

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

In the Matters of)
)
S J and) OAH No. 17-1193-MDS
O J) OAH No. 17-1194-MDS
)
_____)

FINAL DECISION AFTER REMAND

A proposed decision after remand was issued on this consolidated case on June 6, 2018. After a review of the record and pleadings in this case, the undersigned, by delegation from the Commissioner of Health and Social Services, and in accordance with AS 44.64.060(e)(3) adopts the proposed decision in its entirety with the following clarification.

Alaska regulation 7 AAC 130.260(c) 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 is necessary to “protect the recipient’s health and safety; and ... prevent institutionalization.”¹ Pursuant to the Alaska Administrative Procedure Act, that amendment was effective on October 1, 2017.² However, because the change to the regulation was substantive, *i.e.*, it reduced services available under the Alaska State Medicaid Intellectual and Developmental Disabilities Home and Community-Based Waiver, the change could not be enforced until it was approved by the federal Centers for Medicare and Medicaid Services (CMS). CMS approved the change effective March 20, 2018. The Division of Senior and Disabilities Services (Division) partially denied the Js’ request for day habilitation services, based upon the amended regulation, on October 27, 2017, prior to the March 20, 2018 CMS approval date. As a result, notwithstanding the fact that the applicable regulation was amended effective October 1, 2017, the Division’s decision to deny the additional hours of day habilitation is reversed.

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 13th day of June, 2018.

By: Signed
Deborah Erickson
Project Coordinator
Department of Health and Social Services

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

² See AS 44.62.180.

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DECISION AFTER REMAND¹

I. Introduction

S J and O J are brothers. They are both autistic young men who receive Medicaid Home and Community-based Waiver (Waiver) services. Their individual 2017 – 2018 Medicaid Plans of Care (POC) included a request that they each receive a total of 30 hours per week of day habilitation services, consisting of 15 hours per week in individual day habilitation services and 15 hours per week of group day habilitation services. On October 27, 2017, the Division of Senior and Disabilities Services (Division) approved the Js’ POCs but limited the day habilitation services to 12 hours per week for each: 6 hours per week in individual day habilitation services and 6 hours per week of group day habilitation services. D K, the Js’ mother and court appointed guardian, requested a hearing to challenge the partial denial of their day habilitation requests.

The Js’ hearing was held on January 22, 2018. Ms. K represented the Js and testified on their behalf. Victoria Cobo represented the Division. Glenda Aasland and Corinna Castillo-Shepherd, both of whom are Health Program Managers with the Division, testified for the Division.

A proposed decision was issued on February 5, 2018. The delegee of the Commissioner of Health and Social Services, acting in her capacity as final decisionmaker, remanded the decision to “hold a supplemental hearing with the parties to allow them to address the 1915(c) HCBS waiver document filed with the Centers for Medicare & Medicaid Services.” Briefing and a supplemental hearing followed. After consideration of the parties’ arguments, this Decision After Remand replaces the proposed decision issued on February 5, 2018 in its entirety.

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 (one year). The applicable regulation allows an exception to that limit if

¹ While these two cases were not formally consolidated, they involve identical factual and legal issues. Accordingly, a joint hearing was held on the two cases and a single decision is being issued.

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. The controlling federal Medicaid regulations explicitly provide that the federal Centers for Medicare and Medicaid Services (CMS) must approve substantive changes to Waiver services before they become effective. The change to the Alaska Medicaid day habilitation regulation was a substantive change because it reduced or limited available day habilitation services, a Waiver service. CMS did not approve the requested change until March 20, 2018, with an effective date of March 20, 2018. As a result, even though the change to the Alaska day habilitation service regulation was adopted as of October 1, 2017, that change could not be applied until March 20, 2018. Consequently, the Division's October 27, 2017 action denying a portion of the Js' requested day habilitation services, based upon the day habilitation regulation change, cannot be supported as a matter of law, and is REVERSED.

II. Facts

S J and O J are brothers. They are both autistic and both receive Medicaid Waiver services through the Intellectual and Developmental Disabilities Waiver category. They live together semi-independently in an apartment, which is attached to their parents' home. In their POCs for 2016 – 2017, they were each approved for individual and group day habilitation services.² When they applied to renew their POCs for 2017 – 2018, they each requested that they receive 15 hours per week of individual day habilitation services and 15 hours per week of group habilitation services.³ On October 27, 2017, the Division partially denied their requests, providing each with a total of 12 hours per week of day habilitation services, which consisted of 6 hours of individual day habilitation services per week and 6 hours of group day habilitation services per week.⁴ This was a substantial reduction from the hours provided in their previous POCs.⁵ The approved amount of day habilitation services for each came to 624 hours per year. The Division's reasoning was that the regulation had changed to cap the number of day habilitation hours to 624 hours per year, and that neither of the Js met the requirements for an exception to that cap, which required them to experience a threat to their health and safety and be at risk of institutionalization if the cap was not exceeded.⁶

² Ex. F, p. 3 (S J – Case No. 17-1193-MDS); Ex. F, p. 3 (O J – Case No. 17-1194-MDS).

³ Ex. E, pp. 20 – 23 (S J – Case No. 17-1193-MDS); Ex. E, pp. 15- 21 (O J – Case No. 17-1194-MDS).

⁴ Ex. D (S J – Case No. 17-1193-MDS); Ex. D (O J – Case No. 17-1194-MDS).

⁵ See 2016 – 2017 list of services: Ex. F, p. 3 (S J – Case No. 17-1193-MDS); Ex. F, p. 3 (O J – Case No. 17-1194-MDS).

⁶ Ex. D (S J – Case No. 17-1193-MDS); Ex. D (O J – Case No. 17-1194-MDS); Ms. Aasland's testimony.

S J and O J are each physically fit energetic young men, who want to be independent. They require a fair amount of physical activity. They like to go on walks and hikes and they will disappear unless they are adequately supervised by trained staff. Even when they are on short excursions with people who know them well, such as when grocery shopping with their mother, they are capable of vanishing and are not found until an hour or two later. An extreme example of what can happen is shown by the fact that S was lost overnight in a forest in 2016.⁷ The family has tried tracking devices and other measures, but those have been ineffective.⁸

III. Discussion

The Medicaid program has a number of coverage categories. One of those coverage categories is the Waiver program.⁹ The 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.”¹⁰ The Division must approve each specific service as part of the Waiver recipient’s POC.¹¹

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.¹² In 2016, the applicable Alaska regulation did not limit the number of day habilitation hours available to a recipient, unless the recipient also received group-home habilitation services:

If the recipient of day habilitation services is also provided group-home habilitation services under 7 AAC 130.265(f), the department will not pay for more than 15 hours per week of day habilitation services from all providers combined, unless the department determines that the recipient is unable to benefit from any other community service or activities.¹³

The Alaska regulation governing day habilitation 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.”¹⁴

⁷ Ms. K’s testimony; Ex. E, p. 4 (S J – Case No. 17-1193-MDS).

⁸ Ms. K’s testimony.

⁹ 7 AAC 100.002(d)(8); 7 AAC 100.502(d).

¹⁰ 7 AAC 130.217(b)(1).

¹¹ 7 AAC 130.217(b).

¹² 7 AAC 130.260(b).

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

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

Ostensibly, the effective date of the amendment was October 1, 2017, but as will be seen below, the amendment did not become effective under governing law until a later date.

The Department of Health and Social Services (Department), in an undated submission¹⁵ to CMS seeking approval of the change to day habilitation services, described it as follows:

Adding limits to a service. This waiver amendment places limits on the amount of day habilitation a recipient can receive in one year. The limit is not unduly conservative and is annualized in order to allow for seasonal fluctuation in usage. The State received and considered all public comment on the regulations proposing the limit on day habilitation, and consequently increased the limit that was initially proposed. The cap is ‘soft’ in that the regulation allows approval in excess of the limit when requested for individuals who are at risk of institutionalization within 30 days, **or** who have health and safety requirements affected by the limit, if justified in a plan of care or amendment.¹⁶

On or about March 9, 2018, the Department filed a revised submission with CMS where it changed the “or” bolded above to “and”, thus aligning it with the actual language of the regulation:

The cap is “soft” in that the regulation allows approval in excess of the limit when requested for individuals who are at risk of institutionalization within 30 days, **and** who have health and safety requirements affected by the limit, if justified in a plan of care or amendment.¹⁷

In that submission, the Department requested that the proposed effective date of the amendment be March 1, 2018.¹⁸ CMS approved the Department’s requested amendment effective March 20, 2018. CMS’s approval letter reads, in part:

[t]his amendment, submitted on January 4, 2018 made the following revisions:

- Amends Appendix C to include service limits on Day Habilitation;¹⁹

As an initial point, it must be noted that state Medicaid agencies are required to comply with federal 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

¹⁵ See Attachment A to this decision. This one page would have been part of a multipage submission to CMS. However, only this one page is present in the record. This document is not contained on either the Department’s or the Division’s website.

¹⁶ Attachment A (emphasis supplied).

¹⁷ See March 9, 2018 email to CMS (Attachment B, p. 1) and Amendment Request (Attachment B, pp. 2 – 3). The complete application from March 9, 2018 is available online at <http://dhss.alaska.gov/dsds/Documents/pdfs/IDD-ApprovedWaivers.pdf> (date accessed May 24, 2018).

¹⁸ Attachment B, p. 2.

¹⁹ Attachment C, p. 1.

voluntary, participating States must comply with certain requirements imposed by the Act and regulations promulgated by the Secretary of Health and Human Services (Secretary).²⁰

Federal Medicaid regulations require that CMS must approve substantive changes to Waiver services before they become effective:

(d) The agency may request that waiver modifications 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 amendment 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.²¹

The federal regulation cited above leads to the conclusion that the amendment to the Alaska day habilitation regulation was a substantive change, which had to be approved by CMS before it went into effect. CMS approved the amendment on March 20, 2018 effective March 20, 2018. This means that even though Alaska's change to its day habilitation regulation was adopted as of October 1, 2017, it could not enforce or apply that change until March 20, 2018.

The Division has strenuously argued that the new Alaska regulation must be enforced as written with an effective date of October 1, 2017. This argument is baffling. It ignores the federal requirements with which a state must comply as a condition for participation in the Medicaid program. It also ignores the fact that the Department issued a public notice on October 24, 2017, directed to "recipients, waiver service providers, and other stakeholders," asking for comments on proposed amendments to Alaska's Waivers before "these items are submitted to" CMS and specifically identifying one of the proposed amendments as being one to "[a]lign the service limit for day habilitation with adopted regulations."²² It also ignores that Department's own submission of March 9, 2018, which asked for an effective date of March 1, 2018 – a date

²⁰ *Wilder v. VA. Hosp. Ass'n*, 496 US 498, 502 (1990).

²¹ 42 C.F.R. § 441.304(d).

²² Attachment D: "Notice of Amendments to Medicaid Waivers and Proposed New Medicaid Waiver." <https://aws.state.ak.us/OnlinePublicNotices/Notices/View.aspx?id=187510> (date accessed May 25, 2018).

several months after October 1, 2017. Having asked for an effective date in March of 2018, and received an effective date in March of 2018, the Department obtained a regulation that appeared on the books in 2017 but became effective in March of 2018.

No regulation can be applied before its effective date. This decision does not declare the regulation invalid. It merely addresses the date when the Division can begin applying the regulation as written. That effective date is March 20, 2018, the effective date approved by CMS. As a result, the October 27, 2017 partial denial of the Js' request for day habilitation services must be reversed.

There is an alternative ground for ruling in favor of the Js in this case. That is because in its initial communications with CMS, the Department represented that the change to the day habilitation regulation limiting day habilitation hours to 624 hours per year (12 hours per week) allowed "approval in excess of the limit when requested for individuals who are at risk of institutionalization within 30 days, **or** who have health and safety requirements affected by the limit."²³ While the Department subsequently changed its position to CMS, stating instead that exceeding the limit was allowable for "individuals who are at risk of institutionalization within 30 days, **and** who have health and safety requirements affected by the limit,"²⁴ that change in the Department's representation did not occur until March 9, 2018. Accordingly, the Department's official position, up until March 9, 2018, was that the regulation allowed the limit to be exceeded for "individuals who are at risk of institutionalization within 30 days, **or** who have health and safety requirements affected by the limit." The Department is bound by this position for actions preceding March 20, 2018, the date of final approval by CMS.

The undisputed evidence in this case demonstrates that there are legitimate safety concerns for both S J and O J due to their propensity to wander. Day habilitation services help to keep them both safe. On its face, *assuming arguendo* that the regulation was enforceable beginning October 1, 2017, this justifies exceeding the limits contained in the day habilitation regulation at the time the Division made its October 27, 2017 decision denying the Js day habilitation services over the 624 hour yearly limit.

It must also be noted that Ms. K voiced legitimate concerns that without day habilitation services, the Js would both be forced into a group home instead of the degree of independence they are currently afforded. Ms. K argued that a group home is an institution.

²³ Attachment A (emphasis supplied).

²⁴ Attachment B, p. 2 (emphasis supplied).

The applicable regulations do not define the terms institution or institutionalization.²⁵ However, day habilitation services are only available to individuals who are in a residential setting, *i.e.*, a non-institutional setting. Residential settings include assisted living homes, group homes, and foster homes.²⁶ It therefore follows that assisted living homes, group homes, and foster homes are not “institutions.”

Bearing in mind that a group home is not an “institution,” there is no evidence that either S J or O J have any serious behavioral or psychological issues that could place them in an institution of some type such as an in-patient treatment center or a psychiatric hospital. While day habilitation services help to assure their safety, the evidence does not show that it is more likely true than not true that either faces institutionalization unless they each receive more than 12 hours per week of day habilitation services.

In summary, the history of the regulation demonstrates that the change limiting day habilitation hours was not approved by CMS until March 20, 2018 with an effective date of March 20, 2018. As a result, even though the amendment to the regulation was in place on October 1, 2017, the Department could not apply it until March 20, 2018. Alternatively, the Js have demonstrated that their request for day habilitation services was necessary for their health and safety. Accordingly, the Division’s partial denial of S J’s and O J’s requests for day habilitation services is reversed.

IV. Conclusion

The Division’s partial approval of S J’s and O J’s request for day habilitation services for 12 hours per week (624 hours per year), rather than the 30 hours per week that were requested for each, is reversed. Their requests for day habilitation services are approved in full.

DATED this 6th day of June, 2018.

Signed

Lawrence A. Pederson
Administrative Law Judge

²⁵ The general Medicaid regulations contain definitions for “medical institution,” (7 AAC 100.990(29)), but none for the generic term “institution” or “institutionalization.” *See* 7 AAC 100.990 (General Medicaid regulations); 7 AAC 130.319 (Medicaid Waiver regulations); 7 AAC 160.990 (General Medicaid Definitions).

²⁶ 7 AAC 130.260(b); 7 AAC 130.265(b)(1) and (f)..