

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

In the Matter of)
)
K Q) OAH No. 21-0439-MDS
) Agency No.
_____)

DECISION

I. Introduction

Medicaid recipient K Q applied for renewal of his PCS services. The Division of Senior and Disabilities Services (Division) notified Mr. Q that his PCS hours were reduced from 45 hours a week to 13.5 hours a week. Mr. Q requested a hearing.

During the hearing process, the Division authorized 6 hours of PCS for Locomotion, Transfer, and Dressing pursuant to 7 AAC 127.040(a)(2)(B) due to Mr. Q’s cognitive limitations.

Also during the hearing process, Mr. Q’s representative, his mother D N, conceded changes in regulation required elimination of PCS for Eating and Locomotion for Medical Escort. Ms. N further conceded elimination of PCS for Shopping and Meal Preparation was appropriate to avoid duplication of services.

The remaining areas of dispute were PCS for Toileting, Bathing, and Hygiene as well as whether the recalculated PCS time would place Mr. Q at risk of institutionalization. As discussed in detail below, the evidence presented at the hearing did not support the Division’s requested elimination of PCS for Toileting. The evidence did support Mr. Q’s request for addition of PCS for Hygiene. Accordingly, the Division shall provide Mr. Q services as specified in this decision.

Mr. Q is not at risk of institutionalization from the award of services authorized in this decision.

II. The PCS Service Determination Process

The Medicaid program authorizes Personal Care Services (PCS) to provide assistance to a Medicaid recipient who has functional limitations, resulting from his/her physical condition, that “cause the recipient to be unable to perform, independently, or

with an assistive device, the activities specified in 7 AAC 125.030.”¹ Those activities are broken down into activities of daily living (ADLs) and instrumental activities of daily living (IADLs). The ADLs are Bed Mobility, Transfers, Locomotion, Dressing, Eating, Toileting, Personal Hygiene, and Bathing.² The IADLs are Light Meal Preparation, Main Meal Preparation, Housework, Laundry, and Shopping.³ PCS can also be authorized for a few additional services. Specific rules regarding eligibility for those services exist.⁴

PCS are furnished by a Personal Care Assistant, usually abbreviated as “PCA.” Due to regulatory specificity, PCS are provided solely to assist in the performance of enumerated tasks. PCS do not exist to provide generalized care. In addition, PCS are not provided for activities that can “be performed by the recipient.”⁵ A person who can perform the task on his or her own- even with great difficulty-- will not qualify for PCS for that task.

The Division assesses PCS need using the Consumer Assessment Tool, or “CAT”, as a methodology to code both eligibility for the PCS program and the amount of assistance needed for covered activities and services.⁶ The actual list of services, time allotted for each service based upon the severity of need, and the allowable frequencies for each service are set out in the *Personal Care Services: Service Level Computation* instructions, which are adopted by reference into regulation.⁷

The CAT numerical coding system for ADLs has two components. The first component is the *self-performance code*. These codes rate how capable a person is of performing a particular ADL. The ADLs are Bed Mobility, Transfers, Locomotion, Dressing, Eating, Toileting, Personal Hygiene, and Bathing.⁸ The possible codes are: **0** (the person is independent⁹ and requires no help or oversight); **1** (the person requires

¹ 7 AAC 125.010(b)(1)(A)(iii).

² 7 AAC 125.030(b).

³ See Ex. D.

⁴ 7 AAC 125.030(d).

⁵ 7 AAC 125.040(a)(4).

⁶ See 7 AAC 125.020(a)(1). The CAT is itself a regulation, adopted in 7 AAC 160.900(d)(6).

⁷ 7 AAC 125.024(a); 7 AAC 160.900(d) (29). The *Personal Care Services: Service Level Computation* instructions can be found online at http://dhss.alaska.gov/dsds/Documents/regulationMaterials/PCS_SLA_Computation_Chart_6-2-2017.pdf

⁸ 7 AAC 125.030(b).

⁹ A self-performance code of 0 is classified as “[I]ndependent – No help or oversight – or – Help/oversight provided only 1 or 2 times during the last 7 days.” See Ex. H.

supervision); **2** (the person requires limited assistance¹⁰); **3** (the person requires extensive assistance¹¹); **4** (the person is totally dependent¹²). There are also codes which are not used in calculating a service level: **5** (the person requires cueing); and **8** (the activity did not occur during the past seven days).¹³

The second component of the CAT scoring system is the *support code*. These codes rate the degree of assistance that a person requires for a particular ADL. The possible codes are: **0** (no setup or physical help required); **1** (only setup help required); **2** (one-person physical assist required); **3** (two or more-person physical assist required). Again, there are additional codes which are not used to arrive at a service level: **5** (cueing required); and **8** (the activity did not occur during the past seven days).¹⁴

The IADLs measured by the CAT are Light Meal Preparation, Main Meal Preparation, Housekeeping, Laundry, and Shopping.¹⁵ The CAT codes IADLs slightly differently than it does ADLs. The *self-performance codes for IADLs* are: **0** (independent either with or without assistive devices - no help provided); **1** (independent with difficulty; the person performed the task, but did so with difficulty or took a great amount of time to do it); **2** (assistance / done with help - the person was somewhat involved in the activity, but help in the form of supervision, reminders, or physical assistance was provided); and **3** (dependent / done by others - the person is not involved at all with the activity and the activity is fully performed by another person). There is also a code that is not used to arrive at a service level: **8** (the activity did not occur).¹⁶

The *support codes* for IADLs are also slightly different than the support codes for ADLs. The support codes for IADLs are **0**: (no support provided); **1** (supervision / cueing provided); **2** (set-up help); **3** (physical assistance provided); and **4** (total

¹⁰ Limited assistance with an ADL is defined as “[p]erson highly involved in activity; received physical help in guided maneuvering of limbs, or other nonweight-bearing assistance 3+ times – or – Limited assistance (as just described) 1 or 2 times during last seven days.” See Ex. H.

¹¹ Extensive assistance is defined as “[w]hile person performed part of activity, over last 7-day period, help of following type(s) provided 3 or more times: Weight-bearing support [;] Full staff/caregiver performance during part (but not all) of last 7 days.” See Ex. H.

¹² Total dependence is defined as “[f]ull staff/caregiver performance of activity during ENTIRE 7 days.” See Ex. D.

¹³ Ex. H.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

dependence - the person was not involved at all when the activity was performed). Again, there is an additional code that is not used to arrive at a service level: **8** (the activity did not occur).¹⁷

The codes assigned to a particular ADL or IADL determine how much PCA service time a person receives for each occurrence of a particular activity. A person who can perform an activity independently or with supervision or who needs no physical assistance to perform the ADL or IADL will not be eligible for PCS.

If a person needs help to perform the activity and physical assistance is required, commonly referred to a score of 2/2, the person will be eligible for PCS. If the person scores a 2/2 or higher, a fixed number of PCS minutes is assigned for each activity.¹⁸ That number is then multiplied by the times a day the activity is performed and a weekly total of minutes is calculated.¹⁹ For instance, if a person is coded as requiring extensive assistance (code of 3) with bathing, he or she would receive 22.5 minutes of PCA service time every day he or she is bathed.²⁰

With one exception, PCS are not available if the care recipient can perform the activity on his or her own regardless of how difficult it may be for the person to perform the activity unassisted. The exception exists for individuals whose cognitive functioning triggers 7 AAC 127.040(a)(2)(B). That regulation permits the award of PCS services for supervision and cueing when the care recipient requires assistance based on behavioral or cognitive scoring on the CAT. To receive time for supervision and cueing, the recipient needs to have a cognition score of at least 5 on section C4B of the CAT assessment with a frequency score of 1, 2 or 3 and a score of 1 on alterability of any one of the five behaviors in section D: Problem Behavior of the CAT assessment.²¹

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 7 AAC 125.024(a); 7 AAC 160.900(d) (29). The *Personal Care Services: Service Level Computation* instructions can be found online at http://dhss.alaska.gov/dsds/Documents/regulationMaterials/PCS_SLA_Computation_Chart_6-2-2017.pdf

²¹ Ex. D.

III. Facts²²

A. Historical Background

K Q met normal developmental milestones until he was approximately two and half years old. At that age he was able to count and say his ABCs. His toddler babbling included the ability to recognize and name familiar people. He showed signs of being ready for potty training.²³

As Mr. Q approached his third birthday, his family saw a sudden and rapid regression in his cognitive and behavioral functioning. A pediatrician noticed an oddity in his teeth consistent with exposure to heavy metal. A test of Mr. Q's urine showed an extremely elevated level of thallium.²⁴ Thallium is a soft, malleable gray metal that was previously widely used in rat poisons and insecticides. Thallium is a tasteless, odorless, and extremely potent poison –ingestion of as little as one gram of thallium salt may kill an adult.²⁵ Mr. Q also experienced an extremely high fever during this time.²⁶

The change in functioning was extreme. Mr. Q was diagnosed with autism disorder and severe intellectual disability before he was four. Mr. Q began to receive state services soon thereafter.²⁷

Testing when Mr. Q was 17 determined he exhibited the cognitive functioning of a toddler of approximately 1 year and 9 months in age. He showed severe deficiencies in adaptive communication, living skills and socialization.²⁸ Subsequent testing in his twenties indicated he had the expressive language of an infant and the receptive language of a two-year-old.²⁹

Now in his 30s Mr. Q is non-verbal. Mr. Q can follow approximately 50 basic directions. He continues to function at the cognitive level of a toddler. He also has some physical limitations, particularly with gross and fine motor skills involving his hands.³⁰

²² These facts were established by a preponderance of the evidence from testimony at the hearings and evidence within the admitted exhibits.

²³ Exs. E- I; G.; SDS Support Plan dated March 8, 2020, p. 8-9.

²⁴ Ex. C submitted on May 5, 2021. There are two documents marked “Ex. C.” They will be identified by date.

²⁵ See, <https://calpoison.org/news/thallium-poisoning>.

²⁶ Ex. E.

²⁷ Ex. C. submitted May 5, 2021.

²⁸ *Id.*

²⁹ Ex. G.

³⁰ Ex. E-I; N Testimony; video submission.

A grown adult over 6 feet tall, Mr. Q has behavioral problems.³¹ He can be aggressive and violent with people as well as destructive to property. An assessment in 2014 documented that he exhibited aggressive or disruptive behavior almost daily.³² He has seriously injured at least two caregivers.³³ It is probable both his mother and sister have been physically threatened and harmed by Mr. Q. Mr. Q's current SDS support plan is replete with goals and strategies to reduce violent behavior, but staff are advised not to interact if he begins to escalate for their own safety.³⁴

This is not to say that Mr. Q's family does not also enjoy good times with him. Mr. Q lives in a basement studio in his mother's home. He participates in family activities. Mr. Q enjoys listening to his brother play the guitar. He enjoys going on camping trips and visiting Business A.³⁵ But these outings are never easy. Mr. Q will never be a candidate for independent living because he requires constant monitoring and supervision.³⁶

Mr. Q has been treated for his neurological and behavioral problems since childhood. He did not respond to multiple trials of prescription medication.³⁷ In 2008 his family investigated whether marijuana could assist Mr. Q.³⁸ According to Mr. Q's mother and the notes within his SAP, Mr. Q responds well to marijuana usage. When he is not under the influence Mr. Q will constantly scream, pace, and flap his arms. Mr. Q is also more aggressive. Under the influence Mr. Q can be cued and directed. He is calmer and less dangerous.³⁹ Because Mr. Q's cognitive function appears slightly better while using marijuana and his behavioral issues are greatly reduced, Mr. Q's doctors have come to, reluctantly in some cases, support its use.⁴⁰

³¹

Id.

³² Ex. H., pp. 19-20.

³³ Exs. H. and I.

³⁴ Ex. E. (SDS Support Plan Amendment (SPA) dated April 20, 2021.)

³⁵ Ex. G.

³⁶ Ex. C dated May 5, 2021, pp. 7, 15, N testimony.

³⁷ Ex. I., pp. 20-24.

³⁸ K's mother has described his exposure to marijuana as "inadvertent." Because K cannot use a pipe or smoke a cigarette, that assertion is not credible.

³⁹ Ex. G., pp. 10, 19, 42; Ex. H. pp. 20-22; Ex. I, pp. 16, 20-24; N testimony.

⁴⁰ Ex. I, pp. 15-24; Ex. E. A great deal of that support appears to be as much about ensuring Mr. Q does not harm his mother and family members as it is about Mr. Q's physical and mental health.

Given his physical limitations, in order for Mr. Q to inhale marijuana a very unorthodox approach is used: Mr. Q holds a plastic container or bag over his head; his mother pipes smoke into the container via a vaporizer unit; and Mr. Q inhales the smoke.⁴¹ This has become a ritualized process for Mr. Q and each exposure takes approximately an hour and a half to two hours. His mother provides marijuana to Mr. Q via this method 3 or 4 times a day. As she described it to one of Mr. Q's doctors, getting K stoned consumes "a large portion of their day."⁴² This includes exposure immediately upon Mr. Q's waking in the morning or he will grab, spit, and hit people until it is clear he will be given marijuana.⁴³

While his mother testified to the great benefit marijuana provides to Mr. Q, its usage in her home presents clear practical difficulties. First, none of Mr. Q's third-party care givers can provide him marijuana without violating federal law. Second, although K's mother repeatedly referred to use of marijuana as an "all natural supplement"⁴⁴ or "medicine"⁴⁵ providing marijuana is not a an action covered by PCS hours: it does not provide assistance in the performance of an ADL or IADL, nor is it medication management as defined by regulation. Which means Ms. N, too, cannot be paid State of Alaska benefits for the time she spends exposing K to marijuana. As a conservative estimate this means four and a half to six hours of each day are exempt from state assistance benefits.

B. The 2014 CAT

Mr. Q was assessed via CAT on January 28, 2014.⁴⁶

For the ADL of Bed Mobility Mr. Q was assessed a self-performance score of 5 (cueing) and a support code of 5 (cueing) with a frequency of 0.⁴⁷

For the ADL of Transfer Mr. Q was assessed a self-performance score of 5 (cueing) and support a code of 5 (cueing) with a frequency of 0.⁴⁸

⁴¹ Ex. I, pp. 20-21. K apparently is unwilling or unable to ingest marijuana via edibles or sprays. N testimony.

⁴² *Id.*

⁴³ Ex. G., p. 10.

⁴⁴ *Id.* at 5.

⁴⁵ N testimony.

⁴⁶ Ex. H.

⁴⁷ *Id.*

⁴⁸ *Id.*

For the ADL of Locomotion, Mr. Q was assessed a self-performance score of 1 (supervision) and a support code of 5 (cueing) with a frequency of 0. The assessor observed that Mr. Q needed to hold on to someone while walking outside or on stairs.⁴⁹

For the ADL of Dressing, Mr. Q was assessed a self-performance score of 2 (limited assistance) and a support code of 2 (one-person physical assist) with a frequency of 2 times a day. The assessor noted that Mr. Q could do a portion of his own dressing, but he needed help with sock and shoes. He also could not button or zip clothing on his own.⁵⁰

For the ADL of Eating, Mr. Q was assessed a self-performance score of 1 (supervision) and a support code of 1 (set up only). The assessor concluded, however, that while Mr. Q could feed himself, it was not safe for him to do so. Thus, he authorized a frequency of 3 times a day.⁵¹

For the ADL of Toileting, Mr. Q was assessed a self-performance score of 2 (limited assistance) and a support code of 2 (one person physical). The assessor noted that even with cueing and prompting Mr. Q could not clean himself. He made no attempt to do so and did not appear to understand the concept. The toilet in the home was set-up so it could not flush. This allowed his mother to monitor his bowel movements and keep him clean. Toileting was assessed a frequency of 3 times a day, 7 days a week.⁵²

For the ADL of Bathing, Mr. Q was assessed a self-performance score of 3 (needs help with a part of the bathing activity) and a support code of 2 (one person physical) with a frequency of 1 time a day.⁵³

For the IADL of Shopping Mr. Q was assessed a self-performance score of 3 (dependent on others) with a support code of 4 (total dependency).⁵⁴

For the IADLs of Main Meal and Light Meal preparation Mr. Q was assessed self-performance scores of 3 (dependent on others) with a support code of 4 (total dependency). He was assessed identical scores for Housework and Laundry.⁵⁵

⁴⁹ *Id.*
⁵⁰ *Id.*
⁵¹ *Id.*
⁵² *Id.*
⁵³ *Id.*
⁵⁴ *Id.*
⁵⁵ *Id.*

For the IADL of Hygiene, Mr. Q was assessed a self-performance score of 3 (extensive assistance) and support code of 2 (one person physical) with a frequency of 1 time per day. The accompanying notes state that Mr. Q could not brush his teeth or clean his ears.⁵⁶

The 2014 CAT assessment identified Mr. Q's significant behavioral problems. He was described as frequently aggressive.⁵⁷

The 2104 CAT assessment also identified Mr. Q's significant cognitive limitations. Mr. Q was given a Total C.4B Cognitive Score of 15. He was assessed as exhibiting daily (3) or frequent (2) not easily altered problem behaviors.⁵⁸

C. *The 2019 Settlement*

It appears a re-assessment in 2018 would have significantly reduced the hours allocated by the 2014 CAT.⁵⁹ However, Mr. Q appealed that reduction and later entered a settlement agreement with the State of Alaska.⁶⁰ Per the settlement, the Division agreed to provide 41 hours a week of Supported Living Services; 10 hours a week of Day Habilitation Services; and 44.87 (45) hours per week of Community First Choice waiver services.⁶¹

This is an average of 6.42 hours per day of Community First Choice PCS. The hours were allocated according to a chart dated July 9, 2019.⁶² These hours were authorized until Mr. Q's regular PCS renewal in 2021. In exchange, Mr. Q agreed to remove references of marijuana from his plan of care and to withdraw his request for a fair hearing.⁶³

The settlement modified certain scoring from the 2014 CAT assessment. Specifically, for the ADL of Transfer Mr. Q was assigned a self-performance score of 3 (extensive assistance), a support a code of 2 (one person physical) and a frequency of 6 times a day, 7 days a week.⁶⁴

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ The 2018 CAT was not provided as part of the record in this case.

⁶⁰ Ex. D.

⁶¹ Ex. E.

⁶² This chart also was not provided as part of the record in this case. It was referenced in Ex. E, p. 1, but not attached. However, a written summary appears at Ex. D, pp. 2-5.

⁶³ N Testimony.

⁶⁴ Ex. D.

For the ADL of Locomotion Mr. Q was assigned a self-performance score of 3 (extensive assistance) and support a code of-2 (one person physical). Locomotion between locations was assessed a frequency of 6 times a day, 7 days a week. Locomotion (multi-level) was assessed a frequency of 3 times a day, 7 days a week. Locomotion to assess medical appointments was assessed a frequency of 1 time a week.⁶⁵

For the ADL of Dressing Mr. Q was assigned a self-performance score of 3 (extensive assistance) and support a code of-2 (one person physical) with a frequency of 2 times a day, 7 days a week.⁶⁶

For the ADL of Toileting Mr. Q was assigned a self-performance score of 4 (extensive assistance) and support a code of-2 (one person physical) with a frequency of 8 times a day, 7 days a week.⁶⁷

Other ADLs, such as Bathing and Hygiene, apparently were not addressed in the 2019 settlement even though PCS had previously been authorized. It is clear from review of the 2019 Settlement that the parties reached an agreement on the number of PCS hours to provide to Mr. Q and then adjusted his self-performance codes, support codes, and weekly frequencies to reach that number. The parties were free to do so as part of the settlement process. There is no indication in the record, however, that Mr. Q in fact experienced a significant change in his functional capabilities in 2019 that would justify such departures from the 2014 assessment of Bed Mobility, Locomotion, and Transfers. Since the agreement is expired, this decision looks to the totality of Mr. Q's functioning and needs in determining whether the Division met its burden.

D. The 2021 Assessment

i. Procedural Background

Melissa Meade, a Health Program Manager II, processed Mr. Q's request for continued services in 2021. She reviewed his therapeutic records, plan of care, support plan, total service allocation, the 2019 settlement, and the 2014 CAT. She concluded that Mr. Qs Community First Choice Personal Care Services should be reduced from 45 hours to 13.5 hours. The Division provided notice of that determination on March 24, 2021.⁶⁸

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Ex. A., pp. 1-2; Ex. D.; Meade testimony.

Mr. Q appealed.⁶⁹

The telephonic hearing took place over two days. D N, K Q's mother and guardian, appeared on his behalf. She was accompanied by Mr. Q's sister, H Q, and B P, Mr. Q's care coordinator. Ms. N and Ms. P provided testimony.

The Division was represented by Terri Gagne. Ms. Gagne called Melissa Meade, the Health Program Manager who conducted the 2021 re-assessment, as her only witness.

ii. Details of the Division Presentation

Ms. Meade described the reasons underlying her determination to eliminate or reduce most of Mr. Q's PCS hours. First, Ms. Meade determined that PCS time negotiated for Meal Preparation and Shopping in the 2019 settlement could no longer be authorized because they were duplicative of services provided by Day Habilitation.⁷⁰

Second, Ms. Meade eliminated PCS time for Eating and Medical Escort due to changes in the regulations. Current regulations prohibited an award of PCS for supervised Eating unless the recipient submitted a swallow study to support the award.⁷¹ Mr. Q did not submit a swallow study, so she could not authorize PCS for Eating. Similarly, current regulations prohibit award of PCS time for Medical Escort unless the benefit recipient is also receiving PCS support for Locomotion to Access Medical Appointments.⁷²

Third, Ms. Meade testified she removed all PCS time for Locomotion- Between Locations, Multi-Level, and Locomotion to Access Medical Appointments- due to Mr. Q's overall ability to ambulate reflected in his updated records. In support of her decision, Ms. Meade pointed to portions of his 2020-2021 IDD Waiver Support Plan (Support Plan) which described his ability to wander the neighborhood, jump on trampolines, and otherwise walk and move without assistance. Mr. Q's physical abilities were described as: "K is very strong. He has full use of his fingers, hands, arms, and legs. He can walk independently for long distances and balances very well. K has very long legs and can move fast when he wants to. K can move up and down stairs without

⁶⁹ Ex. C dated March 26, 2021.

⁷⁰ *Id.*; 7 AAC 127.040(d).

⁷¹ *Id.*; 7 AAC 125.030(a)(5)(C).

⁷² *Id.*; 7 AAC 125.030(a)(3).

the need for the handrail, though in the community he should be encouraged to use one.” Mr. Q’s Day Habilitation goals also addressed a plan for safe walking for Mr. Q.⁷³

Fourth, Ms. Meade testified that she reduced the self-performance score for Dressing to self-performance of 1 (supervision) and support 5 (cueing). She concluded Mr. Q no longer needed extensive assistance from one person because recent records described Mr. Q’s ability to undress himself independently and dress with prompting.⁷⁴

Fifth, Ms. Meade removed all PCS hours for Toileting based on her conclusion Mr. Q could independently go to the toilet. Her conclusion was based on notations in his Support Plan which discussed his ability to sit on a toilet and disengage from an activity to go to the bathroom. Ms. Meade acknowledged that other portions of the records indicated Mr. Q still could not wipe himself, was likely to soil his underwear, and the toilet remained modified not to flush so that Ms. N could monitor his bowel movements to keep him clean and sanitary.⁷⁵ Later, after having heard Ms. N describe Mr. Q’s difficulties with proper Toileting, Ms. Meade acknowledged that PCS would be appropriate for that ADL.⁷⁶

Lastly, Ms. Meade did not assess Mr. Q’s need for assistance with the ADLs of Bathing and Personal Hygiene. The Notice of Authorization Letter dated March 24, 2021 failed to address his eligibility for PCS assistance for those activities.⁷⁷

iii. Details of Mr. Q’s Presentation

Ms. N did not dispute that PCS for Meal Preparation and Shopping could no longer be authorized because they were duplicative of services provided by Day Habilitation. Nor did she dispute that changes to the regulations required removal of PCS time for Medical Escort and supervised Eating. She also acknowledged that Mr. Q was physically capable of independent Locomotion. Finally, Ms. N agreed that Mr. Q was now typically able to dress and undress himself with cueing and supervision.⁷⁸

However, Ms. N vigorously objected to the reduction in PCS time for Toileting. She also asserted Mr. Q should be provided PCS for Bathing, and Hygiene. She gave a

⁷³

Id.

⁷⁴

Id.

⁷⁵

The 2014 CAT made similar, if not identical, observations. Ex. H.

⁷⁶

Id.

⁷⁷

Ex. D., pg. 4.

⁷⁸

N testimony.

thorough explanation of the reasons Mr. Q continued to need physical assistance as well as cueing and supervision to Toilet.⁷⁹ For example, Mr. Q cannot flush the toilet or wipe himself. He does not understand the purpose of flushing the toilet, and the flushing mechanism remains disabled just as it was in 2014. He does not remember to wipe and cleanse himself after defecating even if he goes alone to the toilet rather than finding her for assistance or going in his pants.⁸⁰

Ms. N also testified that Mr. Q needs hands-on assistance with Bathing and Hygiene. Mr. Q can pick up a washcloth, but he is not capable of understanding how to use soap or keep it out of his eyes. Nor does he have the range of motion with his elbow joints and hands to reach all his body. Mr. Q cannot shave himself. He has difficulty holding a comb or toothbrush. He is physically capable of brushing his teeth and hair about as well as four or five-year-old, according to her.⁸¹

Ms. N argued that despite his physical ability to do certain things, Mr. Q does not understand why or how to do them. For example, he went to a neighbor's home to jump naked on their trampoline with no understanding of why that was inappropriate from a social perspective or why it was dangerous given the weather. Ms. N home is completely childproofed because Mr. Q will still put things in his mouth like a toddler, including electric cords and raw meat. Ms. N identified numerous portions of the medical records and prior CAT that supported her argument Mr. Pederson was not cognitively able to perform many of the ADLs and IADLs.⁸²

In addition, Ms. N strenuously objected to the overall severity of cuts to PCS time. She argued Mr. Q required 24/7 monitoring and supervision. According to Ms. N, removal of the hours would not result in Mr. Q acting independently. Reduction of PCS would only mean Ms. N would be forced to provide the subtracted 31.5 hours of care a week- almost the equivalent of a full-time job- without remuneration which she cannot afford to do. If she cannot provide care, Mr. Q will certainly be institutionalized within 30 days of the day Ms. N must get employment other than as his caregiver.⁸³

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

To support her argument that removal of hours would create a risk of institutionalization, Ms. N submitted a coded chart outlining how she and H Q provide care to Mr. Q over a 31-day cycle.⁸⁴ A reduction from 45 hours a week (6.2 per day) to 13.5 hours a week (2.0 hours a day) would have far reaching consequences according to her calculations. Ms. N testified there was an elevated risk of institutionalization if his PCS hours through Community First Choice were reduced to 13.5.⁸⁵ Ms. N also identified statements from Mr. Q's doctors regarding his extreme risk of institutionalization.⁸⁶

iv. Division Authorization Pursuant to 7 AAC 127.040.

Following Ms. N testimony and additional examination of the regulations, the Division authorized PCS time to Mr. Q for cueing and supervision of Locomotion, Transfer, and Dressing under 7 AAC 127.040(a)(2)(B). The Division authorized the maximum 6 hours of PCS available per that regulation. To make the award, the Division adjusted scoring for Locomotion, Transfer, and Dressing.⁸⁷ The addition of this PCS time raised the award to 19.5 hours a week (2.75 per day).

v. Argument on the Risk of Institutionalization

The hearing closed with arguments from both sides regarding Mr. Q's risk of institutionalization under the amended 19.5-hour assessment. The Division argued that once the adjustment under 7 AAC 127.040(a)(2)(B) was made, it met its burden to otherwise reduce Mr. Q's PCS service award. The Division argued that because the PCS award was properly calculated, there could be no resulting risk of institutionalization.

In contrast, Ms. N argued that a reduction to 19.5 hours would not meet Mr. Q's needs and would place him at risk of institutionalization. Her arguments rested on general equitable principles. She addressed frustration with a statutory scheme that she felt did not adequately address people like her son whose cognitive issues were severe but who did not have significant physical impairment. Ms. N noted what she perceived to be the constant chipping away at services for her son. She perceived the reductions to be not only inappropriate from a humanitarian standpoint, but also a purely fiscal one.

⁸⁴ Ex. F.
⁸⁵ N testimony
⁸⁶ *Id.*; Exs. E-I.
⁸⁷ Meade testimony.

According to her, Mr. Q needs 24/7 care. Mr. Q's placement in a secure facility would cost the State of Alaska much more than maintaining the PCS time it pays her and his sister to provide care at home.⁸⁸

Ms. N was aware of her increasing age and spoke of the Sophie's Choice the future presents to her: She must ask her children or grandchildren to sacrifice their personal choices and live in service providing care for Mr. Q, who will likely become a more challenging responsibility as he ages, or she can fear for Mr. Q's care in a secure institution if one can be found.⁸⁹

IV. Discussion

A. The Burden of Proof

When a recipient seeks to increase PCS time or add services that were not previously provided, the recipient bears the burden of proof to show a change that justifies the additional time.⁹⁰ Mr. Q was required to establish justification for his request to increase the award with PCS for Toileting, Bathing, and Hygiene

The Division has the burden of proof by preponderance of the evidence on tasks that it wishes to reduce or eliminate.⁹¹ Once a person receives PCS services, they must be regularly reassessed to maintain eligibility.⁹² Before the Division can eliminate or reduce services, the assessment must find that the recipient "has experienced a change that alters the recipient's need for physical assistance with ADLs, IADLs, or other covered services."⁹³ Regulatory changes are also considered a material change, allowing an increase or decrease in PCS services.⁹⁴

The Division can meet its burden of proof using any evidence on which reasonable people might rely in the conduct of serious affairs, including such sources as written reports of firsthand evaluations of the patient.⁹⁵ The relevant date for purposes of

⁸⁸ *Id.*

⁸⁹ *Id.* It is not likely that Mr. Q could live in a group home or nursing facility. His marijuana reliance means he cannot be placed in a facility that receives federal funds and his violence makes him a danger to others in a non-restrictive setting

⁹⁰ 7 AAC 125.026(b).

⁹¹ 7 AAC 49.135.

⁹² AS 47.07.045(b)(1); 7 AAC 125.012(b).

⁹³ 7 AAC 126.026(a).

⁹⁴ 7 AAC 125.026(b)(3)(C).

⁹⁵ 2 AAC 64.290(a)(1).

assessing the state of the facts is, in general, the date of the agency's decision under review.⁹⁶

The Division may not reduce authorized PCS time if the reduction would create a risk of institutionalization within 30 days.⁹⁷

Because the Division re-assessed Mr. Q's need for PCS for Locomotion, Transfer, and Dressing based on 7 AAC 127.040(a)(2)(B) and Ms. N conceded elimination of PCS for Eating, Shopping, and Meal Preparation was appropriate to avoid duplication and comply with current regulations, the remaining issues for resolution are whether the Division met its burden of proof to establish PCS for Toileting should be eliminated and whether Mr. Q met his burden of proof to establish PCS for Bathing and Hygiene should be added. In addition, this decision must resolve the question of whether Mr. Q would be at risk of institutionalization under the adjusted award.

B. PCS for Toileting and Hygiene are Required

The Division failed to meet its burden of proof to eliminate PCS for Toileting. 7 AAC 126.026(a) authorizes a reduction in services upon a showing that the care recipient "has experienced a change that alters the recipient's need for physical assistance with ADLs, IADLs, or other covered services." Although the assessor pointed to some language supporting her decision, that language was overwhelmingly outweighed by other evidence in the medical records and Ms. N testimony. The evidence did not demonstrate it was more likely than not true that Mr. Q experienced a change in his functioning or needs. To the contrary, he appears to be functioning close to the same level and need the same amount of care to Toilet as identified in the 2014 CAT.⁹⁸

According to the evidence, Mr. Q still has bowel control similar to a toddler who is being potty trained. That is, he can indicate a need to void his bladder or bowels but is unreliable in doing so and is unable to properly cleanse himself when he toilets. This decision concludes Mr. Q regularly requires non-weight bearing assistance from one person for a 2/2 score on Toileting.

⁹⁶ See 7 AAC 49.170; *In re T.C.*, OAH No. 13-0204-MDS (Commissioner of Health & Soc. Serv. 2013) (<http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130204.pdf>).

⁹⁷ 7 AAC 125.026(f) and(g).

⁹⁸ Ms. Meade, the CAT assessor, agreed that some PCS was appropriate for Toileting after hearing Ms. N's testimony, but the Division did not adjust the award.

It is typical practice to check the diaper of a two- to three-year old every three to four hours with the expectation the child might need to be changed four or five times a day. Mr. Q should be provided PCS to toilet 4 times a day, seven days a week. According to the service authorization sheet, this results in 24 minutes of PCS per day or 168 minutes a week.⁹⁹

In 2014 the independent CAT assessment concluded Mr. Q needed assistance with Bathing and Hygiene. In 2019 the parties reached a settlement to award hours based on negotiation rather than a strict assessment of Mr. Q's physical functioning. The 2019 Settlement did not address Bathing or Personal Hygiene. However, once that agreement expired, the Division was required to assess Mr. Q's needs for all ADL and IADL listed in 7 AAC 125.030. The failure of the March 24, 2021 authorization assessment to do so was an oversight.

Based on evidence at the hearing, Mr. Q needs non-weight bearing assistance from one person to perform Bathing. The oral and video evidence regarding the gross and fine motor skills for his hands demonstrated that he cannot fully perform this activity independently. This translates to a 2/2 score and would authorize PCS for that ADL. Mr. Q met his burden of proof that expiration of the 2019 settlement was a change in circumstances and PCS for Bathing was appropriate. However, the testimonial and documentary evidence also demonstrated that bathing and showering are covered by other services. A PCS award for Bathing would be duplicative. It will not be granted.

Mr. Q also needs extensive assistance from one person- a 3/2 score- for Hygiene just as he did in 2019. Again, he continues to lack the gross and fine motor skills in his hands to brush his teeth, shave, or clean his ears. Nor does he have the cognitive ability to properly do so. There is insufficient evidence that PCS for Hygiene would be duplicative of other services. Therefore, a daily PCS award seven days a week will be assessed. According to the service authorization sheet, this results in 15 minutes per day or 105 minutes a week additional PCS authorization.¹⁰⁰

⁹⁹ Ex. B, p. 40.

¹⁰⁰ See, Ex. B., p. 40.

C. Mr. Q is Not at Risk of Institutionalization from the Adjusted PCS Award

Mr. Q's PCS may not be reduced if the reduction will place him at a risk of institutionalization within 30 days.¹⁰¹ An institution is defined by regulation as being a hospital or nursing home.¹⁰²

The Division's original 2021 reduction in PCS services from 45 to 13.5 hours of service was a two-thirds reduction. That is a significant change. However, that proposed reduction was raised by 6 hours of service per week to reflect adjustments in Mr. Q's service levels authorized by 7 AAC 127.040. The resulting total 19.5-hour weekly service authorization must be adjusted to reflect an additional 4.55 hours for Toileting and Hygiene per the foregoing discussion.¹⁰³ This leads to a total weekly PCS award of 24 hours (24.05).

The analysis of whether a weekly PCS award of 24 hours a week or 3.42 hours a day would place Mr. Q at risk of institutionalization must be prefaced with several observations. First, Mr. Q may not receive PCS while he sleeps. PCS services are not available through the Community First Choice program to supervise a recipient while he sleeps. Sleep is not an activity covered in the ADLs and IADLs listed by regulation. Mr. Q is not a particularly good sleeper, according to the evidence presented, but he does sleep approximately six hours a night. Assuming without deciding that sleep time is individually determined rather than assessed at a standard eight hours for each Medicaid recipient, Mr. Q cannot receive PCS for six hours out of each twenty-four.

Second, Mr. Q is not entitled to PCS hours to provide him exposure to marijuana. The time his mother or sister spend exposing Mr. Q to marijuana cannot be paid for by Community First Choice or any other State program. The evidence established that Mr. Q is "hot-boxed" three or four times a day with each exposure taking between one and half to two and a half hours. Conservatively, five hours a day are spent in that fashion.¹⁰⁴

¹⁰¹ 7 AAC 127.095(c) and (d).

¹⁰² 7 AAC 127.095(d).

¹⁰³ 168 (weekly Toileting minutes) + 105 (weekly Hygiene minutes) = 273 minutes or 4.55 hours of PCS.

¹⁰⁴ Mr. Q cannot be left unsupervised with a container over his head.

Because Mr. Q may not receive PCS for time he is asleep or being exposed to marijuana, eleven of the twenty-four hours in the day are excluded from the time PCS can be provided. In addition, Mr. Q may not receive PCS that would duplicate other services.

Ms. N provided a chart to demonstrate Mr. Q's care over a 31-day cycle. The chart was not discussed in detail at the hearing, but it provides useful information in assessing the likelihood of Mr. Q's institutionalization within 30 days if the reduction is upheld. According to the chart, Mr. Q received wrap around services from supported living, personal care services, and day habilitation.¹⁰⁵

In total he received 420.50 hours of state provided services per month in 2020. This includes the 45 hours of weekly Community First Choice PCS hours established in the 2019 settlement.¹⁰⁶ This is a weekly average of 60.07 service hours per week.¹⁰⁷

Mr. Q received an average of 13.55¹⁰⁸ hours of paid coverage each day, although the actual hours vary from a low of 11.00 hours one day a month to a high of 15.75 hours on 8 days a month.¹⁰⁹ Mr. Q's Community First Choice PCS averaged 6.2 hours a day per the terms of the 2019 settlement. This means an additional 7.35 hours of daily service were provided to Mr. Q from other programs. Mr. Q's care provider may not be paid for PCS and other program work for the same hours. According to the Administrative Law Judge's rough calculations, the foregoing assessment will result in a weekly PCS of approximately 24 hours or 3.42 hours a day. Adding that 3.42 hours a day to the 7.35 daily average Mr. Q receives for other services leads to an average of 10.77 hours of total services to him per day.

Again, services cannot be authorized for 11 hours a day while Mr. Q sleeps or is exposed to marijuana. That leaves 13 hours of the day for which Mr. Q can be provided

¹⁰⁵ The services are provided by Ms. N and H Q. It is certainly possible that changes to Mr. Q's wrap around services in the future could impact his risk of institutionalization, but this decision assessed the risk as it existed at the time the evidence was presented.

¹⁰⁶ According to Q Ex. F., supported living provides services from 7:00 a.m. to 12:45 p.m. on 27 of 31 days in the month and from 7:00 a.m. to 1:30 p.m. on 4 days a month. Day Habilitation provides services from 1:00 p.m. to 4:30 p.m. on 8 days. It also provides services from 4:00 p.m. to 5:30 on 5 days. Personal care hours are provided from 5:15p.m. to midnight on 21 days. They are provided from 5:30 p.m. to midnight on 8 days; from 6:00 p.m. to midnight one day a month; and from 8:00 p.m. to midnight one day a month.

¹⁰⁷ 420.50 divided by 4 = 60.07.

¹⁰⁸ The hours on the chart add up to 420.50 hours per week. 420.50 divided by 31 = 13.55.

¹⁰⁹ Typically, the non-covered hours are between 12.45 p.m. and 5:15 p.m. (23 days a month). Mr. Q receives day habilitation services from 1:00 p.m. to 4:30 p.m. on 8 days a month.

services. Assuming daily awards of 3.42 PCS hours plus 7.35 hours of other services, Mr. Q will receive support for all but approximately 2.23 hours of the legally coverable hours in a day.¹¹⁰ This decision concludes that Mr. Q will not be placed at risk of institutionalization if he is not provided the additional 2.26 hours of PCS, especially given the conservative estimates of time regarding his sleep and marijuana exposure.¹¹¹

Ms. N credibly testified regarding the joys and difficulties of raising her son, including the financial burden of needing to be paid a livable sum to provide his care. Ms. N suggested that if Mr. Q's hours were cut, it was possible she would have to seek employment other than as his caregiver. The totality of circumstances demonstrates, however, that she and Ms. Q will be compensated for the equivalent of 1 part time job through PCS (@ 24.00 hours per week) and one more than full time job through other services (@ 51.45 hours a week). Nothing in the record demonstrated that this level of compensation would require Ms. N to seek other employment putting Mr. Q at risk.

Nor did the evidence in this case show that Mr. Q's health was so fragile that he is at risk of requiring hospitalization or nursing home placement if his PCS is reduced as set out above.

V. Conclusion

The Division's decision is upheld in part and reversed in part, with the 2021 PCS authorization adjusted as follows:

<u>Activity</u>	<u>Scoring</u>	<u>Weekly Frequency</u>
Toileting	2/2	28
Hygiene	2/2	7

The remainder of the PCS service plan, including the Division's post-appeal authorization regarding PCS for Locomotion, Transfer, and Dressing pursuant to 7 AAC 127.040, remains unchanged.

¹¹⁰ 11 (hours Mr. Q sleeps and is exposed to marijuana) + 10.77 (hours Mr. Q will receive services) = 21.77. 24 (hours in a day) – 21.77 = 2.23.

¹¹¹ From Ms. N perspective Mr. Q would not receive services for almost 6 hours a day while he was awake. That perspective is based, however, on an incorrect belief Mr. Q can receive PCS for marijuana exposure. He cannot.

Accordingly, the Division shall provide Mr. Q services as specified in this decision.

Dated: September 29, 2021.

Signed
Carmen E. Clark
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 2nd day of November, 2021.

By: Signed
Name: Christine Marasigan
Title: Project Coordinator II
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.]