

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

In the Matter of )  
 )  
E T ) OAH No. 21-0711-MDS  
 ) Agency No.

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**DECISION**

**I. Introduction**

E (“E”) T receives services pursuant to a support plan from the Intellectual and Developmental Disabilities, Medicaid Home and Community-based Waiver Program. E is 22 years-old and has Autism and Sensory Modulation Disorder. These conditions require that he be constantly supervised. His mother, D T, is his primary caregiver. After being required to travel out-of-state for the medical care of E’s older brother and her eldest son, Ms. T, submitted to the Division of Senior and Disabilities Services requests to amend E’s SDS Support Plan, seeking approval for him to receive services while out-of-state. While the Division originally approved 30 days of such services, it has denied subsequent requests seeking additional days of out-of-state services. Ms. T appealed.

A hearing was held regarding the Division’s denial. The evidence presented demonstrates that E is undeniably benefitted by being with his mother and in her care while she has travelled out-of-state. However, he does not meet the stringent regulatory requirements to qualify for additional temporary out-of-state services. Accordingly, the Division’s denial of the additional services is affirmed.

**II. Facts**

**A. Citation to the Record**

At the outset, it must be noted that the record in this case is confusing and disorganized, making citation to it very difficult. The Division has submitted exhibits in its position statement that do not match the descriptions indicated. It has also supplemented the record by submitting several exhibits labeled the same as previously submitted exhibits, but which are substantively different.

Throughout the remainder of this decision, and to make citation to the present record as clear as possible given the circumstances, all documents will be parallel cited using two separate citations, with a simple comma separating the two. The first cite will include the title given to the primary document as it is labeled in OAH’s record-keeping system (ProLaw), the particular page number within that larger pdf filing, and the date the document was input into ProLaw. The

second cite will include referenced to the name of the specific document being cited itself, the page number of the specific document referenced, and the date of the document referenced. So, by way of example, citation to D T's hearing request in this case would be cites in the manner indicated in the following footnote.<sup>1</sup>

## **B. Factual Background**

E is a 22-year-old who experiences Autism, Cerebral Palsy, Anxiety Disorder, Neurological Disorder, Sensory Modulation Disorder, Static Encephalopathy, Hyperpia/Exophoria, Acute Allergic Esophagitis, Lordosis and gate abnormality issues.<sup>2</sup> He also has a history of self-injurious and disruptive behaviors, including aggressive actions towards others.<sup>3</sup> He can become extremely anxious when he is out in the community and in group and non-familiar settings. He can also become easily triggered when he is outside of his normal routine, for instance, by loud noises such as baby crying while travelling.<sup>4</sup> He requires supervision in all locations and all times, both in his home where he lives with this mother, as well as in the community.<sup>5</sup> E's mother is his primary provider and caregiver and lives with him at the family's home.<sup>6</sup> His mother has been serving as his paid caregiver due to challenges in having anyone else do so, particularly during COVID.<sup>7</sup>

In February 2021, E's mother travelled to City A to be with her son, N, while he received medical treatment for acute cardiac and renal failure. Because Ms. T contends that E needs to remain with her as his caregiver, he also traveled to City A with his mother.<sup>8</sup>

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<sup>1</sup> Position Statement TD, p. 77 (April 23, 2021) (Position Statement), Ex. C, p. 1 (Email from D T to Fair Hearings) (April 23, 2021)).

<sup>2</sup> E T, to OAH\_SDS Request for Out of State Services.pdf at p. 13 (June 6, 2021) (T Request for Out-of-State Services), SDS Support Plan at p. 3 (January 11, 2021).

<sup>3</sup> Request for Out-of-State Services at Support Plan at pp. 30, 31, SDS Support Plan at pp. 20, 21.

<sup>4</sup> D T Testimony.

<sup>5</sup> Request for Out-of-State Services at p. 19, SDS Support Plan at p. 9; D T Testimony.

<sup>6</sup> Request for Out-of-State Services at pp. 32, 34, SDS Support Plan at pp. 22, 24; D T Testimony.

<sup>7</sup> Request for Out-of-State Services at p. 6, Email from Z Q, Executive Director of Business A to G J (May 6, 2021); Request for Out-of-State Services at p. 7, Letter from Doctor F R. X (May 15, 2021); Request for Out-of-State Services at p. 8, Letter from Doctor Y P. M (undated); D T Testimony.

<sup>8</sup> D T Testimony; Position Statement at 89-90, Ex. E at pp. 3-4 (Appendix K Support Plan Request (March 8, 2021)); Request for Out-of-State Services at pp. 3-5 (texts from D T).

Although confusingly documented in the record, during hearing it was confirmed that there were three separate requests for out-of-state services made on E's behalf. The first sought supported living and day habilitation services while E was out-of-state with his mother from February 22 – March 7, 2021, a total of 14 days. The second sought these same services from March 8 – April 4, 2021, or a total of 28 additional days. The third request sought to extend the length of the services sought in the second request from April 5<sup>th</sup> to May 4, 2021, or an additional 30 days.<sup>9</sup> In total, Ms. T sought out-of-state supported living and day habilitation services on E's behalf from February 22, 2021, through May 4, 2021, or a total of 72 days.<sup>10</sup>

Although the initial approval appears to be missing from the record, Terri Gagne, on behalf of the Division, testified that the first request for out-of-state services, seeking 14 days of out-of-state supported living and day habilitation services from February 22 – March 7, 2021, was approved. This is further confirmed by documentation in the record.<sup>11</sup> Before the second request could be approved or denied, a third request was submitted on behalf of E.<sup>12</sup> In response to the second and third requests seeking amendment of E's Support Plan, the Division sent a partial denial letter.<sup>13</sup> As it confirms, E was approved for an additional 16 days of out-of-state supported living and day habilitation services and denied for the remaining 42 days being sought.<sup>14</sup> Accordingly, in total, E was approved for 30 days of temporary out-of-state supported living and day habilitation services, but denied the remaining additional days requested.<sup>15</sup>

A hearing was requested challenging the Division's denial.<sup>16</sup> At the hearing, Ms. T made clear that her primary concern in seeking approval of the out-of-state services and amendment of the Support Plan, was to avoid E being deemed to have lost Medicaid coverage due to his out-of-state travel. She feared that if amendment of E's Support Plan did not occur, his plan might be nullified because of his time out-of-state. She was very concerned that, if this happened, E might

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<sup>9</sup> *Id.*; D T Testimony; Terri Gagne Testimony; Position Statement at p. 102, Ex. F at p. 10 (Appendix K Support Plan Request (April 8, 2021)).

<sup>10</sup> *Id.*

<sup>11</sup> Terri Gagne Testimony; Position Statement at p. 102, Ex. F at p. 10 (Appendix K Support Plan Request (April 8, 2021)); Position Statement at p. 79-81, Ex. D at pp. 1-3 (Adverse Action Letter (April 20, 2021)).

<sup>12</sup> Terri Gagne Testimony.

<sup>13</sup> Terri Gagne Testimony; T B Testimony; Position Statement at pp. 79-81, Ex. D at pp. 1-3 (Adverse Action Letter (April 20, 2021)).

<sup>14</sup> *Id.*; Position Statement at pp. 102, Ex. F at pp. 10 (Appendix K Support Plan Request (April 8, 2021)).

<sup>15</sup> Position Statement at pp. 102, Ex. F at p. 10 (Appendix K Support Plan Request (April 8, 2021)).

<sup>16</sup> Position Statement p. 77, Ex. C, p. 1 (Email from D T to Fair Hearings) (April 23, 2021)).

have to reapply for Medicaid Waiver and it might take him a year or two after doing so to become covered again.<sup>17</sup> However, as a health program manager from the Division testified, she was very confident that as long as Ms. T kept the Division apprised of why E is out-of-state and avoids him being out-of-state for more than a year, she was very confident that he will not lose his Medicaid Waiver eligibility under these circumstances.<sup>18</sup>

Finally, during the hearing, Ms. T also confirmed her position that, due to E's specific needs, it is medically necessary for him to travel out-of-state in this instance. Specifically, if E did not accompany her on this trip, there would be a real chance that he would become institutionalized in her absence. As such, she believes that all the requested services should be covered in association with E's temporary out-of-state travel.<sup>19</sup>

### III. Discussion

The sole issue in this instance is whether the Division correctly denied prior authorization for E to receive services per his Support Plan while temporarily out-of-state. E and his mother bear the burden of proof in this case to show that it was incorrect for the Division to deny all such services exceeding 30 days.<sup>20</sup>

Medicaid provides medical assistance to individuals whose income and resources are insufficient to meet the cost of necessary medical services.<sup>21</sup> Medicaid regulations specifically address services occurring during temporary absences from the recipient's home community.<sup>22</sup> Such services must be pre-authorized.<sup>23</sup> To be eligible, among other things, it must be shown that: 1) the absence is justified as a medical necessity documented by a physician; 2) an educational opportunity; or 3) a vacation.<sup>24</sup> Generally, such services may not exceed 30 days.<sup>25</sup> However, the regulations provide that services may be approved for absences greater than 30 days if a physician justifies the longer absence as being medically necessary.<sup>26</sup>

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<sup>17</sup> D T Testimony.

<sup>18</sup> T B Testimony.

<sup>19</sup> D T Testimony.

<sup>20</sup> 2 AAC 64.290(e); 7 AAC 49.135.

<sup>21</sup> 42 U.S.C. § 1396 *et. seq.*

<sup>22</sup> 7 AAC 130.231.

<sup>23</sup> 7 AAC 130.231(a)(4).

<sup>24</sup> 7 AAC 130.231(b)(3).

<sup>25</sup> 7 AAC 130.231(b)(4).

<sup>26</sup> 7 AAC 130.231(c)(1).

Here, as the record reflects, the medical necessity at issue is associated with E's sibling, not E himself. E possesses no medical reason to be out-of-state other than the fact that his mother, his primary caregiver, is going out-of-state to be present with E's brother for medical treatment he is receiving as well as his recovery.<sup>27</sup>

Ms. T has framed the issue in the context of E's medical necessity. She has argued that due to his physical and emotional condition and needs, there is nobody else that can presently care for him as well as she can. This is because she is the most familiar with him, his traits, and characteristics. She is also the one most familiar with his various triggers that can cause outbursts and disruptive behavior.<sup>28</sup>

For instance, Ms. T described an alarming incident on the plane while her and E were travelling to City A. At some point, E became agitated because a baby was crying nearby as they descended. This caused E to react radically and damage a set of noise-cancelling headphones that he usually wears while travelling on planes. This in turned caused him to become even more disruptive. Ultimately, as a result, Ms. T suffered two black eyes during the incident while attempting to get E back under control.<sup>29</sup>

The point Ms. T was making by way of this example is that E can be very difficult to manage, even under the best of circumstances. She is more aware than anyone else of his many personal traits, characteristics, likes, dislikes, triggers, and emotional and physical comforts. Even with this familiarity, E can be extremely difficult and challenging to care for. Her concern is that if he were placed in the hands of a caregiver less familiar with him than she is, there is a very real risk that he would ultimately require institutionalization because of his high level of needs.<sup>30</sup>

Based on the above, there is no doubt that E and his mother are faced with very real, understandable, and challenging circumstances. It is undeniable that Ms. T is likely able to provide E better care than virtually anyone else. That said, however, the record does not

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<sup>27</sup> D T Testimony; Position Statement at pp. 89-90, Ex. E at pp. 3-4 (Appendix K Support Plan Request (March 8, 2021)); Request for Out-of-State Services at pp. 3-5, texts from D T (undated and no page numbers).

<sup>28</sup> Request for Out-of-State Services at p. 6, Email from Z Q, Executive Director of Business A to G J (May 6, 2021); Request for Out-of-State Services at p. 7, Letter from Doctor F R. X (May 15, 2021); Request for Out-of-State Services at p. 8, Letter from Doctor Y P. M (undated); D T Testimony.

<sup>29</sup> D T Testimony.

<sup>30</sup> D T Testimony.

demonstrate that she is the only person in Alaska presently capable of caring for E. While the evidence does indicate that the entity Business A was presently unable to provide a Direct Support Professional, that does not mean that other persons or entities in Alaska are currently unavailable to do so.<sup>31</sup>

The record also fails to demonstrate that it is necessary for Ms. T to travel out-of-state. Certainly, nobody can question a mother's desire to be at the bedside of a sick and ailing son. But Medicaid is an "entitlement program" created by the federal government and administered by each state, to provide medical services for low-income and disabled citizens.<sup>32</sup> People qualify by meeting federal income and asset standards, as well as meeting specified eligibility categories.<sup>33</sup> Medicaid's regulations similarly bind the Division, this Administrative Law Judge and the public.<sup>34</sup> They do not allow the Division to relax the program's eligibility requirements, and they do not include a hardship exception which allows a recipient to receive benefits based on the medical necessity of another.<sup>35</sup>

Accordingly, as sympathetic as the position of E and Ms. T in this instance, these circumstances are not the medical necessity that the regulations encompass. Instead, the regulations allow out-of-state travel for a recipient's own medical necessity. Here, E does not need to be out-of-state as a medical necessity. While E may be more at risk if he were to remain in-state while his mother travels out-of-state, it is not *his medical necessity* that gives rise to the travel. Instead, it is arguably his brother N's. At best, E simply needs to be with his mother as his caregiver. But there is nothing that *requires* her presence out-of-state. The regulation simply does not allow an individual to substitute one person's medical necessity for another, no matter how beneficial or reasonable it might be to do so.

The evidence presented at the hearing demonstrates that E is undeniably benefitted by being with his mother and in her care while she travelled out-of-state. However, he does not meet the stringent regulatory requirements to qualify for additional temporary out-of-state services.

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<sup>31</sup> Request for Out-of-State Services at p. 6, Email from Z Q, Executive Director of Business A to G J (May 6, 2021).

<sup>32</sup> See generally <https://www.benefits.gov/benefit/1619>.

<sup>33</sup> 7 AAC 100.502.

<sup>34</sup> *Burke v. Houston NANA, L.L.C.*, 222 P.3d 851, 868 – 869 (Alaska 2010); 7 AAC 49.170.

<sup>35</sup> See generally 7 AAC 130.231.

#### IV. Conclusion

In this instance, Ms. T has applied for and been granted approval by the Division for the maximum home and community-based waiver services allowed by regulation for temporary out-of-state absences. While additional services are available in some instances for a longer period, to be eligible, the recipient must demonstrate a medical necessity for such services. Here, E has no such medical necessity. Consequently, the Division's denial of the application for the additional out-of-state services is AFFIRMED.

Dated this 1<sup>st</sup> day of July, 2021.

*Signed*  
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Z. Kent Sullivan  
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 23<sup>rd</sup> day of July, 2021.

By: *Signed*  
\_\_\_\_\_  
Name: Jillian Gellings  
Title: Project Analyst  
Agency: Office of the Commissioner, DHSS

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