

**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. 19-0442-MDS
) Agency No.
_____)

DECISION

I. Introduction

N B is a disabled adult Medicaid recipient who was receiving 20 hours per week of day habilitation services as part of her 2018 – 2019 Medicaid Waiver Plan of Care (POC). Her renewal POC for 2019-2020 requested that she continue to receive 20 hours per week of day habilitation services. The Division of Seniors and Disabilities Services (Division) approved 12 hours per week of day habilitation services, a reduction of 8 hours per week.

Ms. B’ mother and guardian T T requested a hearing to challenge the reduction in Ms. B’ services. The hearing was held on June 28, 2019. Ms. T represented her daughter and testified on her behalf. Ms. B’ Medicaid Care Coordinator, E P, and S V, a regional supervisor with Consumer Direct Network, which provides services to Ms. B, also participated in the hearing. Terri Gagne, a Health Program Manager with the Division represented the Division. Glenda Aasland, a Health Program Manager with the Division, testified on its behalf.

Ms. B has the burden of proof in this case. In order to continue to receive more than 12 hours per week of day habilitation services, she must show that it is more likely true than not true that a reduction to 12 hours per week of day habilitation services will either result in her health and safety being placed at risk or that it will place her at risk of institutionalization. She did not meet her burden of proof. Accordingly, the Division’s reduction of Ms. B’ day habilitation services to 12 hours per week is upheld.

II. Facts

Ms. B is 36 years old. She is disabled and experiences a number of health impairments. Those include developmental delays, intellectual disability, legal blindness, neurological disorder, pseudo seizures, and hydrocephalus. She has a VP shunt. She experiences frequent protracted severe headaches, which last for extended periods of times. Ms. B lives with her mother. Her mother and

siblings help care for her. Ms. B requires a great deal of oversight and supervision.¹ The last time Ms. B had a seizure was approximately two and three-quarter years ago.²

In the plan year preceding this one, the 2018 – 2019 plan year, Ms. B requested that she receive 35 hours per week of supported living services, 20 hours per week of day habilitation services, and 10 hours per week of respite care. In addition, she requested that she receive 14 full days of respite care. The Division approved Ms. B' request with the exception of day habilitation services, which it reduced to 12 hours per week.³ Ms. B requested a hearing challenging that reduction. After the hearing was concluded, the decision found that a reduction of Ms. B day habilitation hours to 12 hours per week would not pose a danger to her health and safety, nor would it place her at risk of institutionalization. However, because there was a settlement in a federal class action suit that resolved the issue, the decision concluded that Ms. B should continue to receive 20 hours per week of day habilitation services, even though she would not otherwise be eligible for that amount.⁴

When Ms. B applied to renew her POC for the 2019 – 2020 plan year, she requested that she receive the same amount of services that she received in the 2018 – 2019 plan year, including 20 hours per week of day habilitation services. The Division approved the requested services, with the exception of day habilitation, which it again reduced to 12 hours per week. The Division's rationale was Ms. B did not have the health and safety needs or the risk of institutionalization necessary to entitle her to receive more than 12 hours per week of day habilitation services.⁵

Ms. B uses her day habilitation time for shopping, errands outside the home, bingo, and Special Olympics. Shopping occurs on Mondays and takes a little over an hour. Errands occur on Tuesday and take approximately two hours. Bingo occurs on Wednesdays and Thursdays, each of which take approximately three hours. The Special Olympics activities vary, and include items such as bowling, snowshoeing, bocce or other sports. They can occur twice weekly and, including transportation to and from the home, require two to two and one-half hours each time. In addition, Ms. B frequently goes for a long bingo evening at the large bingo hall, which includes dinner, and takes approximately six hours.⁶

Ms. T described Ms. B's behavior when she does not receive her day habilitation time as Ms. B being very clingy, very high needs, and requiring constant attention, which places a great deal of stress

¹ Ex. E, pp. 2 – 3, 8; Ms. T's testimony.

² Ms. T's testimony.

³ Ex. F, pp 1 – 2, 5.

⁴ OAH Case No. 18-0246-MDS (Commissioner Health and Social Services June 27, 2018).

⁵ Ex. D, pp. 1 – 3; Ms. Aasland's testimony.

⁶ Ms. T's testimony; Ex. E, pp. 8, 18 – 22.

on her family members and caregivers.⁷ Ms. B’s 2019 – 2020 renewal POC describes Ms. B as ignoring her caregivers and being rude, mean, and argumentative with them.⁸ In the administrative hearing held regarding the renewal of Ms. B’s day habilitation benefits for 2018 – 2019, Ms. T testified that a prior temporary reduction in her day habilitation hours resulted in Ms. B becoming “irritable, angry, and rude.”⁹ Ms. T believes Ms. B’s well-being will be jeopardized if her day habilitation hours are reduced.¹⁰

III. Discussion

A. Burden of Proof

In cases 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.¹¹ However, this case involves a change to the regulation controlling the provision of day habilitation services, which now requires hours in excess of 624 hours per year (an average of 12 hours per week) be justified by health, safety, or institutionalization concerns.¹² Resolving the question of who has the burden of proof in this specific case first requires a factual inquiry. 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.¹³ 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 institutionalization concerns dictate a higher level of services. 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.¹⁴

⁷ Ms. T’s testimony.

⁸ Ex. E, p. 11.

⁹ *Decision After Remand*, p. 4, OAH Case No. 18-0246-MDS (Commissioner Health and Social Services June 27, 2018).

¹⁰ Ms. T’s testimony.

¹¹ 7 AAC 49.135.

¹² *See* 7 AAC 130.260(c).

¹³ *See* 7 AAC 130.260(c).

¹⁴ *See* 7 AAC 130.260(c).

The history of this case, including, the decision issued in the immediately preceding case, OAH Case No. 18-0246-MDS, demonstrates that Ms. B’s prior receipt of 20 hours per week was not the result of her needing more than 12 hours per week due to either health and safety concerns or a risk of institutionalization. As a result, Ms. B has the burden of proof by a preponderance of the evidence.

B. Day Habilitation Hours

The Medicaid Waiver program pays for specified services to Waiver recipients if each of those services is “sufficient to prevent institutionalization and to maintain the recipient in the community.”¹⁵ The Division must approve each specific service as part of the Waiver recipient’s POC.¹⁶

The type of waiver services at issue here are day habilitation services, which 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. The services may also reinforce skills taught in other settings, and promote the skills necessary for independence, autonomy, and community integration.¹⁷

The regulation applicable to day habilitation services was amended in October 2017.¹⁸ The amended regulation requires that day habilitation services of over 624 hours per year (i.e., an average of 12 hours per week) be “justified” as necessary to “protect the recipient’s health and safety; *and* . . . prevent institutionalization.”¹⁹ However, after a litigation over the implementation of the amended regulation, the Division agreed to temporarily review requests for day habilitation in excess of the 12 hour per week “cap” by assessing whether the additional hours are needed to protect the recipient’s health and safety *or* to prevent institutionalization.²⁰

As discussed above, Ms. B has the burden of proof. In order to receive more than 12 hours per week of day habilitation services, she must demonstrate that the additional hours are necessary to protect her health and safety or prevent her from being institutionalized.

A review of the facts demonstrates that a decrease in Ms. B’ day habilitation hours results in behavioral changes. She is rude, mean, and argumentative with her caregivers. She becomes

¹⁵ 7 AAC 130.217(b)(1); *see also* Ex. B, p. 6.

¹⁶ 7 AAC 130.217(b); *see also* Ex. B, p. 6.

¹⁷ 7 AAC 130.260(b); *see also* Ex. B, p. 17.

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

¹⁹ 7 AAC 130.260(c) (emphasis added); *see also* Exh. B, p. 17.

²⁰ SDS E-Alert: Change in Implementation of Day Habilitation Regulation, dated July 18, 2008 (emphasis added), available at <http://list.state.ak.us/pipermail/sds-e-news/2018-July/002414.html>.

very needy, and requires constant attention, which places a great deal of stress on her family and caregivers. However, these poor behaviors do not place her health and safety at risk. While they certainly make things more difficult for her caregivers and family, that is not a factor that can be taken into account. In addition, there is no evidence showing that Ms. B is at risk of being institutionalized. As a result, Ms. B has not met her burden of proof on this point. This means that she is only allotted 12 hours per week of day habilitation hours.

It should also be noted that the evidence at hearing showed that Ms. B uses her day habilitation hours for four primary purposes: shopping, errands, Special Olympics and attending bingo. Per Ms. T's testimony, shopping takes approximately one hour, errands, two hours, and Special Olympics can take up to a total of five hours per week. This comes to eight hours per week. This still allows four hours per week for bingo, an activity that she highly values.

IV. Conclusion

Ms. B had the burden of proof in this case. She did not meet it. As a result, the Division's reduction of Ms. B' day habilitation services to 12 hours per week is upheld.

Dated: July 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 15th day of August, 2019.

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

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