSM email system, the Division did not receive or begin to process the POC Amendment until August 28, 2018.⁷² The amendment was assigned to Esther Hayes, a Health Program Manager in the Division's IDD unit, for review. Ms. Hayes did not believe that the amendment sufficiently documented a need for day habilitation in excess of the presumptive maximum of twelve hours per week.⁷³ The Division gave M's team the opportunity to submit any additional information that may support the amendment request in excess of the regulatory limitation.⁷⁴ M's team asked the Division to process the amendment with the information provided. On October 10, 2018, the Division notified M's parents that the reduction of in-home support services was approved, but the Division denied the increase in day habilitation hours, effectively reducing M's over-all service hours by 17 hours during 3 non-school weeks.⁷⁵

⁶⁵ Ex. E at 3.

⁶⁶ Ex. E at 4 & 7.

⁶⁷ Ex. E at 3.

⁶⁸ Ex. E at 7.

⁶⁹ Ex. E at 7.

⁷⁰ Ex. E at 7 – 9.

⁷¹ J Testimony.

⁷² Testimony of Esther Hayes.

⁷³ Hayes Testimony; Ex. D at 2.

⁷⁴ Ex. D at 1.

⁷⁵ Ex. D at 1.

Waiver services are not transferrable.⁷⁶ Instead, the Division reviews requests to change each service separately.⁷⁷ So in this case, the Division reviewed the request to reduce in-home support services separately from the request to increase day habilitation services.⁷⁸ The Division approved the request to reduce the in-home support services.⁷⁹ But the Division could not approve the request to increase day habilitation hours without applying the regulatory cap set out in 7 AAC 130.260(c).⁸⁰

Based on the information presented by M’s team (i.e. that they viewed the additional day habilitation hours important for M’s health and safety), the Division focused on M’s health and safety as a potential justification for additional day habilitation hours. According to Ms. Hayes, risk of institutionalization and health and safety “go hand in hand,” and the Division considers risk of institutionalization in every case. Here, there was nothing articulated in M’s POC indicating that his team considered him to be at risk of institutionalization.⁸¹ Ms. Hayes explained that when deciding whether additional day habilitation hours over the regulatory cap are warranted, the Division looks for extraordinary circumstances and looks at the whole picture, including but not limited to: all the supports in place, other services, past institutionalization, hospitalizations, critical incident reports, psychological exams, previous POCs, current needs, past use of services, service scores, and ICAP.

The denial letter cited the changed regulations for day habilitation services and provided a link to all the Medicaid waiver regulations.⁸² While the letter acknowledged the benefits of day habilitation services for M, the Division concluded that the approved level of services meets M’s needs:

While the department acknowledges that M may benefit from additional Day Habilitation, the Division determines that his approved level of services, combined with his natural supports, educational supports, and other community activities meet his needs as presented and maintain his health and safety. Therefore the request for the additional 204 units, or 17 hours per week for 3 weeks, is denied due to lack of justification and supporting documentation.⁸³

Ms. Hayes concluded that although communication is important, most waiver recipients struggle with communication, and denying day habilitation hours over the regulatory cap would not negatively impact M’s health and safety.⁸⁴

D. Appeal

⁷⁶ Hayes Testimony.
⁷⁷ Hayes Testimony.
⁷⁸ Hayes Testimony.
⁷⁹ Hayes Testimony.
⁸⁰ Hayes Testimony.
⁸¹ Hayes Testimony.
⁸² Ex. D at 2.
⁸³ Ex. D at 2.
⁸⁴ Hayes Testimony.

Ms. L requested a hearing to challenge the denial of additional day habilitation services and the overall reduction in M's benefits. The original hearing for that appeal was held in Anchorage on January 9, 2019. Assistant Attorney General Paul Peterson represented the Division. Division Health Program Manager Esther Hayes testified for the Division. M was present, and he and Ms. L were represented by Alaska Legal Services attorney, P G. Present and testifying on M's behalf were: Ms. L; M's care coordinator, D J; and his direct care provider K D. All exhibits offered by both parties were admitted without objection.

A proposed decision was issued concluding that Alaska Medicaid regulations plainly intended to limit a recipient's use of day habilitation services to 624 hours per year, or an average of 12 hours per week for 52 weeks, unless the recipient faces institutionalization or risk to his health and safety without additional day habilitation hours. The proposed decision found that assisting recipients with acquiring, retaining, or improving their self-help, socialization, behavior, and adaptive skills is the very purpose of day habilitation services, and thus, the fact that day habilitation may be a successful tool for teaching and practicing communication skills that will eventually make a recipient safer and more independent in the community, is not enough to justify hours over the regulatory cap. The administrative law judge concluded that because the decision being appealed is the approval or denial of an amendment to a year-long POC, the appropriate standard is whether denying hours above the 12-hour regulatory cap, will create an actual risk to health and safety during the plan year. The proposed decision found that while the evidence showed that M benefits from day habilitation services, the evidence did not show that he faces institutionalization or risk to his health and safety if his day habilitation hours are not increased above the regulatory maximum. The proposed decision affirmed the Division's decision to deny the additional day habilitation hours. But because the preponderance of the evidence showed that M needs the waiver service hours he receives, and his team did not intend to request a reduction of overall service hours through the amendment, the proposed decision remanded the case to the Division to allow Ms. L and M's team the opportunity to withdraw the POC Amendment.

Ms. L filed a proposal for action, arguing that the proposed decision arbitrarily incorporates a one-year limit on health and safety issues. Ms. L argued that M endures significant deficits in communication, social interaction, and sensory processing that threaten his health and safety and place him at risk of institutionalization now and in the future—that the services are necessary for M's future health and safety.

After considering the proposal for action and reviewing the record in the case, the Commissioner of Health and Social Services' delegee declined to adopt the proposed decision and returned the case to the Office of Administrative Hearings (OAH) to conduct an evidentiary hearing for additional evidence about:

any specific special needs, deficits, and/or communication barriers that pose health and safety risks to M; any identifiable and actual health and safety problems or risks; what services were intended to be provided under the additional day habilitation hours that specifically address those health and safety needs; how the additional hours of day habilitation hours will reduce risk to health and safety; any identifiable impacts to M's health and safety related skill development when day habilitation hours have been fewer; and whether M regressed, plateaued, or had identifiably slower rates of progress towards health and safety related skill development when his day habilitation hours have been fewer.

A remand hearing was held on March 20, 2019. Assistant Attorney General Paul Peterson represented the Division. M and Ms. L were represented by Alaska Legal Services attorney, P G. The Division did not present any additional witness testimony. Ms. L testified on behalf of M.

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.”⁸⁵ The Division must approve each specific service as part of the Waiver recipient's POC.⁸⁶

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.⁸⁷

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.⁸⁸ In October 2017, the Department amended 7 AAC 130.260(c)—the regulation governing the day habilitation services—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.”⁸⁹ So, under the 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

⁸⁵ 7 AAC 130.217(b)(1).

⁸⁶ 7 AAC 130.217(b).

⁸⁷ 7 AAC 130.260(b).

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

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

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.⁹⁰ However, the regulation has not been rescinded.

As a threshold issue, a dispute arose over the Division's notice of partial denial of the POC Amendment. Ms. L argued that the Division's notice was misleading because it "intimat[ed] there is a hard cap on relevant services and by evoking an incorrect standard." She also argued that the Division's notice failed to address whether M was at risk of institutionalization.

However, the Division cited and quoted the applicable regulation and gave a brief explanation of its reasoning. The regulation does indeed limit the number of day habilitation hours without a showing that additional hours are necessary. And consistent with the settlement agreement, the Division applied an "or" standard to M's case.

M's team stressed health and safety as a justification for additional day habilitation hours. Nothing in the POC Amendment or the previous POCs indicated that M's team considered him to be at risk of institutionalization. Nevertheless, the Division considers risk of institutionalization in every case. As Ms. Hayes explained, when deciding whether additional day habilitation hours over the regulatory cap are warranted, the Division looks at the whole picture, including but not limited to: all the supports in place, other services, past institutionalization, hospitalizations, critical incident reports, psychological exams, previous POCs, current needs, past use of services, service scores, and ICAP. The Division did that here and concluded that the approved level of services meets M's needs.

Although the letter the Division sent to M's parents did not use the words "risk of institutionalization" in its conclusion and the letter could certainly have provided more detail, the notice did inform M's team of both the legal and factual basis of the denial. As a result, the Division provided adequate, albeit minimal, notice.

B. Timeliness of the Division's Decision

Ms. L argues that the Division's decision was improper because the Division's delay in processing the POC Amendment violated 7 AAC 130.217(e). Alaska regulation 7 AAC 130.217 states: "Not later than 30 business days after the department receives a complete plan of care amendment, the department will notify the recipient, the recipient's representative, and the recipient's care coordinator of the department's approval or disapproval of specific services."

⁹⁰ 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>.

In this case, M's team submitted the amendment through the DSM email system on August 8, 2018. Unfortunately, because of systemic issues with the DSM system, the Division did not receive or process the amendment until August 28—20 days after it was submitted. The delay was not the fault of either party. And the Division issued its decision within 30 business days of the date the amendment was date-stamped.

Assuming the Division's decision was untimely, 7 AAC 49.170 limits the power of OAH in cases like this to whether the relevant law was properly applied, and whether the benefit amount was properly calculated. Although OAH regulations give ALJs the power to levy sanctions in certain limited circumstances, those circumstances are not present here.⁹¹ Accordingly, to the extent there was a delay in the Division's decision, that delay is noted, but it cannot be adjudicated in this forum.⁹²

C. Burden of Proof

Typically, if the Division reduces the level of services, it bears the burden of proving the reduction is appropriate.⁹³ However, in this case M's team sought an increase of 17 hours per week, during 3 non-school weeks of day habilitation hours. Although M's team sought to offset the additional day habilitation hours by reducing M's in-home support services, and the net hours for both services requested under the POC amendment is the same as what M received under his 2018 – 2019 POC, M's team is seeking an increase of M's day habilitation services. Accordingly, Ms. L bears the burden of proving, by a preponderance of the evidence, that the additional day habilitation service hours are warranted. Moreover, because the requested hours exceed the regulatory cap, Ms. L must prove that M requires more than the presumptive maximum of 12 hours of day habilitation per week to protect his health and safety or to prevent institutionalization.

D. Whether more than 12 hours per week of day habilitation services are necessary to protect M'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 and prevent institutionalization, the regulations do not define or quantify the protection to health and safety or risk of institutionalization associated with this exception. Nor does the Division have written guidance for determining when circumstances warrant the exception.

Although Ms. L faults the Division for not providing a thorough explanation of its risk of institutionalization in its denial letter, there is absolutely no evidence in the record showing that M is at risk of institutionalization if he does not have more than 12 hours of day habilitation services per week. On the

⁹¹ See 2 AAC 64.360.

⁹² See *ITMO M.L., Jr.*, OAH Case No. 13-1572-MDS (April 25, 2014).

⁹³ 7 AAC 49.135.

contrary, M is a child, who lives with his parents. And although he has significant special needs warranting waiver services, he has good natural supports, and his family ensures that his needs are met. He receives 24-hour supervision. His mother has devoted her career to navigating the special needs system and advocating for M. His health has been stable over the past year. And though he has some behavioral challenges when frustrated, any problem behaviors are mild. Moreover, M has significant resources and supports in place. The approved waiver services, combined with his natural supports, educational supports, and other community activities have worked to prevent any risk of institutionalization.

The real issue here is whether more than 12 hours per week of day habilitation services are necessary to protect M’s health and safety. M’s team argues that his inability to communicate creates a health and safety risk, and thus, the work they are doing with M in the community through day habilitation services is necessary to protect his health and safety. They reason that the strides M is making through real-world practice in the community will ultimately help him safely navigate community situations. Whereas, the Division argues that the regulation requires a showing of grave danger to qualify for day habilitation services above the regulatory cap.

Neither the language of the regulation nor the spirit of the waiver program supports either reading of the “health and safety” component of the day habilitation regulation. While the regulation is plainly intended to limit recipients’ use of day habilitation services, it is possible that such services can be “necessary to protect health and safety,” even if withdrawing them will not lead to a “grave danger” as required by the standard applied by Ms. Hayes. On the other hand, the fact that day habilitation may be a successful tool for teaching and practicing communication skills that will *eventually* make a recipient safer and more independent in the community, is not sufficient to justify hours over the regulatory cap—assisting recipients with acquiring, retaining, or improving their self-help, socialization, behavior, and adaptive skills is the very purpose of day habilitation services.⁹⁴ Accordingly, determining whether a denial of hours above the regulatory cap poses actual health and safety risks during the plan year at issue is not arbitrary.

The undisputed evidence in this case demonstrates that M has significant impairments with communication and social interactions. He is unable to appreciate or judge risk and danger. And he has significant behavioral issues when he gets frustrated. As a result, there are legitimate safety concerns for M—he requires supervision to access community activities. The evidence also shows that day habilitation services are beneficial for M. His communication and social interaction skills are improving through

⁹⁴ 7 AAC 130.260(b).

practice in the community, and the day habilitation time makes M more productive, communicative, and generally easier to guide, when in the home.

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 [or] . . .to prevent institutionalization.”⁹⁵ As noted, there must be an actual risk to health and safety if the hours above the 12-hour per week regulatory cap are not approved. Here, the evidence shows that just as day habilitation services are intended, they are assisting M with acquiring, retaining, or improving his self-help and socialization; they are reinforcing skills taught in other settings; and they are promoting the skills necessary for independence, autonomy, and community integration.⁹⁶ The evidence also shows that when M experiences a decrease in his day habilitation hours, he experiences less progress with his speech therapy.⁹⁷ When he gets less practice in the community, he acts less independently and requires more prompts for day-to-day activities.⁹⁸ And the frequency and intensity of his problem behaviors have increased since his day habilitation hours were reduced from an average of 13 hours per week to an average of 12 hours per week.⁹⁹ Indeed, since the reduction, M’s frustration escalates to the point of hitting himself a couple of times a day, and he hits himself hard enough to cause a bloody nose.¹⁰⁰ Accordingly, Ms. L has shown that it is more likely true than not true that limiting M’s day habilitation hours to the regulatory cap will result in a risk to his health and safety.

IV. Conclusion

The evidence in this case shows that M benefits from day habilitation services, and he faces risk to his health and safety if his day habilitation hours are not increased above the regulatory maximum. Accordingly, the Division’s decision to deny the additional day habilitation hours is REVERSED.

Dated: March 29, 2019

Signed

Jessica Leeah

Administrative Law Judge

Adoption

⁹⁵ 7 AAC 130.260(c)(2).

⁹⁶ 7 AAC 130.260(b).

⁹⁷ J Testimony.

⁹⁸ D Testimony.

⁹⁹ J Testimony; L Testimony.

¹⁰⁰ L Testimony.

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 29th day of March, 2019.

Signed _____
Laura Russell, J.D.
Department of Health and Social Services
Policy Advisor

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